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CASES REPORTED

Vols. 95-97 P.

	P.	
	Vol.	Page
Abbott; Hemenway v., App.	97	190
Adams; Castro v., Sup.	95	1027
Agoure; Lewis v., App.	96	327
Ah Lean; People v., App.	95	380
Ah Quong; Cameron v., App.	96	1025
Albitre; People v., Sup.	95	653
Alderson v. Houston, Sup.	96	884
Aldrich v. Barton, Sup.	95	900
Amer; People v., App.	96	401
American De Forest Wireless Telegraph Co. v. Superior Court of City and County of San Francisco, Sup.	96	15
Angelo; Davies v., App.	96	909
Anglo-Californian Bank v. Griswold, Sup.	96	353
Anglo-Californian Bank v. Superior Court of California, Sup.	96	803
Armsby Co.; Germain Fruit Co. v., Sup.	96	319
Arthurs; Kornblum v., Sup.	97	420
Atchison, T. & S. F. R. Co.; Herzog v., Sup.	95	898
Atlantic, G. & P. Co.; Mugford v., App.	95	674
Aydelotte v. Billing, App.	97	698
Baden Brick Co. v. Chubbuck, App.	95	905
Baehr; Payne v., Sup.	95	895
Baker's Estate, In re, Sup.	96	12
Baldwin; Strong v., Sup.	97	178
Balfour; Millsap v., Sup.	97	668
Bangs; Groom v., Sup.	96	503
Bank of Mendocino v. Brown, App.	97	533
Bank of San Luis Obispo; People v., Sup.	97	306
Barner; Hill v., App.	96	111
Barnum; Harrold v., App.	96	104
Barron v. Barron, Sup.	96	273
Barron; Kaiser v., Sup.	95	879
Barron; Kaiser v., Sup.	96	806
Barry v. Beamer, App.	96	373
Barthel v. Board of Education of City of San Jose, Sup.	95	892
Barton; Aldrich v., Sup.	95	900
Bass; Stemler v., Sup.	96	809
Bassett; Norton v., Sup.	97	894
Beamer; Barry v., App.	96	373
Becker v. Nye, App.	96	333
Becker v. Schmidlin, Sup.	96	280
Becker; Winchester v., App.	97	74
Becker; Winchester v., App.	97	76
Beckwith v. Sheldon, Sup.	97	867
Bell v. Haun, App.	97	1126
Bell v. National Bank of D. O. Mills, Sup.	95	378
Bell v. Thompson, Sup.	95	372

	Vol.	Page
Bell v. Thompson, App.	97	158
Bell; United States Oil & Land Co. v., Sup.	96	901
Bell's Estate, In re, Sup.	95	372
Bell's Estate, In re, Sup.	95	378
Bentley v. Hurlburt, Sup.	96	890
Berryman v. Gibson, App.	95	671
Besold; People v., Sup.	97	871
Bigler; Hogan v., App.	96	97
Billing; Aydelotte v., App.	97	698
Blackburn v. Bucksport & E. R. R. Co., App.	95	668
Blakeman; Young v., Sup.	95	888
Board of Directors of Woman's Relief Corps Home Ass'n of California v. Nye, App.	97	208
Board of Education of City of San Jose; Barthel v., Sup.	95	892
Board of Education of Sonoma County; Ferguson v., App.	95	165
Board of Public Works of City and County of San Francisco; Coon v., App.	95	913
Board of Sup'rs of Merced County; Davis v., App.	95	170
Boca Mill Co. v. Curry, Sup.	97	1117
Bonestell, Richardson & Co. v. Curry, Sup.	95	887
Booraem v. Potter Hotel Co., Sup.	97	65
Borello v. Superior Court of Amador County, App.	96	404
Borrego; People v., App.	95	381
Bort v. Quadt, App.	96	815
Bothin v. California Title Ins. & Trust Co., Sup.	96	500
Bottle Min. & Mill. Co. v. Kern, Sup.	97	25
Bouri v. Spring Valley Water Co., App.	97	530
Boyd; Stevenson v., Sup.	96	284
Bradley v. Rosenthal, Sup.	97	875
Breen v. Roy, App.	97	170
Bristol v. Hershey, App.	95	1040
Brodie; Dorcy v., Sup.	96	278
Brown; Bank of Mendocino v., App.	97	533
Brown; City and County of San Francisco v., Sup.	96	281
Brown v. Town of Sebastopol, Sup.	96	363
Brum v. Ivins, Sup.	96	876
Bucksport & E. R. R. Co.; Blackburn v., App.	95	668
Buhman v. Nickels & Brown Bros., App.	95	177
Buhne; Dauphiny v., Sup.	96	880
Bull's Estate, In re, Sup.	96	366
Burke v. Dittus, App.	96	330
Burnett v. Glas, Sup.	97	423
Burns v. Glover, App.	96	788
Bush v. Head, Sup.	97	512
Bush v. Wood, App.	97	709
Cahill v. E. B. & A. L. Stone & Co., Sup.	96	84
California Door Co.; Whitaker v., App.	95	910
California Fruit Growers' Ass'n of Los Angeles v. Superior Court of Los Angeles County, App.	97	769
California Safe Deposit & Trust Co.; Farnham v., App.	96	788
California Title Ins. & Trust Co.; Bothin v., Sup.	96	500
Cameron v. Ah Quong, App.	96	1025
Campbell v. Santa Maria Oil & Gas Co., Sup.	95	39
Campodonico; Carmichael v., App.	95	164
Carlson; People v., App.	97	827
Carmichael v. Campodonico, App.	95	164
Carr v. Howell, Sup.	97	885
Carr; Seligman v., App.	97	324

	Vol.	Page
Cassin v. Cole, Sup.	96	277
Castro v. Adams, Sup.	95	1027
Caulfield; People v., App.	95	636
Central Oil Co. of Los Angeles v. Southern Refining Co., Sup.	97	177
C. Ganahl Lumber Co.; Hartwell v., App.	97	901
Chamberlain v. Chamberlain, App.	95	659
Chambers; Great Western Gold Co. v., Sup.	95	151
Chandler; Needham v., App.	96	325
Charles A. Warren Co. v. San Francisco Sav. Union, Sup.	96	807
Cheeseborough v. San Francisco, Sup.	96	288
Chubbuck; Baden Brick Co. v., App.	95	905
Churchill v. More, App.	96	108
City and County of San Francisco v. Brown, Sup.	96	281
City Council of City of Los Angeles; Stoner v., App.	97	692
City of Escondido v. Escondido Lumber, Hay & Grain Co., App.	97	197
City of Escondido v. Wohlford, App.	97	199
City of Long Beach; Haskell v., Sup.	96	92
City of Los Angeles; People v., Sup.	97	311
City of San Buenaventura v. McGuire, App.	97	526
City of San Buenaventura v. McGuire, Sup.	97	528
City of San Diego; Goldtree v., App.	97	216
City of San Diego; Goldtree v., App.	97	218
City of San Diego v. Potter, Sup.	95	146
City Street Improvement Co. v. Regents of University of California, Sup.	96	801
Clark; Hill v., App.	95	382
Clark; Lincoln Northern Ry. Co. v., App.	97	537
Clark; Swanston v., Sup.	95	1117
Claudius; People v., App.	97	687
Coburn; Gazos Creek Mill & Lumber Co. v., Sup.	96	359
Coffey; Tracy v., Sup.	95	150
Cole; -Cassin v., Sup.	96	277
Collins, Ex parte, App.	97	188
Collins v. Gray, Sup.	97	142
Collins; Holt Mfg. Co. v., Sup.	97	516
Collins; Sequeira v., Sup.	95	876
Collins; Tulare Irrigation District v., Sup.	97	1124
Commercial Union Assur. Co., Limited, of London v. Wolf, App.	97	79
Common Council of City of San Diego; Webster v., App.	97	92
Confer; Stockton Automobile Co. v., Sup.	97	881
Connell v. Harron, Rickard & McCone, App.	95	916
Coon v. Board of Public Works of City and County of San Francisco, App.	95	913
Cooper-Power v. Hanlon, App.	95	678
Coplew v. Durand, Sup.	95	38
Corea v. Higuera, Sup.	95	882
Corey; People v., App.	97	907
County of Sonoma; Wright v., App.	96	333
Couts v. Winston, Sup.	96	357
Creely, In re, App.	97	766
Crescent Feather Co. v. United Upholsterers' Union, Local No. 28, Sup.	95	871
C. Scheerer & Co. v. Deming, Sup.	97	155
Cunha; Meek v., App.	96	107
Cunningham; Nims v., App.	96	785
Curry; Boca Mill Co. v., Sup.	97	1117
Curry; Bonestell, Richardson & Co. v., Sup.	95	887
Dabner; People v., Sup.	95	880
Dahlgren v. Superior Court of Santa Cruz County, App.	97	681
Dasso; Napa State Hospital v., Sup.	96	355

	Vol.	Page
Dauphiny v. Buhne, Sup.	96	880
Davies v. Angelo, App.	96	909
Davies; Larue v., App.	97	903
Davis v. Board of Sup'rs of Merced County, App.	95	170
Davis v. Treacy, App.	97	78
Davis' Estate, In re, App.	97	86
Davisson v. East Whittier Land & Water Co., Sup.	96	88
Deming; C. Scheerer & Co. v., Sup.	97	155
Dent v. Superior Court of Los Angeles County, App.	95	672
Denton v. Vann, App.	97	675
De Picot; Montgomery v., Sup.	96	305
Desanta, In re, App.	96	1027
De Witt v. Floriston Pulp & Paper Co., App.	96	397
Dickinson v. Kingsbury, App.	96	329
Diehl, Ex parte, App.	96	98
Diepenbrock v. Superior Court of Sacramento County, Sup.	95	1121
Di Ryana; People v., App.	96	919
District Agr. Ass'n No. 6; Mansfield v., Sup.	97	150
Dittus; Burke v., App.	96	330
Dolbeer's Estate, In re, Sup.	96	266
Donati v. Righetti, App.	97	1128
Donnelly v. Tregaskis, Sup.	97	421
Dorey v. Brodis, Sup.	96	278
Duff; Leuschner v., App.	95	914
Duncan; People v., App.	96	414
Dundon; Krasilnikoff v., App.	97	172
Durand; Coplew v., Sup.	95	38
Durphy; Vance Redwood Lumber Co. v., App.	97	702
East Whittier Land & Water Co.; Davisson v., Sup.	96	88
E. B. & A. L. Stone & Co.; Cahill v., Sup.	96	84
Echo Oil Co.; Greve v., App.	96	904
Ede Co. v. Heywood, Sup.	96	81
Edward's Estate, In re, Sup.	97	23
Ellsworth v. Knowles, App.	97	690
Emery v. Kipp, Sup.	97	17
Emmons; People v., App.	95	1032
Engwicht v. Pacific States Life Assur. Co., Sup.	96	7
Ervin v. Record Pub. Co., Sup.	97	21
Escondido Lumber, Hay & Grain Co.; City of Escondido v., App.	97	197
Everett; People v., App.	97	175
Everett; Rubio Cañon Land & Water Ass'n v., Sup.	96	811
Fabens; Fleischhauer v., App.	96	17
Falconer v. Hughes, App.	96	19
Farnham v. California Safe Deposit & Trust Co., App.	96	788
Farnham; Hibernia Savings & Loan Soc. v., Sup.	96	9
Ferguson v. Board of Education of Sonoma County, App.	95	165
Finch; O'Rourke v., App.	96	784
Finerty; People v., App.	97	73
Fisher v. Frank, App.	97	95
Fite v. Perry, App.	96	102
Flannigan v. Towle, App.	96	507
Fleischhauer v. Fabens, App.	96	17
Floriston Pulp & Paper Co.; De Witt v., App.	96	397
Floyd, Ex parte, App.	95	175
Focha v. Focha's Estate, App.	97	321
Focha's Estate; Focha v., App.	97	321
Fogg v. Perris Irr. Dist., Sup.	97	316

CASES REPORTED

P.

	Vol.	Page
Fossetti; People v., App.	95	384
Fox v. Monahan, App.	97	765
Frank; Fisher v., App.	97	95
Freed; Randall v., Sup.	97	669
Freitas; Home & Farm Co. of California v., Sup.	96	308
Fresno Canal & Irrigation Co.; Paolini v., App.	97	1130
Galindo v. Walter, App.	96	505
Gamble; Schell v., Sup.	95	870
Ganahl Lumber Co.; Hartwell v., App.	97	901
Gantner & Mattern; Occidental Real Estate Co. v., App.	95	1042
Garbarino; Gondolfo v., App.	97	203
Garvey Water Co. v. Huntington Land & Improvement Co., Sup.	97	428
Gazos Creek Mill & Lumber Co. v. Coburn, Sup.	96	359
Germain Fruit Co. v. J. K. Armsby Co., Sup.	96	319
Gerth v. Gerth, App.	95	904
Gianella v. Gray, App.	96	329
Gibson; Barryman v., App.	95	671
Gillespie; Van Loenen v., Sup.	96	87
Glas; Burnett v., Sup.	97	423
Glassell v. O'Dea, App.	95	44
Glenwood Lumber Co.; Wendling Lumber Co. v., Sup.	95	1029
Glover; Burns v., App.	96	788
Goldstein v. Webster, App.	95	677
Goldtree v. City of San Diego, App.	97	216
Goldtree v. City of San Diego, App.	97	218
Gondolfo v. Garbarino, App.	97	203
Goodman v. Superior Court of California in Santa Clara County, App.	96	395
Gordan v. Graham, Sup.	95	145
Graff & Co.; Winer v., App.	95	167
Graham; Gordan v., Sup.	95	145
Grand Lodge A. O. U. W. of Washington v. Miller, App.	96	22
Graves' Estate, In re, App.	96	792
Gray; Collins v., Sup.	97	142
Gray; Gianella v., App.	96	329
Gray; Mitchel v., App.	97	160
Great Western Gold Co. v. Chambers, Sup.	95	151
Green v. Thornton, App.	96	382
Greenall, Ex parte, Sup.	96	804
Gregory; People v., App.	97	912
Greve v. Echo Oil Co., App.	96	904
Griffith; O'Sullivan v., Sup.	95	873
Griffith; O'Sullivan v., Sup.	96	323
Griswold; Anglo-Californian Bank v., Sup.	96	353
Groom v. Bangs, Sup.	96	503
Grote; H. Raphael Co. v., Sup.	97	155
Guaranty Realty Co.; Steele v., App.	96	105
Hallawell, Ex parte, App.	97	320
Haneman v. Western Meat Co., App.	97	695
Hanlon; Cooper-Power v., App.	95	678
Harrold v. Barnum, App.	96	104
Harron, Rickard & McCone; Connell v., App.	95	916
Hartwell v. C. Ganahl Lumber Co., App.	97	901
Haskell v. City of Long Beach, Sup.	96	92
Hatch v. Nevills, Sup.	95	43
Haun; Bell v., App.	97	1126
Heacock, Ex parte, App.	97	77
Head; Bush v., Sup.	97	512

	Vol.	Page
Heberle's Estate, In re, Sup.	95	41
Hellman v. Longley, Sup.	97	17
Hemenway v. Abbott, App.	97	190
Henderson v. Western Gas Engine Co., App.	96	787
Henry; Pearsall v., Sup.	95	154
Henry; Pearsall v., Sup.	95	159
Hentig v. Johnson, App.	96	390
Hermosa Beach Land & Water Co.; Stiles v., App.	97	91
Hershey; Bristol v., App.	95	1040
Herzog v. Atchison, T. & S. F. R. Co., Sup.	95	898
Heywood; William Ede Co. v., Sup.	96	81
Heywood's Estate, In re, Sup.	97	825
H. Graff & Co.; Wiener v., App.	95	167
Hibernia Savings & Loan Soc. v. Farnham, Sup.	96	9
Hicks v. Post, Sup.	96	878
Higgins; Los Angeles Pressed Brick Co. v., App.	97	414
Higgins; Los Angeles Pressed Brick Co. v., Sup.	97	420
Higuera; Corea v., Sup.	95	882
Hill v. Barner, App.	96	111
Hill v. Clark, App.	95	382
Hill v. Hoefer, App.	96	116
Hill's Estate, In re, App.	96	918
Hoefer; Hill v., App.	96	116
Hoffman-Marks Co. v. Spires, Sup.	97	152
Hogan v. Bigler, App.	96	97
Hollywood Cemetery Ass'n; O'Dea v., Sup.	97	1
Holt Mfg. Co. v. Collins, Sup.	97	516
Home & Farm Co. of California v. Freitas, Sup.	96	308
Hornef, Ex parte, Sup.	97	891
Horton; White v., Sup.	97	70
Houghton Co. v. Kennedy, App.	97	905
Houser; Richmond v., App.	96	908
Houston; Alderson v., Sup.	96	884
Howell; Carr v., Sup.	97	885
H. Raphael Co. v. Grote, Sup.	97	155
Hubbell v. Hubbell, App.	95	664
Huff v. Sweetser, App.	97	705
Hughes; Falconer v., App.	96	19
Hughes Mfg. Co.; Stimson Mill Co. v., App.	97	322
Humphry v. Protestant Episcopal Church, Diocese of Los Angeles, Sup.	97	187
Huntington; People v., App.	97	760
Huntington Land & Improvement Co.; Garvey Water Co. v., Sup.	97	428
Hurlburt v. Bentley, Sup.	96	890
Hutchings; People v., App.	97	325
Independence League v. Taylor, Sup.	97	303
Ivins; Brum v., Sup.	96	876
Izlar; People v., App.	97	685
Jackman; McCue v., App.	95	673
Jacob; Roberts v., Sup.	97	671
Jerrue v. Superior Court of Los Angeles County, App.	95	906
J. K. Armsby Co.; Germain Fruit Co. v., Sup.	96	319
J. Noonan Furniture Co.; Perry v., App.	95	1128
Johnson; Hentig v., App.	96	390
Johnson v. Southern Pac. R. Co., Sup.	97	520
Johnson v. Williams, Sup.	95	655
Johnston; Wood v., App.	96	508
Kaiser v. Barron, Sup.	95	879

CASES REPORTED

P.

	Vol.	Page
Kaiser v. Barron, Sup.	96	806
Keating v. Smith, Sup.	97	300
Kelley; People v., App.	95	45
Kennedy; Houghton Co. v., App.	97	905
Kennedy v. Merickel, App.	97	81
Kennedy; Pekin Min. & Mill. Co. v., Sup.	95	161
Kern; Bottle Min. & Mill Co. v., Sup.	97	25
Kerns; Litch v., App.	97	897
Kettner v. Shippy, App.	96	912
Kilburn; Marinovich v., Sup.	96	303
Kilgore; Laurence v., Sup.	97	760
King; People v., App.	96	916
Kingsbury; Dickinson v., App.	96	329
Kipp; Emery v., Sup.	97	17
Kirkpatrick; Roussin v., App.	95	1123
Kitts; Worchester v., App.	96	335
Klinge; Los Angeles Brewing Co. v., App.	95	44
Klokke v. Raphael, App.	96	392
Knobloch; Toomey v., App.	97	529
Knowles; Ellsworth v., App.	97	690
Koch's Estate, In re, App.	96	100
Kornblum v. Arthurs, Sup.	97	420
Krasilnikoff v. Dundon, App.	97	172
Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., Sup.	96	369
Lackmann; McRae v., App.	96	505
Lamphrey, In re, App.	96	389
Larsen v. Leonardt, App.	96	395
Larue v. Davies, App.	97	903
Laurence v. Kilgore, Sup.	97	760
Leavitt, In re, App.	97	916
Lebus; People v., Sup.	96	1118
Leonardt; Larsen v., App.	96	395
Leuschner v. Duff, App.	95	914
Levy; Olsen v., App.	97	76
Lewis v. Agoure, App.	96	327
Lincoln Northern Ry. Co. v. Clark, App.	97	537
Lincoln Northern Ry. Co. v. Wiswell, App.	97	536
Linscott; Streator v., Sup.	95	42
Litch v. Kerns, App.	97	897
Litch v. O'Connor, App.	97	207
Lomita Land & Water Co. v. Robinson, Sup.	97	10
Longley; Hellman v., Sup.	97	17
Los Angeles Brewing Co. v. Klinge, App.	95	44
Los Angeles Pressed Brick Co. v. Higgins, App.	97	414
Los Angeles Pressed Brick Co. v. Higgins, Sup.	97	420
Lott; Marsh v., App.	97	163
Lowe v. Yolo County Consol. Water Co., App.	96	379
Lunnun v. Morris, App.	95	907
Lynch v. Sweetland, App.	97	413
McCowen v. Pew, Sup.	96	893
McCue, Ex parte, App.	96	110
McCue v. Jackman, App.	95	673
McFarland v. Matthai, App.	95	179
McGee's Estate, In re, Sup.	97	299
McGinnis v. Mayor, etc. of City of San Jose, Sup.	96	367
McGuire; City of San Buenaventura v., App.	97	526
McGuire; City of San Buenaventura v., Sup.	97	528

CASES REPORTED

P.

	Vol.	Page
Mackel v. Nolan, App.	97	1128
McNab & Smith; Wiley v., App.	96	332
McPhee's Estate, In re, Sup.	97	878
McRae v. Lackmann, App.	96	505
Mansfield v. District Agr. Ass'n No. 6, Sup.	97	150
Marinovich v. Kilburn, Sup.	96	303
Mariposa Commercial & Mining Co.; Sterne v., Sup.	97	66
Marron v. San Diego County, App.	96	814
Marsh v. Lott, App.	97	163
Matthai; McFarland v., App.	95	179
Maughs; People v., App.	96	407
Mayor, etc. of City of San Jose; McGinnis v., Sup.	96	367
Meek v. Cunha, App.	96	107
Meek v. Southern California Ry. Co., App.	95	166
Melvin v. Melvin, App.	97	696
Mercantile Refining Co.; Union Oil Co. of California v., App.	97	919
Merced Oil Mining Co. v. Patterson, Sup.	96	90
Merickel; Kennedy v., App.	97	81
Mexican Colorado River Land Co.; Tapscott v., Sup.	96	271
Michael; Quist v., Sup.	95	658
Miller; Grand Lodge, A. O. U. W. of Washington v., App.	96	22
Miller v. Scoble, App.	97	93
Millsap v. Balfour, Sup.	97	668
Mitchel v. Gray, App.	97	160
M., K. & T. Oil Co.; Raisch v., App.	95	662
Moffitt's Estate, In re, Sup.	95	653
Moffitt's Estate, In re, Sup.	95	1025
Monahan; Fox v., App.	97	765
Montgomery v. De Picot, Sup.	96	305
Moore; Younger v., App.	96	1093
More; Churchill v., App.	96	108
Morley; People v., App.	97	84
Morris; Lunnun v., App.	95	907
Mugford v. Atlantic, G. & P. Co., App.	95	674
Munger's Laundry Co. v. Rankin, App.	97	95
Murphy, Ex parte, Sup.	97	188
Murphy, Ex parte, App.	97	199
Murphy v. Stelling, App.	97	672
Mutual Sav. Bank of San Francisco; Robinson v., App.	95	533
Napa State Hospital v. Dasso, Sup.	96	355
National Bank of D. O. Mills; Bell v., Sup.	95	378
Needham v. Chandler, App.	96	325
Nevills; Hatch v., Sup.	95	43
Nickels & Brown Bros.; Buhman v., App.	95	177
Nilson v. Sarment, Sup.	96	315
Nims v. Cunningham, App.	96	785
Noee; Peck v., Sup.	97	865
Nolan; Mackel v., App.	97	1128
Nonrefillable Bottle Co. v. Robertson, App.	96	324
Noonan Furniture Co.; Perry v., App.	95	1128
North Alaska Salmon Co.; Ryan v., Sup.	95	862
Norton v. Bassett, Sup.	97	894
Nye; Becker v., App.	96	333
Nye; Board of Directors of Woman's Relief Corps. Home Ass'n of California v., App.	97	208
O'Brian; People v., App.	97	679
Occidental Real Estate Co. v. Gantner & Mattern, App.	95	1042

CASES REPORTED

P.

	Vol.	Page
O'Connor; Litch v., App.	97	207
O'Dea; Glassell v., App.	95	44
O'Dea v. Hollywood Cemetery Ass'n, Sup.	97	1
Oliver; People v., App.	95	172
Olsen v. Levy, App.	97	76
Orleans Bar Gold Min. Co.; Salstrom v., Sup.	96	292
O'Rourke v. Finch, App.	96	784
O'Sullivan v. Griffith, Sup.	95	873
O'Sullivan v. Griffith, Sup.	96	323
Pacific States Life Assur. Co.; Engwicht v., Sup.	96	7
Pacific Window Glass Co. v. Smith, App.	97	898
Pajaro Valley Bank v. Scurich, App.	95	911
Paolini v. Fresno Canal & Irrigation Co., App.	97	1130
Patten v. Pepper Hotel Co., Sup.	96	296
Patterson; Merced Oil Min. Co. v., Sup.	96	90
Payne v. Baehr, Sup.	95	895
Peabody's Estate, In re, Sup.	97	184
Pearsall v. Henry, Sup.	95	154
Pearsall v. Henry, Sup.	95	159
Peck v. Noee, Sup.	97	865
Pekin Min. & Mill. Co. v. Kennedy, Sup.	95	161
People v. Ah Lean, App.	95	380
People v. Albitre, Sup.	95	653
People v. Amer, App.	96	401
People v. Bank of San Luis Obispo, Sup.	97	306
People v. Besold, Sup.	97	871
People v. Borrego, App.	95	381
People v. Carlson, App.	97	827
People v. Caulfield, App.	95	666
People v. City of Los Angeles, Sup.	97	311
People v. Claudius, App.	97	687
People v. Corey, App.	97	907
People v. Dabner, Sup.	95	880
People v. Di Ryana, App.	96	919
People v. Duncan, App.	96	414
People v. Emmons, App.	95	1032
People v. Everett, App.	97	175
People v. Finerty, App.	97	73
People v. Fossetti, App.	95	384
People v. Gregory, App.	97	912
People v. Huntington, App.	97	760
People v. Hutchings, App.	97	325
People v. Izlar, App.	97	685
People v. Kelley, App.	95	45
People v. King, App.	96	916
People v. Lebus, Sup.	96	1118
People v. Maughs, App.	96	407
People v. Morley, App.	97	84
People v. O'Brian, App.	97	679
People v. Oliver, App.	95	172
People v. Perris Irr. Dist., Sup.	97	316
People v. Quijada, Sup.	97	689
People v. Russo, App.	97	700
People v. Scobie, App.	95	667
People v. Siemsen, Sup.	95	863
People v. Silva, App.	97	202

CASES REPORTED

P.

	Vol.	Page
People v. Simmons, App.	95	48
People v. Simmons, App.	95	51
People v. Soto, App.	96	913
People v. Thompson, App.	95	386
People v. Whitelaw, App.	95	379
People v. Williams, App.	97	684
People v. Yun Kee, App.	96	95
Pepper Hotel Co.; Patten v., Sup.	96	296
Perris Irr. Dist.; Fogg v., Sup.	97	316
Perris Irr. Dist.; People v., Sup.	97	316
Perry; Fite v., App.	96	102
Perry v. J. Noonan Furniture Co., App.	95	1128
Pew; McCowen v., Sup.	96	893
Post; Hicks v., Sup.	96	878
Potter; City of San Diego v., Sup.	95	146
Potter; Woods v., App.	95	1125
Potter Hotel Co.; Booraem v., Sup.	97	65
Prewett; Risdon v., App.	97	73
Protestant Episcopal Church, Diocese of Los Angeles; Humphry v., Sup.	97	187
Quadt; Bort v., App.	96	815
Quijada; People v., Sup.	97	689
Quist v. Michael, Sup.	95	658
Raisch v. M. K. & T. Oil Co., App.	95	662
Ralph Rogers Co.; San Rafael Ranch Co. v., Sup.	96	1092
Randall v. Freed, Sup.	97	669
Rankin; Munger's Laundry Co. v., App.	97	95
Raphael; Klokke v., App.	96	392
Raphael Co. v. Grote, Sup.	97	155
Record Pub. Co.; Ervin v., Sup.	97	21
Redwood City Salt Co. v. Whitney, Sup.	95	885
Regents of University of California; City St. Improvement Co. v., Sup.	96	801
Richmond v. Houser, App.	96	908
Righetti; Donati v., App.	97	1128
Risdon v. Prewett, App.	97	73
Risdon v. Steyner, App.	97	73
Riviere's Estate, In re, App.	96	16
Roberts v. Jacob, Sup.	97	671
Robertson; Nonrefillable Bottle Co. v., App.	96	324
Robinson; Lomita Land & Water Co. v., Sup.	97	10
Robinson v. Mutual Sav. Bank of San Francisco, App.	95	533
Rogers Co.; San Rafael Ranch Co. v., Sup.	96	1092
Rosenthal; Bradley v., Sup.	97	875
Roussin v. Kirkpatrick, App.	95	1123
Roy; Breen v., App.	97	170
Rubio Cañon Land & Water Ass'n v. Everett, Sup.	96	811
Ruef, Ex parte, App.	96	24
Ruef, Ex parte, App.	97	89
Runge v. Wilson, App.	95	178
Russo; People v., App.	97	700
Ryan v. North Alaska Salmon Co., Sup.	95	862
Salstrom v. Orleans Bar Gold Min. Co., Sup.	96	292
Sanchez v. Yorba, App.	97	205
San Diego County; Marron v., App.	96	814
San Francisco; Cheeseborough v., Sup.	96	288
San Francisco Sav. Union; Charles A. Warren Co. v., Sup.	96	807
San Jose Safe Deposit Bank of Savings; Teich v., App.	97	167
San Raphael Ranch Co. v. Ralph Rogers Co., Sup.	96	1092

CASES REPORTED

P.

	Vol.	Page
Santa Maria Oil & Gas Co.; Campbell v., Sup.	95	39
Sarment; Nilson v., Sup.	96	315
Savage v. Smith, Sup.	97	821
Scheerer & Co. v. Deming, Sup.	97	155
Schell v. Gamble, Sup.	95	870
Schmidlin; Becker v., Sup.	96	280
Scobie; People v., App.	95	667
Scoble; Miller v., App.	97	93
Scott, In re, App.	96	385
Scurich; Pajaro Valley Bank v., App.	95	911
Seligman v. Carr, App.	97	324
Sequeira v. Collins, Sup.	95	876
Sheldon; Beckwith v., Sup.	97	867
Shippy; Kettner v., App.	96	912
Siemens; People v., Sup.	95	863
Silva; People v., App.	97	202
Simmons; People v., App.	95	48
Simmons; People v., App.	95	51
Sims' Estate, In re, Sup.	95	655
Sixth Dist. Agr. Ass'n v. Wright, Sup.	97	144
Smith; Keating v., Sup.	97	300
Smith; Pacific Window Glass Co. v., App.	97	898
Smith; Savage v., Sup.	97	821
Soto; People v., App.	96	913
Southern California Ry. Co.; Meek v., App.	95	166
Southern Pac. R. Co.; Johnson v., Sup.	97	520
Southern Refining Co.; Central Oil Co. of Los Angeles v., Sup.	97	177
Spires; Hoffman-Marks Co. v., Sup.	97	152
Spring Valley Water Co.; Bouri v., App.	97	530
Steele v. Guaranty Realty Co., App.	96	105
Stelling; Murphy v., App.	97	672
Stemler v. Bass, Sup.	96	809
Sterne v. Mariposa Commercial & Mining Co., Sup.	97	66
Stevenson v. Boyd, Sup.	96	284
Steyner; Risdon v., App.	97	73
Stiles v. Hermosa Beach Land & Water Co., App.	97	91
Stimson Mill Co. v. Hughes Mfg. Co., App.	97	322
Stockton Automobile Co. v. Confer, Sup.	97	881
Stone & Co.; Cahill v., Sup.	96	84
Stoner v. City Council of City of Los Angeles, App.	97	692
Streator v. Linscott, Sup.	95	42
Strong v. Baldwin, Sup.	97	178
Sugar Apparatus Mfg. Co.; Kullman, Salz & Co. v., Sup.	96	369
Superior Court of Amador County; Borello v., App.	96	404
Superior Court of California; Anglo-Californian Bank v., Sup.	96	803
Superior Court of California in Santa Clara County; Goodman v., App.	96	395
Superior Court of City and County of San Francisco; American De Forest Wireless Telegraph Co. v., Sup.	96	15
Superior Court of Los Angeles County; California Fruit Growers' Ass'n of Los Angeles v., App.	97	769
Superior Court of Los Angeles County; Dent v., App.	95	672
Superior Court of Los Angeles County; Jerrue v., App.	95	906
Superior Court of Sacramento County; Diepenbrock v., Sup.	95	1121
Superior Court of Santa Cruz County; Dahlgren v., App.	97	681
Superior Court of Shasta County; Tingley v., App.	96	20
Swanston v. Clark, Sup.	95	1117
Sweetland; Lynch v., App.	97	413

CASES REPORTED

P.

	Vol.	Page
Sweetser; Huff v., App.	97	705
Tandy v. Waesch, Sup.	97	69
Tapscott v. Mexican Colorado River Land Co., Sup.	96	271
Taylor; Independence League v., Sup.	97	303
Teich v. San Jose Safe Deposit Bank of Savings, App.	97	167
Thompson; Bell v., Sup.	95	372
Thompson; Bell v., App.	97	158
Thompson; People v., App.	95	386
Thornton; Green v., App.	96	382
Tingley v. Superior Court of Shasta County, App.	96	20
Toomey v. Knobloch, App.	97	529
Towle; Flannigan v., App.	93	507
Town of Sebastopol; Brown v., Sup.	96	363
Tracy v. Coffey, Sup.	95	150
Treacy; Davis v., App.	97	78
Tregaskis; Donnelly v., Sup.	97	421
Tulare Irrigation District v. Collins, Sup.	97	1124
Union Oil Co. of California v. Mercantile Refining Co., App.	97	919
United States Oil & Land Co. v. Bell, Sup.	96	901
United Upholsterers' Union, Local No. 28; Crescent Feather Co. v., Sup.	95	871
Vance Redwood Lumber Co. v. Durphy, App.	97	702
Van Loenen v. Gillespie, Sup.	96	87
Vann; Denton v., App.	97	675
Waesch; Tandy v., Sup.	97	69
Walter; Galindo v., App.	96	505
Waring v. Wilcox, App.	96	910
Warren Co. v. San Francisco Sav. Union, Sup.	96	807
Webster v. Common Council of City of San Diego, App.	97	92
Webster; Goldstein v., App.	95	677
Wendling Lumber Co. v. Glenwood Lumber Co., Sup.	95	1029
Western Gas Engine Co.; Henderson v., App.	96	787
Western Meat Co.; Haneman v., App.	97	695
Whitaker v. California Door Co., App.	95	910
White v. Horton, Sup.	97	70
Whitelaw; People v., App.	95	379
Whitney; Redwood City Salt Co. v., Sup.	95	885
Wickersham's Estate, In re, Sup.	93	311
Wiener v. H. Graff & Co., App.	95	167
Wilcox; Waring v., App.	96	910
Wiley v. McNab & Smith, App.	96	332
Wilkes, In re, App.	97	677
William Ede Co. v. Heywood, Sup.	96	81
Williams; Johnson v., Sup.	95	655
Williams; People v., App.	97	684
Wilson; Runge v., App.	95	178
Winchester v. Becker, App.	97	74
Winchester v. Becker, App.	97	76
Winston; Coutts v., Sup.	96	357
Wiswell; Lincoln Northern Ry. Co. v., App.	97	536
Wohlford; City of Escondido v., App.	97	199
Wolf; Commercial Union Assur. Co., Limited, of London v., App.	97	79
Wood; Bush v., App.	97	709
Wood v. Johnston, App.	96	508
Woods v. Potter, App.	95	1125
Worcester v. Kitts, App.	96	335
Wright v. County of Sonoma, App.	96	333
Wright; Sixth Dist. Agr. Ass'n v., Sup.	97	144

CASES REPORTED

P.

	Vol.	Page
Yolo County Consol. Water Co.; Lowe v., App.	96	379
Yorba; Sanchez v., App.	97	205
Young, Ex parte, Sup.	97	822
Young v. Blakeman, Sup.	95	888
Younger v. Moore, App.	96	1093
Yung, In re, App.	96	24
Yun Kee; People v., App.	96	95
Zihn v. Zihn, Sup.	95	868



CALIFORNIA REPORTER

95 PACIFIC REPORTER

Action by D. Coplew against A. W. Durand and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Anderson & Anderson, for appellants. J. Wiseman Macdonald, for respondent.

HENSHAW, J. Plaintiff had entered into a contract with defendants to do the painting, polishing, enameling—in short the “finishing”—of the woodwork and floors of defendants’ house. By the terms of the contract progress payments were to be made, 75 per cent. of the contract price to be paid on completion, and 25 per cent. 36 days after final completion. The progress payments were made as in the contract provided, and this action is brought to recover the 25 per cent. final payment, which defendants refused to make.

The contract provided that the work was to be “strictly first-class and to be done to the entire satisfaction of the owner and the architect”; as to the payments, “that in each of said cases a certificate be obtained and signed by the said architect.” Defendants’ refusal to pay was based upon the declaration of the architect that the work was not first-class and was not done to his satisfaction. Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. This proposition is too well established to be questioned, and, indeed, is not questioned in this case. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Loup v. California, etc., Co.*, 63 Cal. 97; *Cox v. McLaughlin*, 63 Cal. 196; *Tally v. Parsons*, 131 Cal. 516, 63 Pac. 833; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Wangler v. Swift*, 90 N. Y. 38; 9 Cyc. 618.

To make his case, in the absence of such certificate, the contractor pleaded and the court found that the work was done to the entire satisfaction of the owner and the architect, and that the refusal to issue the completion certificate was wrongful and was due to plaintiff’s refusal to do certain repair work which was not required of him by the contract. The evidence, while conflicting, established to the satisfaction of the trial court the following facts: Under the terms of the contract plaintiff was to be paid \$2,165. The work consisted of the finishing of the woodwork of the doors and walls and the finishing of the hardwood floors. The hardwood floors were naturally the last woodwork to be put in place and the last to be finished by the contractor. The contractor proceeded with his work upon the doors and walls, receiving partial payments. In the early part of August he had completed all this work, and nothing remained for him to do under his contract but to finish the floors, which were not as yet ready for him. The architect asked the plaintiff what would be the value of the work which he had yet to do upon the

153 Cal. 278

COPLEW v. DURAND et al. (L. A. 1,999.) (Supreme Court of California. March 24, 1908.)

1. CONTRACTS — PERFORMANCE — APPROVAL OF ARCHITECT.

Where work is to be done to the satisfaction of a person evidenced by a certificate, the production of such a certificate is a condition precedent to a right of action on the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1308–1317.]

2. SAME—WITHHOLDING CERTIFICATE.

Where from the nature of work to be paid for on certificate of approval by an architect there might be latent defects, not discoverable at the time of completion, but becoming patent after lapse of time, or the defects were apparent and the architect frequently called the contractor’s attention to them and paid the progress payments under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance, there was reserved to the architect the right of final approval or rejection at the time of final payment.

3. SAME—FRAUD.

Where work to be paid for on certificate of approval by an architect has been completed to the satisfaction of the owner and the architect, and the architect without warrant refuses to issue his certificate, the refusal under such circumstances being unreasonable, the necessity for production thereof as a condition precedent to an action on the contract is dispensed with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1310, 1311.]

Department 2. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

floors, and plaintiff replied, "About \$200." The architect then stated that he would allow him the full 75 per cent. of the contract price, deducting the value of the separate work yet to be done upon the floors, and did so; the architect himself testifying that he knew that he had paid precisely 75 per cent. of the entire contract price, excepting \$200, the cost or the value of the work upon the floors. It is in evidence on behalf of the plaintiff that at the time of the completion of all this woodwork, excepting the floors, the architect and owner both expressed themselves satisfied with it. This condition of affairs obtained from August 8, 1904, when the last payment, amounting to 75 per cent. was made, until January 22, 1905, when plaintiff finally completed the work upon the floors. The delay was through no fault of his. Meantime decorators had been called in, and in doing their work they had injured the work done by plaintiff. This is not disputed, and a separate contract was entered into by defendants with plaintiff to repair the damage so occasioned by the decorators. This work, in turn, he did to the apparent satisfaction of the defendants. At least he was paid in full therefor. It is not satisfactorily explained why at this time he should have been employed at a special price to do this repair work, if, as defendants' architect contends, he was at that time insisting that the original work was incomplete, unsatisfactory, and poor. The floors were done by plaintiff, as the court finds, in a satisfactory and workmanlike manner. Then, when in due course plaintiff demanded his final payment, the architect refused to give him a final certificate, stating that the woodwork had been damaged by water, panels and joists were cracked and would have to be replaced, and that he looked to the plaintiff to finish these damaged panels and joists, to which plaintiff replied that he could not be expected to do the work twice, when he was paid but once for it. In fact it was necessary to replace panels to the number of about 60, and those panels in turn had to be "finished."

Appellants, however, contend that, notwithstanding these progress payments which had been made, and notwithstanding the fact that the woodwork had been completed to the satisfaction of the architect and owners, and evidence of that completion given by the payment of the 75 per cent., still the owners and architect retained a right under the contract to exercise a later judgment, and were not legally required to pass final judgment until the contractor was ready to turn over to them his work as complete. *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413. In this connection it is pointed out that the very finding of the court, while to the effect that the work had been performed to the satisfaction of the architect and owner, declared also that it was not performed in a good and workmanlike manner, so that,

whatever payments the owners and architect might choose to make during the progress, they still had the right to refuse the certificate for the final payment if at that time the work had not been performed to their satisfaction under the terms of the contract. This undoubtedly is true. Where, from the nature of the work, there might be latent defects, not discoverable at the time of completion, but becoming patent after the lapse of time, it might be important that the architect should not exercise final judgment until after the lapse of the 36 days; or where, as the architect contends in this case, the defects were apparent, and he frequently called the contractor's attention to them, and paid the 75 per cent. under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance. Under such circumstances it would unhesitatingly be held that there was reserved to the architect the right of final approval or rejection at the expiration of the time named. This was the position of the defendants in this case, and that position was supported by the testimony of the architect. But the difficulty which confronts appellants lies in the fact that the court did not accept their version. Its direct finding that the work was done to the satisfaction of the architect impliedly, but positively, negatives the contention that he was, during all of that time, insisting that the work was imperfect and incomplete.

The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with. *Katz v. Bedford*, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826; *Nolan v. Whitney*, 88 N. Y. 649; *Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

For these reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 282

CAMPBELL v. SANTA MARIA OIL & GAS CO. (L. A. 1,961.)

(Supreme Court of California. March 24, 1908.
Rehearing Denied April 23, 1908.)

1. CORPORATIONS — CONTRACTS FOR ISSUE OF STOCK—LIABILITY TO ASSESSMENT.

Plaintiff, a lessee of oil property, who was also director and secretary in a corporation, proposed at a director's meeting that the corporation acquire the leasehold to be paid for in stock of the company issued as fully paid and non-assessable. At a subsequent stockholders' meeting the directors were requested to purchase for \$300,000, "payable in the fully paid stock" of the company, without specifying that the stock should be non-assessable. The offer in this form was made by the board of directors, and was accepted, and the conveyance made. Plaintiff

himself as secretary prepared the certificates of stock, and caused to be printed across the face of each the word "nonassessable." *Held*, that it was not the mere offer of plaintiff to sell for nonassessable stock, but the offer which the corporation made in return to buy for "fully paid" stock and its acceptance which constituted the contract, and the fact that plaintiff caused the word "nonassessable" to be printed on the certificates without authority had no weight in determining the rights of the original parties, whatever effect the word might have had if the stock had passed into the hands of an innocent purchaser without notice.

2. SAME—OFFICERS—ESTOPPEL TO QUESTION REGULARITY OF CORPORATE ACTS.

A director of a corporation, who voted as such for the levying of an assessment on the capital stock, is estopped to object to defects and irregularities in the assessment, and the estoppel binds the assignee of his interests.

3. SAME—RECOVERY OF STOCK—ACTION—TENDER—SUFFICIENCY.

A tender to a corporation by the owner of stock which was sold for a delinquent assessment of the amount of the delinquent assessment and costs is insufficient to sustain an action under Civ. Code, § 347, providing that no action must be sustained to recover stock sold for delinquent assessments upon the ground of irregularity in the assessment, unless the party first tenders to the corporation or the party holding the stock sold, the sum for which it was sold, with subsequent assessments "and interest on such sums from the time they were paid."

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen and Charles Monroe, Judges.

Action by John B. Campbell against the Santa Maria Oil & Gas Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. F. Conroy, for appellant. Wright, Bell & Ward, for respondent.

HENSHAW, J. This is an action brought by the assignee of one Kloeckner to recover certain stock sold for delinquent assessment under section 347 of the Civil Code. Defendant is a California corporation, having a capital stock of \$500,000 divided into 500,000 shares of the par value of \$1 each. Plaintiff's right to relief is based upon his allegations of certain irregularities in the assessment, and upon his claim that there was an agreement that the stock in question should be nonassessable. The court found against plaintiff's contentions. Judgment passed for the defendant, and plaintiff appeals.

As plaintiff is but the assignee of Kloeckner, with whom all of the transactions of the corporation were had, his name may be dropped from consideration. Kloeckner and others were the lessees of certain oil land in Santa Barbara county. The owners of the leasehold concluded to incorporate for convenience in operating their property. To that end certain of them, including Kloeckner, subscribed to articles of incorporation and for five shares of the capital stock of the defendant company. The incorporation was duly had. At the first directors' meeting after the officers of the corporation had been chosen Kloeckner, being one of the directors and

retary of the corporation, proposed that the corporation acquire the leasehold, if possible, from himself and his associates, "and to use in payment of the purchase capital stock of the company to any amount not to exceed \$300,000; the stock to be issued as fully paid and nonassessable by the company." At the stockholders' meeting next held the stockholders requested the board of directors "to purchase said leasehold interest for the price of \$300,000, payable in the fully paid stock of this company." After this action at the stockholders' meeting another directors' meeting was held at which the proposition was fully discussed, and it was resolved to acquire the leasehold estate "for 300,000 shares of the fully paid stock of this company." The offer thus formulated the court finds was accepted, and the leasehold conveyed to the corporation for \$300,000 of the fully paid capital stock of the company. The conveyance was actually made to the corporation, the stock ordered issued to Kloeckner and his associates in such proportion as Kloeckner himself directed upon payment by the purchasers of the United States revenue tax. Kloeckner, in fact, prepared these certificates for issuance. The stock certificates, which he himself, as secretary, procured to be printed, bore upon the face of each, without authority from the board of directors, the word "nonassessable." The contention that the contract between Kloeckner and the company was for nonassessable stock is based upon these circumstances. But it was not the mere offer of Kloeckner to sell the leasehold interest for \$300,000 of nonassessable stock which fixed the liability of the corporation. It was the offer which the corporation in turn made to Kloeckner, and which he accepted, which determines the rights of the parties. By that offer, and in the acceptance of that offer, it nowhere appears that nonassessability of the stock was a condition of the contract. In terms, the leasehold was to be conveyed to the corporation for 300,000 shares of the fully paid capital stock of the company, and this in fact was done, and the circumstance that Kloeckner himself caused to be printed on the stock certificates of the company the word "nonassessable" can have no weight in determining the rights of the original parties to the contract, whatever effect the words might have if the stock had passed into the hands of an innocent purchaser, without notice.

It was pleaded by the defendant that Kloeckner was estopped from denying the validity of the assessment, in that he was a director of the defendant corporation, and voted affirmatively for the adoption of the resolution levying the assessment. The court so found upon abundant evidence. That having participated in all of these matters, and having voted as a director for the levying of this assessment, an estoppel is raised against Kloeckner's objections to the defects and ir-

regularities in the assessment, is too well settled to require discussion. It is sufficient to refer to the cases of *Marten v. Burns Wine Co.*, 99 Cal. 357, 33 Pac. 1107; *Macon & Augusta R. R. Co. v. Vason*, 57 Ga. 314; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Willamette Freighting Co. v. Stannus*, 4 Or. 263; *Stone v. Great Western Oil Co.*, 41 Ill. 86. As an estoppel, of course, binds the parties and their privies, the estoppel is equally effective against Kloeckner's assignee, plaintiff in this action. *Kessler v. Ensley Co. (C. C.)* 123 Fed. 559; *Union Dime Savings Bank v. Wilmot*, 94 N. Y. 228, 46 Am. Rep. 137.

The final contention of plaintiff is that he elected under section 347 of the Civil Code to pay, and tendered to the corporation, the amount of the assessment, with costs; but, as the court holds, his averment was simply that he offered to pay the costs and assessment on the last day of the six months immediately preceding the sale. This offer was insufficient to entitle Kloeckner to redeem or to entitle him to bring the action under the section above cited, inasmuch as no tender or payment was made of the amount of interest.

For these reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 275

In re HEBERLE'S ESTATE. (L. A. 2,079.)
(Supreme Court of California. March 24, 1908.
Rehearing Denied April 23, 1908.)

1. WORDS AND PHRASES—"DISTRIBUTED."

The word "distributed" is not a technical word in conveyancing; but, if it has any technical meaning, it is with reference to decrees of distribution in probate courts.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 3, p. 2133.]

2. WILLS—CONSTRUCTION IN FAVOR OF TESTACY—VOID TRUSTS.

A testator directed real property to be held in trust for certain beneficiaries. The trust was void. The will further provided that, in case testator should dispose of the trust property, the trustees should pay to the same beneficiaries the amount received for the property, "it being my will that" they "receive from my estate the said real estate or its value." The trustees were empowered to sell real property, except the property subject to the trust, "which is not to be sold but is to be kept and distributed" to the beneficiaries. *Held*, that the paramount intention of the testator was not that the property should descend to his beneficiaries through a trust, but that with or without a trust they should with certainty receive property to that value, and, since a construction which favors testacy is always preferred to one resulting in intestacy, the fact that the trust was void should not operate to defeat testator's intention, and render him intestate as to the estate attempted to be devised in trust.

Department 2. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Petition by Jacob Heberle and another for partial distribution to them as heirs at law, of a portion of the estate of George Heberle.

From an order sustaining, without leave to amend, demurrers to the petition, petitioners appeal. Affirmed.

Milton K. Young, F. E. Lacy, and Dennis & Loewenthal, for appellant. Lee, Scott & Chase, for respondent Jacob Swigart. Murphy & Schmidt, for other respondents.

PER CURIAM. This is an appeal from an order sustaining, without leave to amend, demurrers to the petition of Jacob Heberle and Eva Dickhof for partial distribution to them, as heirs at law, of a portion of the estate of George Heberle, deceased; it being the contention of petitioners that as to this portion he died intestate. The petitioners' status as heirs at law is not in question. The only question is whether or not from a construction of the will of deceased intestacy resulted as to the property in controversy.

The deceased by his will, after directing the payment of his debts and funeral expenses, devised and bequeathed to trustees all the rest and residue of his estate upon specified trusts. By the seventh paragraph of his will he directed certain real property upon Spring street, in the city of Los Angeles, called for convenience the "Spring street property," of the estimated value of \$65,000, to be held by the trustees for the term of five years, "and then the same by said trustees to be conveyed to the children of my deceased brother Martin Heberle, late of Miamisburg, Montgomery county, state of Ohio, share and share alike." It is conceded by all parties to this litigation that this trust is void. Estate of Walkerly, 108 Cal. 628, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Cavarly, 119 Cal. 408, 51 Pac. 629; Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Estate of Sanford, 136 Cal. 97, 68 Pac. 494. At the time of his death the testator still owned the Spring street property. The question to be answered is what disposition is to be made of it. Admittedly, if intestacy results as to this property, the petitioners are entitled to share in it.

Reading the whole will, we find next this clause: "In case I should dispose of said property, then it is my will that my trustees pay over to the said children or grandchildren of my said deceased brother the amount received by me for said property. It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value." By the fourteenth paragraph the testator empowers the trustees to convert real estate into money by sale. The seventeenth paragraph, however, is a limitation of this general power, and reads as follows: "That the power to sell my real estate, as set forth in the fourteenth subdivision shall not affect my said Spring street property, which is not to be sold, but is to be kept and distributed to the children of my said deceased

brother Martin." The trust created by paragraph 7 being void in its creation, no estate as to the Spring street property passed to the trustees. If in the will there are no other apt words disposing of the property upon the failure of this trust, intestacy as to it must be the result. The trial court found those words in the seventeenth subdivision of the will above quoted, and, in view of the fact that a construction which favors testacy is always preferred to one resulting in intestacy (Dunphy's Estate, 147 Cal. 96, 81 Pac. 315), it may not be said that the interpretation is not a permissible one. The seventeenth paragraph contains a direction for the "distribution" of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. As is said in Estate of Dunphy, supra, the word "distributed" is not a technical word in conveyancing, and is not usually found in deeds. "If it have any legal technical meaning, it has such meaning with reference to decrees of distribution in probate courts." It appears that while the testator designed in case he died possessed of the Spring street property that that property should be held for five years, yet that, if the Spring street property had been sold, they were to receive in money the amount obtained from such sale directly, and not through the medium of trustees. The paramount idea in the testator's mind, therefore, was not that the property should descend to his beneficiaries through a trust, but that, with or without a trust, they should with certainty receive property to that value from his estate. Under the wording of this instrument, therefore, the trial court was correct in holding that its conclusion that the trust was void did not, in contemplation of the other language employed in the will, so defeat the testator's intent as to render imperative a finding of intestacy.

For which reason the decree appealed from is affirmed.

153 Cal. 285

STREATOR v. LINSKOTT et al. (S. F. 4,976.)

(Supreme Court of California. March 26, 1908.)

1. PLEADING—SUFFICIENCY OF ALLEGATIONS—CONCLUSION OR FACTS.

An allegation in an action to enjoin the issuance of bonds that plaintiff has no speedy or adequate remedy at law is a mere conclusion of law without value, in the absence of allegation of facts supporting it.

2. INJUNCTION—GROUNDS OF RELIEF—INJURY THREATENED.

Where, if a taxpayer is right in his contention that Pol. Code, §§ 1880-1886, authorizing the issuance of school district bonds, have,

as to school districts composed in whole or in part of municipal corporations of the fifth class, been superseded by Act March 23, 1893, Laws 1893, p. 292, c. 210, and an amendment thereof, approved March 11, 1897, Laws 1897, p. 103, c. 99, the alleged invalidity of the issue of bonds sought to be enjoined will appear on the face of the bonds, the taxpayer can suffer no damage if the bonds are put in circulation, they being void even in the hands of bona fide holders, and has no cause of action.

3. APPEAL—REVIEW—SCOPE—THEORY AND GROUNDS OF DECISION OF LOWER COURT.

Where, in an action by a taxpayer to enjoin the issue of school district bonds on the ground that Pol. Code, §§ 1880-1886, authorizing the issuance of school district bonds as to school districts composed in whole or in part of municipal corporations of the fifth class, have been superseded by act approved March 23, 1893, Laws 1893, p. 292, c. 210; and an amendment thereof, approved March 11, 1897, Laws 1897, p. 103, c. 99, and that the provisions of that act as amended were violated in various particulars by the bonds proposed to be issued and the proceedings purporting to authorize their issuance, the court below declined to pass on the question raised by defendants that the act of 1893 and its amendment, if applicable to the school district in question, was unconstitutional, and sustained a demurrer on the ground that the complaint did not show that the taxpayer would suffer any injury by issue of the bonds, the Supreme Court will not decide the question of the validity of the bonds "independent of the ground upon which the superior court based its decision," since, if on examination it should agree with the contention that the district in issuing the bonds must proceed under the act of 1893, it could not afford the taxpayer any relief without reversing a judgment rightly made on a ground fairly presented by the record.

4. SAME—REVIEW—ABSTRACT QUESTIONS.

The Supreme Court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3122, 3331-3341.]

In Bank. Appeal from Superior Court. Santa Cruz County; Lucas F. Smith, Judge.

Action by Clark P. Streater against James A. Linscott and others, chairman of the board of supervisors and other officers of the county of Santa Cruz. Judgment for defendants, and plaintiff appeals. Affirmed.

Hugh R. Osborn, City Atty., for appellant. Benj. K. Knight, Dist. Atty., for respondents.

SLOSS, J. This is an action brought by a resident and taxpayer of the city of Santa Cruz against the chairman of the board of supervisors and other officers of the county of Santa Cruz to enjoin them from signing or issuing certain bonds authorized by a vote of the electors of a school district embracing the city of Santa Cruz and certain outlying territory. A demurrer to the complaint was sustained, and the plaintiff appeals from the ensuing judgment of dismissal.

The complaint sets forth the proceedings had for the purpose of authorizing the issuance of the bonds. It is not disputed that these proceedings were in strict accordance with sections 1880 to 1886 of the Political Code. The position of the appellant is, however, that these sections have, as to school

districts composed in whole or in part of municipal corporations of the fifth class, to which it is claimed the city of Santa Cruz belongs, been superseded by an act entitled "An act to enable school districts in cities of the fifth class, and school districts which embrace territory, a portion of which is within and a portion of which is without such cities of the fifth class, to issue bonds, etc.," approved March 23, 1893 (St. 1893, p. 292, c. 210), and an amendment to said act approved March 11, 1897 (St. 1897, p. 103, c. 99). It is pointed out that the provisions of this act as amended are violated in various particulars by the bonds proposed to be issued, and the proceedings purporting to authorize their issuance. The contention of the respondents in the lower court apparently was that the act of 1893 and its amendment, if applicable to the school district in question, are unconstitutional. The judgment contains a statement showing that the court below declined to pass upon the constitutional question involved, and that the demurrer was sustained upon the ground that the complaint did not show that the plaintiff would suffer any injury by reason of the issuance of the bonds. In this the court was clearly right. All that the complaint contains connecting the plaintiff with the subject-matter of the suit is to be found in the allegations that he is a resident and taxpayer of the city of Santa Cruz, and that he "has no speedy or adequate remedy at law." The latter is, of course, a mere conclusion of law, valueless in the absence of averment of facts supporting it.

The complaint sets forth at length an order of the board of supervisors prescribing the form of the proposed bonds. From this it appears that the bonds themselves, if issued, will contain at least two provisions which, according to the contention of the appellant, conflict with the requirements of the act of 1893 as amended: (1) The bonds provide that interest shall be payable annually, while the only authority given by the act of 1893 is to issue bonds bearing interest "to be payable semiannually"; (2) the bonds declare that they are issued and sold "for the purpose of raising money for purchasing school lots, for building one or more schoolhouses, or insuring the same," etc. The act of 1893 does not authorize the issuance of bonds for the purpose of insuring schoolhouses or other property. The respondents suggest no doubt of the sufficiency of either of these objections to invalidate the bonds, if the act of 1893 is the only law authorizing the issuance of such bonds. If the appellant is right in his contention that this act is the one that governs, the alleged invalidity of the issue will appear on the face of the bonds, and they will be void even in the hands of bona fide holders for value. "It results that the plaintiff as a taxpayer can suffer no damage if the bonds are put in circulation, and has no cause of action." *McCoy v. Briant*, 53 Cal. 247; *Hop-*

kins v. Lovell, 47 Mo. 102; *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

We are informed by the appellant's brief that this is "a friendly proceeding to determine the validity of the legal method adopted," and are asked to decide the question of such validity "independent of the ground upon which the superior court based its decision." This we cannot do. If we should, upon examination, agree with the contention that this district, in issuing bonds, must proceed under the act of 1893, we could not afford the appellant any relief without reversing a judgment which was rightly made upon a ground fairly presented by the record. Furthermore, regardless of the fact that the trial court based its decision upon this particular ground, this court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way. It may be advantageous for municipalities desiring to issue bonds to obtain from this court, in advance, a "certificate of title" attesting the validity of the proposed issue, but such relief can be obtained only in a proper proceeding, that is, one in which the decision of the question sought to be presented will be necessary to the disposition of a real controversy between parties having an actual interest in the matter in litigation.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

7 Cal. Unrep. 341

HATCH v. NEVILLS et al. (L. A. 1,756.)
(Supreme Court of California. Oct. 22, 1907.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT—VALIDITY.

A contract for street improvements providing that all loss or damage arising from the nature of the work to be done under the agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the work, etc., shall be sustained by the contractor, is void as tending to increase the cost of the work, and is therefore insufficient to support an assessment for work done thereunder.

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by P. E. Hatch against William A. Nevills and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. C. Denio and A. B. McCutchen, for appellant. R. W. Kemp, for respondents. O. B. Carter, amicus curiæ.

SLOSS, J. The plaintiff appeals from a judgment entered in favor of defendants in an action to foreclose a street assessment lien for work done in the city of San Pedro.

The various proceedings of the city board of trustees leading up to the contract itself provided that the work should be done in accordance with certain specifications on file in the office of the city clerk. These speci-

fications included the following clause: "All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or from any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by this agreement, shall be sustained by the contractor." In the case of *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, this court held that there could be no valid assessment for street work done under a contract which referred to and included specifications containing the following language: "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." The italicized portion of the provision which we have quoted from the specifications in the present case is substantially the same as the clause considered in *Blochman v. Spreckels*, and, on the authority of that case, the contract and assessment here sued upon must be held to be invalid. It is unnecessary to consider any other point made by the respondents.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.

We dissent, for the reasons given in the dissenting opinion in *Woollacott v. Meekins*, 91 Pac. 615: SHAW, J.; LORIGAN, J.

7 Cal. App. 472

GLASSELL et al. v. O'DEA et al. (Civ. 418.)

(Court of Appeal, Second District, California. Jan. 28, 1908. Rehearing Denied by Supreme Court March 26, 1908.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT—VALIDITY.

A contract for street improvements subject to specifications, one of which required that all loss or damage arising from the nature of the work to be done under the agreement should be sustained by the contractor, was void and insufficient to sustain an assessment for the work done.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Hugh Glassell and another, as executors of the estate of Andrew J. Glassell, deceased, against M. F. O'Dea and others. Judgment for plaintiffs, and defendant Tryon-Brain Company appeal. Affirmed.

Leslie R. Hewitt, for appellant. Lucius M. Fall, for respondents.

TAGGART, J. This is an action to quiet plaintiffs' title to a lot in block 1, town of Garvanza, in the city of Los Angeles, against the lien of a street improvement bond issued upon an assessment for the cost of street work done under the "Vrooman Act." From a judgment in favor of plaintiffs declaring such bond void the defendant Tryon-Brain

Company, the holder of the bond, appeals. From the resolution of intention to the contract for the street work upon which the bond is based, reference is made in all steps of the proceedings to certain specifications on file in the office of the city clerk. These specifications are the same as those considered by the Supreme Court in the opinion rendered in *Woollacott v. Meekin*, 91 Pac. 612, being general specifications Nos. 68, 54, 52, 55, and 51 used by the engineer's office of the city of Los Angeles. The provision therein that "all loss or damage arising from the nature of the work to be done under this agreement, * * * shall be sustained by the contractor," was held to render void an assessment resting upon such specifications. A careful consideration of appellant's brief and the record here, and of the opinion filed in the *Woollacott v. Meekin* Case, leads to the conclusion that there is no question of law left for the decision of this court.

On the authority of that case, the cases therein cited, and *Hatch v. Nevills*, 95 Pac. 43, the judgment appealed from is affirmed.

We concur: SHAW, J.; JAMES, J., pro tem.

7 Cal. App. 550

LOS ANGELES BREWING CO. v. KLINGE et al. (Civ. 407.)

(Court of Appeal, Second District, California. Feb. 15, 1908.)

JUDGMENT—FINDINGS TO SUPPORT.

Where the only issue raised by the findings of the parties in question was as to the amount of sales to defendant K. during a certain period beginning February 20, 1906, and the amount of payments by K. during the same time, and it appeared from the findings of the court that K. bought goods of plaintiff to the amount \$2,179.20 prior to February 20th and \$2,020 subsequently, and that K. paid \$1,145.89 prior to February 20th and \$2,147.77 subsequently, a judgment for plaintiff for \$903.54 could not be sustained, since the findings as to the transactions prior to February 20th, being made outside the issue, would not support a judgment.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the Los Angeles Brewing Company against William Klinge and others on a bond. From a judgment for plaintiff, defendant George G. Garrettson appeals. Reversed.

Wright, Schoonover & Winnek, for appellant. W. T. Craig, Carroll Allen and Fred O'Farrell (Lawler, Allen, Van Dyke & Jutten, of counsel), for respondent.

SHAW, J. Action against sureties on bond to recover payment of the value of goods sold to principal. The appeal is from a judgment in favor of plaintiff.

On February 20, 1906, William Klinge, as principal, and George G. Garrettson and one Walger, as sureties, executed a certain bond to the Los Angeles Brewing Company in the sum of \$1,500. By the terms of this instrument, copy of which is made a part of a

verified complaint, it was provided that the brewing company should sell to said Klinge, as principal, such amount of beer as he might demand, and should open and establish an account with him, and, as it might deem advisable, extend to him a line of credit for such purchases as he might make, not exceeding \$1,500. To secure the payment of any indebtedness incurred by said Klinge for beer sold him by said brewing company, appellant and Walger, as sureties, undertook and agreed to pay the same on demand. Plaintiff alleges that between February 20, 1906, and July 18, 1906, under and in accordance with the terms of said instrument, it sold and delivered to Klinge certain beer, for which he agreed to pay plaintiff the sum of \$930.54, which sum, although demanded, he had failed to pay. By his separate answer appellant admits all the allegations of the complaint, except that he alleges the aggregate amount of beer sold by plaintiff to Klinge between said dates to have been \$2,045, instead of \$930.54, as stated in the complaint, and alleges, further, that between said dates Klinge paid to plaintiff on account of said purchase the sum of \$2,047.77, and avers that plaintiff was paid in full for all beer so sold to Klinge under the provisions of said contract. It thus appears that the only issue joined by the pleadings related to the transactions had between the parties subsequent to February 20, 1906; plaintiff charging that the amount sold was of the value of \$930.54, no part of which had been paid, and defendant alleging that the value of the beer sold was \$2,045, all of which had been paid. This constituted the sole issue before the court.

The court made the following finding: "That previous to the 20th day of February, 1906, the plaintiff did sell and deliver beer to the defendant Klinge, for which the agreed price was \$2,179.20; that subsequent to the 20th day of February, 1906, and in pursuance of the instrument in writing hereinbefore set forth, the plaintiff did sell and deliver certain quantities of beer to the defendant William Klinge for the agreed price of \$2,020; that all the goods hereinbefore mentioned were charged to the defendant Klinge on the books of the plaintiff in the form of a running account; that prior to the 20th day of February, 1906, the defendant Klinge did pay to the plaintiff the sum of \$1,145.89 on said running account; that subsequent to the 20th day of February, 1906, the defendant Klinge did pay to the plaintiff the sum of \$2,147.77 on the said running account; that all of said payments, both subsequent and prior to the 20th day of February, 1906, when received by the plaintiff, were immediately placed upon the books of the plaintiff to the credit of the defendant Klinge on said running account; that prior to and at the time of the filing of the complaint herein, for the said goods sold and delivered, the agreed price unpaid was the sum of \$905.54." If we disre-

gard that part of the finding as to the dealings between the parties prior to February 20, 1906, no reference to which appears in the complaint, and consider only that portion applicable to the issues raised by the pleadings, it would appear that during the period specified in the complaint Klinge bought beer of plaintiff to the value of \$2,020 and paid on account thereof, and for other goods purchased, the sum of \$2,147.77. The court so finds. It cannot be claimed that such finding supports the judgment rendered. In order to sustain the judgment we must invoke the support of a finding not within the issues, namely, that relating to transactions had between Klinge, the principal, and respondent, prior to February 20, 1906, and in no wise mentioned or referred to in the complaint. The law will not permit this to be done. A finding made outside the issues will not warrant a judgment. *Moynihan v. Drobaz*, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46; *Green v. Chandler*, 54 Cal. 626; *Gamache v. South School District*, 133 Cal. 145, 65 Pac. 301. It follows, from what has been said, that the court erred in its conclusion of law that plaintiff was entitled to recover of defendant Garretson the sum of \$905.54.

The transcript contains a bill of exceptions purporting to embody certain evidence had upon the trial. This, however, is not a subject for consideration upon this appeal, for the reason that the appeal was not taken within 60 days after the entry of judgment. Code Civ. Proc. § 939. The evidence given on behalf of defendant seems to bear upon the question of unfairness claimed to have been exerted in procuring appellant's signature to the bond, but no such issue was tendered.

The judgment is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 554

PEOPLE v. KELLEY. (Cr. 58.)

(Court of Appeal, Third District, California. Feb. 15, 1908. Rehearing Denied by Supreme Court April 16, 1908.)

1. CRIMINAL LAW — RESPONSIBILITY FOR CRIME—INSANITY.

A person who was at the time of the commission of an offense insane, and incapable of knowing and understanding that the act was wrong, is entitled to an absolute acquittal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 53-58.]

2. HOMICIDE—EVIDENCE—INSANITY—INSTRUCTIONS.

Where accused did not deny the killing of decedent, and interposed the defense of insanity, and the evidence on the issue was conflicting, an instruction that, if accused was at the time of the killing insane, the jury should not find him guilty of murder in the first degree, for, if insane he could not form the willful, deliberate, and malice aforethought intent which the law requires to constitute murder in the first degree, was, standing alone, erroneous as leading the jury to believe that, if accused was insane, he would be entitled to an acquittal of murder in the first degree, but as to the other

degree of murder, or manslaughter, insanity would not excuse him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 605.]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Frank Kelley was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Pardee & Pardee, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

HART, J. The defendant, under an information charging him with the crime of murder, was convicted at the trial of murder of the second degree. From the judgment and the order denying him a new trial, he takes this appeal.

The homicide occurred on the 22d day of January, 1907, in the county jail at Susanville, the defendant having been arrested and confined in said jail on that day upon suspicion that he was insane. The sheriff, who made the arrest, employed the deceased, Perry Stout, to remain with and guard the defendant during the night of the day of the arrest. At about the hour of 12 o'clock that night one Packard, a night watchman and deputy sheriff, went to the jail with food or "supper" for Stout and the prisoner. On reaching the inside of the jail he found Stout lying dead on the floor. Death, it was learned upon investigation by the sheriff, who had been summoned to the jail immediately upon the discovery of Stout's death, and by the autopsy physician, who later examined the body, was caused by knife wounds. The defendant, as stated, had been arrested on the supposition that he was insane. He had been engaged as a laborer on tunnel work for the Western Pacific Railway, and was placed under arrest by the sheriff at a point on the line of said railway known as "Camp No. 1." The evidence discloses that the defendant had been on a protracted "spree," or under a state of alcoholic intoxication for a number of days previous to his arrest, and that his actions prior to and at the time of his said arrest were so unusual and queer that it was generally believed by his acquaintances that he had lost his reason. The sheriff was notified of the conduct of the defendant, and was requested to place him in custody, and, in obedience to said request, arrested and confined him in the county jail, as already related. The defendant did not deny killing Stout, but interposed the defense that, at the time of the commission of the homicide, he was insane.

On the 4th day of February the district attorney was about to proceed with the arraignment of the defendant upon the information filed against him, when, upon a suggestion by counsel representing the accused, the court, by the authority of section 1368 of the Penal Code, made an order,

reciting that a doubt existed as to the sanity of the prisoner, and that the question of his sanity be submitted to a jury. Thereupon a jury was summoned and impaneled to try the question of defendant's mental condition. The jury, after hearing evidence, returned a verdict "that said alleged insane person is at the present time insane." Upon this verdict the judge of the superior court made an order committing the accused to the Napa state hospital for the insane. The effect of this verdict and order of commitment to the state hospital was only, of course, to suspend, until such time as the prisoner might recover, further proceedings involving his arraignment and trial. On the 18th day of March, 1907, the medical superintendent of the state hospital officially declared the recovery of the defendant, and accordingly made an order, in compliance with section 2139 of the Political Code, discharging him from said hospital. The defendant was subsequently returned to the custody of the sheriff of Lassen county, and on the 18th day of July put upon his trial for the crime of murder, as charged against him in the information.

The defendant, on this appeal, makes the complaint that the trial court erred to his prejudice in a number of its rulings upon questions of evidence, and likewise erred in giving and refusing certain instructions. It is also urged that certain jurors impaneled to try the case received evidence bearing upon the issues of the case out of court. But it will not be necessary to notice all the assignments of error; for we are in no doubt that a reversal of the cause is imperatively demanded because of prejudicial error involved in the charge of the court to the jury. The only defense interposed to the charge was, as we have seen, that the defendant was, at the time he killed the deceased, insane to the extent that he was without volition or responsibility; that is, that he was so unbalanced mentally that he was powerless to know and appreciate the wrongfulness or criminality of his act. The circumstances attending the homicide, according to the description given by the witnesses of the wounds inflicted upon the body of the deceased, were of unusual atrocity and wickedness, if the act was committed by the defendant in a state of sanity. There were found upon the body of the deceased by the autopsy physician something like 30 wounds, all of which, with the exception of 1, were produced by a knife. A few of the wounds were inflicted, in the opinion of the physician, after the deceased had expired. One of the wounds—that on the right side of the neck—extended over an inch to the left of the median line to 2½ inches beyond the right ear, severing the jugular vein and carotid artery.

There is evidence tending to show that the defendant for some days prior to the homicide had been indulging in alcoholic drinks

to such an extent that he became a victim of delirium tremens; that, as before suggested, his actions were so far from his ordinary and apparently normal manner of conducting himself that those who had some personal acquaintance with him became convinced that his mind was affected to the extent at least of temporary dethronement of reason. Expert testimony was offered by both sides as to the mental sanity of the defendant at the time of the commission of the act of killing. As is usual in almost all cases in which insanity is relied upon as a defense to crime, the testimony of the alienists was conflicting—those for the defense claiming that the defendant was certainly insane at the time, and those testifying for the prosecution declaring with equal positiveness that, while he was laboring under certain hallucinations, superinduced by long continued alcoholic intoxication, he nevertheless had intelligence enough to know that his act was not only wrongful but criminal. The defendant and the deceased had never met before the evening preceding the morning on which Stout was found to have been slain, and no motive or reason for the homicide is shown by the record. The defendant made no effort to escape, and there was some evidence to the effect that the opportunity was readily available to him to do so had such a thought been in his mind. In short, the evidence was such that the jury would have been warranted in returning a verdict either for or against the accused.

If the defendant was, at the time he killed Stout, insane to a degree that he was incapable of knowing and understanding that he was thus doing wrong, then he was entitled, under the law, to an absolute acquittal. Logically, under the evidence as presented in the case at bar, either one of two verdicts only could properly have been returned—the one that the defendant was guilty of murder of the first degree; the other an acquittal altogether of any offense embraced in the charge in the information. By this we are not to be understood as saying that a verdict of guilty of murder of the second degree or of manslaughter could or should not be sustained, if the instructions and rulings of the court did not involve prejudicial error. We only make the suggestion for the purpose of illustrating the proposition that the defendant was entitled to a full and accurate statement by the court to the jury of the law applicable to the sole defense interposed by him against the charge alleged in the information. The court signally failed to so instruct the jury, as must be readily obvious from an examination of its full charge, and particularly from the following instruction read and submitted to the jury as the law upon the question of insanity as a defense to the charge of murder: "If you believe and find from the evidence that the defendant was, at the

time of the alleged killing, insane from any cause, either of a temporary or settled nature, then you should not find the defendant guilty of murder in the first degree, for, if insane, he could not form that willful, deliberate, premeditated, and malice aforethought intent which the law absolutely requires to constitute murder in the first degree." The objection made to the quoted instruction is that the court thereby in effect declared to the jury that they could find the defendant guilty of any crime included within that charged in the information other than murder of the first degree, even though they believed the defendant was insane to the extent of irresponsibility at the time he killed the deceased. The instruction, while stating the law correctly as far as it goes, is, we think it will not be disputed, open to the criticism involved in the complaint urged against it. If the court had elsewhere in its charge stated the law fully and correctly upon this subject to the jury, then there might be room for the application of the argument advanced that the charge, considered in its entirety, or as a whole, fairly presented the law relating to the defendant's only defense, and although, even under the mentioned circumstances, the instruction would be none the less vulnerable to the criticism made against it, there would perhaps be some ground for holding that it did not operate prejudicially to the accused. But we have searched the record in vain for a single line in any of the court's instructions bearing upon the issue of insanity in which the jury were told that, if the defendant was shown by sufficient proof to have been insane at the time of the commission of the act, he was thereby under our law absolved from responsibility for the same, and consequently entitled to an absolute acquittal, or a verdict of not guilty of any offense comprehended in the charge preferred against him. The criticised instruction, standing alone, and without any other or further or more correct amplification of the law applicable to insanity as a defense to the crime of murder, cannot reasonably be construed to mean anything less than that, if the defendant were shown to have been insane when he killed Stout, he would thereby be entitled to an acquittal of murder of the first degree, because his mentality was such that he could not conceive and form the malice aforethought essential to a consummation of the crime of murder of that degree, but that as to the other degree of murder or manslaughter insanity would not excuse him. This is not the law as it should have been declared to the jury, and the instruction was highly prejudicial.

The judgment and order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 559

PEOPLE v. SIMMONS. (Cr. 60.)

(Court of Appeal, Third District, California.
Feb. 17, 1908. Rehearing Denied by Supreme Court April 16, 1908.)

1. CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—EXTENSION OF TIME FOR PRESENTING.

Under the express provisions of Pen. Code, § 1174, as amended in 1905, the time specified therein and in section 1171 within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk may be extended for a reasonable period by the judge, but only for good cause, and upon affidavit showing the necessity therefor, presented upon written notice to the adverse party, who may file counter affidavits, and in no case may the time be extended by the stipulation of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2857-2860.]

2. SAME—BILL OF EXCEPTIONS PRESENTED TOO LATE—PRESUMPTIONS.

Attorneys will be presumed to know the procedure necessary to secure an extension of time in which to prepare a bill of exceptions, and where they fail to observe it their misunderstanding or misconstruction of the statute cannot excuse their default.

3. SAME—SUFFICIENCY OF AFFIDAVIT FOR RELIEF.

Affidavits in support of a motion to be relieved from the objection that a proposed bill of exceptions was not presented in time are not aided by the recital in the motion that it would be made "on the ground of mistake, inadvertence, surprise, and excusable neglect," where they do not present the grounds constituting the mistake, etc.

4. SAME—QUESTION PRESENTED FOR REVIEW—APPEAL FROM JUDGMENT.

An appeal from the judgment alone without a bill of exceptions presents for review only the action of the trial court in giving and refusing instructions.

5. SAME—TRIAL—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In a murder case an instruction that the prosecution is not required to establish accused's guilt beyond any possible doubt, but all that is required is moral certainty, that is, that degree of proof which produces conviction in an unprejudiced mind, and, if the jury are satisfied beyond a reasonable doubt of accused's guilt, they should convict, was not erroneous, because failing to state that the jury should be satisfied "to a moral certainty and beyond a reasonable doubt," especially where the instructions as a whole required that degree of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1877-1882.]

6. SAME—CONSIDERATION OF CASE BY JURY.

In a murder case it was not error to refuse a requested instruction that if, after consideration of the case, a juror should entertain a reasonable doubt of accused's guilt, it would be his duty not to vote for a verdict of guilty, and not to be influenced in so voting for the single reason that a majority of the jury should be in favor of such a verdict, where the court repeatedly charged that they must be convinced of accused's guilt beyond a reasonable doubt or else acquit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

7. SAME—TRIAL—DUTY TO GIVE INSTRUCTIONS—PRESUMPTION.

It will be presumed that refused instructions were not pertinent to any fact shown by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3032.]

8. HOMICIDE—MURDER—TRIAL—INSTRUCTIONS—THREATS.

In a murder case a requested instruction that a threat of accused could not be considered unless the jury believed that the act upon which it was conditioned was done by deceased was properly rejected, since the character of the threat may have been such, and the condition upon which it was to be executed of such trivial importance, as to show malice, even without evidence that the act upon which the threat was conditioned was performed by deceased, especially as an attempted performance by deceased of the condition would make the threat admissible.

9. CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a murder trial a statement in an instruction that "there is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence" was not violative of the constitutional provision prohibiting judges from charging with respect to matters of fact, and was not erroneous where, when considered with other instructions, it could only be understood as meaning that circumstantial evidence is just as reliable as any other kind, if it convinces the jury of accused's guilt to a moral certainty, and beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883-1888.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

H. C. Simmons was convicted of murder, and appeals from an order refusing to settle a bill of exceptions and from the judgment. Affirmed.

Weldon & Held, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

BURNETT, J. There are two appeals in the case upon separate records—one from an order refusing to settle a bill of exceptions, and denying and refusing to grant the motion of defendant to be relieved from the objection of plaintiff that defendant's proposed bill of exceptions was not presented in time, and the other from the judgment of life imprisonment upon conviction of murder in the first degree, with that penalty fixed by the jury. In this opinion we shall consider the questions arising in both appeals.

1. Judgment was entered against defendant on October 2, 1906. The court on the same day made an order granting defendant 30 days in addition to the time allowed by law in which to prepare, serve, file, and present his bill of exceptions. On November 10th, and before the expiration of the time theretofore allowed, the district attorney entered into a stipulation with the attorney for defendant that the latter should have to and including December 11th to present his bill of exceptions. On December 8th defendant gave notice that on December 10th he would present his bill to the judge. On December 10th said bill was duly presented, and thereupon the district attorney objected to the settlement upon the ground that the said proposed bill of exceptions was not presented "within the time required by law, as express-

ed in sections 1171 and 1174 of the Penal Code, nor was the same delivered to the clerk for the judge within said time, nor was the time expressed in said sections extended by any order of any court or any judge." The defendant then made application on affidavits to be relieved from said objection of the district attorney. These affidavits were made by the attorneys for defendant, and they set out the facts above stated, and that the order of the judge extending time was made in open court in presence of the district attorney, who made no objection, and that affiants "solely and implicitly relied upon the said extension of time so given by said stipulation and the order of the court, and did believe that by compliance therewith the presentation of said proposed bill of exceptions would be made in due time, and did believe that said order and stipulation waived the necessity of securing such extension by the presentation of affidavits, and that the securing of such affidavits and other steps prescribed by said sections 1171 and 1174 were not necessary where the attorney for plaintiff consented to such extension of time." The district attorney filed a counter affidavit presenting the additional fact that the said order of the court was made without any showing by affidavit or otherwise of any good cause therefor, and without any notice being served upon the district attorney, and that he neither assented to nor objected to the granting of said time to said defendant, and that no other order was ever made by any court or judge extending said time. The court denied defendant's application, and refused to settle any bill of exceptions.

Said section 1174, as amended in 1905, provides that: "The time specified in this section and section 1171 within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk, may be extended for a reasonable period by the trial judge, * * * but only for good cause and upon affidavit showing the necessity therefor, presented upon written notice of at least two days to the adverse party, who shall have the right to file counter affidavits. In no case can the time be extended by the stipulation of the parties." Here the order extending the time was made, as we have seen, by the judge without any affidavit having been filed, and without any notice having been given to the adverse party. Again the proposed bill was presented, not within the period covered by the order, but some time thereafter, upon the theory that there was an extension by virtue of the stipulation. To uphold appellant's contention that the bill should have been settled would be to disregard the plain provision of the statute. The significance of said provision was considered and determined by this court in the case of *People v. Blis*, 84 Pac. 676. In that case it was said: "The present statute introduces additional requirements, which we cannot hold to be merely directory. * * * But it is claimed that it

was nevertheless within the discretion of the court, 'after hearing the whole matter, to make the order setting down the bill for settlement, and giving the district attorney time in which to file his amendments to the bill.' We cannot concur in this view of sections 1171 and 1174, and must hold that, when a defendant in a criminal action seeks to obtain an extension of time within which to have his bill of exceptions settled, he must proceed substantially as directed by the statute. Doing this, the judge is then clothed with discretion, and his action would be disturbed only where its abuse is made to appear." There is no pretense that appellant complied with the requirement of said statute. Hence the court below had no authority to consider the proposed bill of exceptions.

But if it were a matter of discretion, and the court had jurisdiction to relieve the appellant of his default, it could not be said that there was any abuse of said discretion. There is nothing in the affidavits of the attorneys for appellant to show that they were not familiar with the requirements of the law. It must be presumed that they had knowledge of the procedure to be taken in order to secure an extension of time in which to prepare their proposed bill. Knowing the law, they departed from its plain provisions at their peril. We might surmise that the amendment to said section 1174 had escaped the attention of counsel, but we must base our decision upon the record as we find it. No effect can be given to the statement in one of the affidavits that counsel, in view of the said order and stipulation, believed that they were acting within the purview of the law, as a misunderstanding or misconstruction of the statute cannot excuse default. *Chase v. Swain*, 9 Cal. 130; *Thompson v. Harlow*, 150 Ind. 455, 50 N. E. 474. Neither can the affidavits be aided by the recital in the motion that it would be made "on the ground of mistake, inadvertence, surprise, and excusable neglect of defendant and his counsel herein." Facts must be presented from which the court reaches the conclusion that the relief should be granted. The court is not concerned with the opinion of affiant that his neglect is excusable. *Shearman v. Jorgensen*, 106 Cal. 485, 39 Pac. 863.

2. The action of the trial court in giving and refusing instructions is the only question to be considered on the appeal from the judgment. The action of the court must be viewed in the light of any conceivable evidence against defendant, as the evidence actually received is not in the record. *People v. Clark*, 121 Cal. 634, 54 Pac. 147.

Complaint is made that the court erred in giving the following instruction: "The prosecution is not required to establish the guilt of the defendant beyond any possible doubt. All that is required is moral certainty, that is, that degree of proof which produces conviction in an unprejudiced mind; and if, from the evidence in this case, the jury are satis-

fied beyond a reasonable doubt of the guilt of the defendant, then your verdict should be one of conviction." The criticism of appellant is as follows: "Our contention is that not only must the jury be satisfied beyond a reasonable doubt, but to a moral certainty before they can convict." It is hard to understand how a juror can be satisfied beyond a "reasonable doubt" and not to a "moral certainty" of the guilt of defendant; but, conceding a difference, it is without significance, as the jury must have understood from the instructions as a whole that they must be satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant in order to convict him.

There was no error committed by the court in its refusal to give the following instruction: "If after consideration of the whole case any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty." It was fully covered by other instructions given by the court. In fact, the court fully and repeatedly charged the jurors that they must be convinced of defendant's guilt beyond a reasonable doubt, or else it was their duty to acquit. For instance: "I charge you, gentlemen of the jury, that there must be in your minds an abiding conviction to a moral certainty of the truth of the charge derived from a comparison and consideration of all the evidence, and you must be satisfied of the truth of the accusation against the defendant to a moral certainty and beyond a reasonable doubt, or your verdict must be not guilty." This instruction was addressed to all the jurors, and any one would be very obtuse indeed who did not understand from it that each individual juror could not vote for conviction under any circumstance unless he was satisfied of the guilt of the defendant to a moral certainty and beyond all reasonable doubt. The law does not require such tautology as is advocated by appellant.

As to the refusal of the court to give a proposed instruction upon circumstantial evidence, it is sufficient to say that it is substantially covered by other instructions, and besides the general suggestion is applicable to this as to all the instructions refused that it must be presumed that they were not pertinent to any fact shown by the evidence.

The instruction as to threats given as modified was as favorable to defendant as he was entitled to. The latter portion, that the threat could not be considered unless the jury believed that the act upon which the same was conditioned was done by the deceased, was properly rejected. The character of the threat may have been such, and the condition upon which it was to be executed of such trivial importance, as to show malice, even

without any evidence whatever that the act upon which the threat was conditioned was performed by deceased. And besides, as suggested by respondent, an attempted performance by deceased of the condition would make the threat admissible while the proposed instruction required a complete performance.

Appellant complains of the following statement in one of the instructions given by the court: "There is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence." It is contended that this is in violation of the provision of the Constitution which prohibits judges from charging juries with respect to matters of fact, and in support of the position *People v. Vereneseneckockhoff*, 129 Cal. 511, 58 Pac. 156, 62 Pac. 111, *People v. O'Brien*, 130 Cal. 8, 62 Pac. 297, and *Estate of Blake*, 136 Cal. 311, 68 Pac. 827, 89 Am. St. Rep. 135, are cited. The *Vereneseneckockhoff* Case, however, goes much beyond the case at bar, as will be seen from the following quotation: "The court enlarged upon the necessity of a resort to such circumstantial evidence in order to punish crime and protect the community, and said: 'Providence, the laws of nature, and the relation of things are so linked and combined together that a medium of proof is often furnished leading to conclusions as strong as those arising from direct testimony.' And again: 'Circumstantial evidence has this great advantage—that various circumstances from various sources are not likely to be fabricated.'" It will be readily seen also upon examination that the instructions condemned in the other two cases are materially different from what we have here. On the contrary, in reference to an instruction containing the same statement, the Supreme Court, in *People v. Wilder*, 134 Cal. 184, 66 Pac. 229, declares: "It may be said that as to this instruction containing a declaration of law there may be grave doubt, but as to the statements there contained not being prejudicially erroneous there is no doubt. *People v. Vereneseneckockhoff* does not go to the length of holding such an instruction reversible error." The ruling was the same in the case of *People v. Howard*, 135 Cal. 266, 67 Pac. 148. But, assuming that the prosecution relied partly or wholly upon circumstantial evidence for a conviction, we think it was proper for the court to tell the jury that they might base their verdict upon circumstantial evidence as well as upon direct evidence. In other words, that there is nothing in its nature that renders it any less reliable than any other class of evidence. Considered with other instructions, it could only be understood as meaning that circumstantial evidence is just as reliable as any other kind, if it convinces the jury of defendant's guilt to a moral certainty and beyond a reasonable doubt.

We have examined the record carefully,

and find no error. The order refusing to settle the bill of exceptions and to relieve appellant of his default is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. SIMMONS. (Cr. 61.) '

(Court of Appeal, Third District, California.
Feb. 17, 1908. Rehearing Denied by
Supreme Court April 16, 1908.)

Appeal from Superior Court, Mendocino
County; J. Q. White, Judge.

H. C. Simmons was convicted of murder,
and appeals. Affirmed.

Weldon & Held, for appellant. U. S. Webb,
Atty. Gen., and J. Chas. Jones, for the Peo-
ple.

BURNETT, J. For the reasons stated in
the opinion in the above-entitled case, No. 60
(this day filed) 95 Pac. 48, the judgment of
conviction is hereby affirmed.

We concur: CHIPMAN, P. J.; HART, J.

session having no notice of such *ex parte* order, she could, to secure an available record on appeal, move to vacate the order and writ, and, on denial of the motion, appeal from the order of denial, instead of appealing directly from the *ex parte* order.

3. MANDAMUS—ACTS OF COURTS—PROCEEDINGS FOR REVIEW.

An order in a partition suit denying defendant's motion to vacate an order for a writ of assistance directing defendant's removal from the premises and the placing of the purchaser in possession, a sale having been confirmed, being in substance an order for the delivery of possession of land, it was the judge's duty, under the express terms of Code Civ. Proc. § 945, on proper application, to fix the amount of the undertaking to be given to stay proceedings on the writ pending defendant's appeal; and mandamus lies to compel performance of that duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 116.]

4. APPEAL—BILL OF EXCEPTIONS—NECESSITY.

The Supreme Court will not declare an appeal from an order confirming a partition sale to be without merit because no bill of exception to the order has been proposed or settled, and the time therefor has expired where the order has not been exhibited to the Supreme Court, since it may be erroneous on its face.

In Bank. Application by Pauline Gordan for mandamus against Thomas F. Graham, judge of the superior court of the city and county of San Francisco. Writ granted.

W. T. Kearney, for petitioner. Louis Hirsch and Jesse H. Steinhart, for respondent.

SHAW, J. This is an application for a writ of mandate. On February 14, 1908, in an action for partition, entitled *Rosa Bloom v. Pauline Gordan et al.*, the superior court made an order denying the petitioner's motion to vacate an order for a writ of assistance theretofore issued therein, directing the sheriff to remove petitioner from the premises involved in the suit and place one Fannie Abrahamson in possession thereof. Desiring to appeal from this order, and to obtain a stay of proceedings on the writ pending the appeal, the petitioner applied to the respondent to fix the amount of the undertaking necessary to stay such proceedings. This the respondent refused, and petitioner asks a mandate to compel respondent to proceed to fix the amount of the proposed undertaking.

An interlocutory decree of partition directing the sale of the property by the referees was filed in *Bloom v. Gordan* on January 9, 1906, and it became final on March 10, 1906, if not before. *Bloom v. Gordan*, 150 Cal. 763, 90 Pac. 115. The sale was made by the referees to Fannie Abrahamson in pursuance of the decree, and, after due notice, it was confirmed by an order made on January 15, 1908, and entered on February 3, 1908. The writ of assistance was issued by authority of an order made *ex parte* on February 11, 1908. On February 13, 1908, the petitioner, Pauline Gordan, gave notice of appeal from the order confirming the sale and filed the undertaking on appeal as required by law. She had notice of the making of that order, but

153 Cal. 297

GORDAN v. GRAHAM, Judge of Superior Court. (S. F. 4,965.)

(Supreme Court of California. March 28, 1908.)

1. APPEAL—RIGHT OF REVIEW—PERSONS AGGRIEVED—SALE IN PARTITION—CONFIRMATION.

Since a valid sale and conveyance of land in a partition suit would terminate a tenant in common's interest and right of possession, she could oppose the confirmation of a sale and have it vacated if not made legally, or for an adequate price, and could appeal from an order confirming such sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

2. SAME—DECISIONS REVIEWABLE—WRIT OF ASSISTANCE.

For appeal purposes an *ex parte* order in a partition suit that a writ of assistance issue to let the purchaser into possession, a sale having been confirmed must be considered as an order made after final judgment; it being as plainly in aid of the order of sale as the order of confirmation, and, the tenant in pos-

no formal notice of the entry thereof, so far as appears, has ever been given to her. The interlocutory order of partition adjudged that Pauline Gordan was the owner of an undivided one-third of the premises as tenant in common. She was in possession. A valid sale and conveyance under the order would terminate her interest and right of possession. She had the right, therefore, to oppose the confirmation of a sale and to have it vacated if not made in conformity with law, or for an adequate price, and the corresponding right to review, on appeal, an order confirming such sale. It has been held that the purchaser at such a sale may appeal directly from an order vacating the sale; that, so far as he is concerned, such order is appealable as an order made after final judgment; and that the interlocutory order directing a sale is to be regarded as a final judgment with respect to subsequent orders in aid of its execution. *Hammond v. Cailleaud*, 111 Cal. 213, 43 Pac. 607, 52 Am. St. Rep. 167; *Dunn v. Dunn*, 137 Cal. 56, 69 Pac. 847. If it is an order made after final judgment and appealable as such by the purchaser, it must be so as to the adverse parties, the tenants in common. The appeal of Pauline Gordan from the order confirming the sale is therefore a valid appeal, if regularly taken. In so far as *Rovegno v. Hunt*, 83 Cal. 446, 23 Pac. 524, is contrary to this conclusion, it must be considered as overruled by the decisions in *Hammond v. Cailleaud* and *Dunn v. Dunn*, supra. We think it was wrong in principle, on that point. Neither the interlocutory order for the sale, nor the order confirming the sale, directed that the purchaser be let into possession. That direction was first given by the court when it made the ex parte order that a writ of assistance should issue to the sheriff. The latter also must be considered, for the purposes of an appeal, as an order made after final judgment; it being as plainly in aid of the order of sale as is the order of confirmation. Being made ex parte, the tenant in possession having no notice, she had the right, in order to secure an available record on appeal, to move for a vacation of the order and writ, and, if the motion were denied, to appeal from the order of denial, instead of appealing directly from the ex parte order. *Pignaz v. Burnett*, 119 Cal. 163, 51 Pac. 48. In substance this appeal is from an order for the delivery of possession of real estate, and it was therefore the duty of the respondent under section 945, Code of Civil Procedure, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings on the writ pending the appeal, and mandamus lies to compel performance of the duty. This was expressly decided in *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202.

Rovegno v. Hunt, 83 Cal. 445, 23 Pac. 524, is cited as a case holding that mandamus is not maintainable in such a case. In that case, however, the order confirming the sale directed that the purchaser be put into pos-

session upon the delivery of the deed. No appeal had been taken therefrom, and it had become final by lapse of the time for appeal. Hence there could be no merit in an appeal from a subsequent order granting a writ of assistance, and it was obviously taken merely to vex and annoy the purchaser. For that reason the writ of mandate in that case was denied. *Mandamus* is a discretionary writ, and it may perhaps be denied when it is sought in aid of an obviously vexatious and fruitless appeal. *Wiedwald v. Dodson*, 95 Cal. 453, 30 Pac. 580; *Gay v. Torrance*, 145 Cal. 147, 78 Pac. 540; 26 Cyc. 149, 156; 19 Am. & Eng. Ency. of Law, 754, 758. It is suggested that the appeal from the order confirming the sale is likewise without merit, because no bill of exception to the order has been proposed or settled and the time therefore has expired. But the order has not been exhibited to us, and we cannot say that it may not be erroneous on its face. See 26 Cyc. 152.

It is ordered that a peremptory writ issue as prayed for, and that proceedings on the writ of assistance be stayed until the expiration of five days after the respondent shall have fixed the amount of the undertaking to be given by petitioner to stay proceedings thereon pending an appeal from the order refusing to vacate the order directing the issuance of the writ of assistance.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 288

CITY OF SAN DIEGO v. POTTER, Auditor.
(S. F. 4,975.)

(Supreme Court of California. March 28, 1908.)

1. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—ISSUANCE OF BONDS—PURPOSES.

St. 1901, p. 27, c. 32, authorizing the incurring of expenses by cities, towns, and municipal corporations for municipal improvements, including street work, etc., and regulating the acquisition, construction, and completion thereof, did not authorize the issuance of bonds except for the purposes for which ordinary revenues of a city might be expended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1897-1905.]

2. SAME—CONSTRUCTION OF STREETS AND BOULEVARDS.

Under St. 1901, p. 27, c. 32, authorizing the incurring of expenses and issuing of bonds by cities, etc., for municipal improvements, including street work, and *Vrooman Act* (St. 1885, p. 161, c. 153) § 26, as amended by St. 1891, p. 206, c. 147, providing that the city council may order the whole or any part of the work mentioned therein, which includes street work, paid out of the city treasury from such fund as it may designate, the building and construction of streets, highways, and boulevards are objects for which the city council may in its discretion expend the ordinary revenues of the city, and bonds may be issued for those purposes under St. 1901, notwithstanding the existence of Act March 19, 1889 (St. 1889, p. 361, c. 248), authorizing the city to acquire public parks and boulevards.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1899.]

3. SAME—PURCHASE OF LAND FOR STREETS.

The charter of San Diego authorizes the common council to pay for land to be used for streets, highways, etc., out of the ordinary revenues of the city, and makes the general laws of the state relative thereto applicable. St. 1889, p. 70, c. 76, provides for the laying out, etc., of streets, and section 22 (page 76) provides that, if the council deem proper that the boundaries of the district to be benefited by the improvements shall include the whole city, the commissioners shall purchase the lands, and, if there is not sufficient money in the city treasury to pay for such improvements, the cost shall be assessed upon the whole taxable property, and be included in the next general assessment, and St. 1903, p. 386, c. 268, § 36, relative to street improvements, provides that it shall not affect the act of 1889. *Held*, that these statutes authorized the council to pay for lands to be used for roads, boulevards, etc., out of the ordinary revenues of the city, and hence propositions to acquire lands for those purposes were properly submitted under St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., and this is true, notwithstanding the existence of St. 1889, p. 361, c. 248, authorizing the construction of parks and boulevards.

4. SAME—SUBMISSION OF QUESTION TO VOTE—QUESTIONS SUBMITTED.

St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., for municipal improvements, provides that the council, having first determined that the public necessity demands the acquisition, construction, etc., of any municipal improvement, including street work, or other works necessary to carry out the purposes of the city, may at a subsequent meeting call a special election, submitting a proposition for incurring the debt set forth in the resolution, and no other question than the incurring of the indebtedness for that purpose shall be submitted, provided that propositions for incurring debts for more than one purpose may be submitted at the same election. *Held*, that the act authorized the submission of several propositions for incurring indebtedness, and the fact that a proposition submitted was for an indebtedness which the city had no power to incur did not invalidate the election as to the remaining authorized propositions.

5. SAME—PUBLIC PARK.

The act authorized the submission of a proposition by the city for incurring an indebtedness for acquiring a public park.

6. SAME—STATUTE AUTHORIZING INDEBTEDNESS.

It was not necessary, under St. 1901, p. 27, c. 32, authorizing the council of cities, etc., to incur indebtedness for municipal improvements, and submit at a special election the proposition of incurring a debt for the purpose stated in the resolution, that the council, in the ordinance calling the election, designate whether the bonds were issued under the act of 1901, or under the park and boulevard act of 1889 (St. 1889, p. 361, c. 248), the provisions of the act of 1901 having been strictly complied with.

7. SAME—PROVISION FOR PAYMENT—SUFFICIENCY.

St. 1901, p. 27, c. 32, authorizes the incurring of indebtedness for municipal improvements, and section 5, p. 28 provides that a part of the bonds issued thereunder, to be determined by the city council, which shall not be less than one-fortieth of the whole amount of such indebtedness, shall be paid each year. Bonds were authorized by popular vote to be issued in the sum of \$59,108.55; the ordinance providing there should be 119 bonds issued, 118 to be of the denomination of \$500, and one of the denomination of \$108.55, three of the bonds to become due yearly, the order of payment beginning with the smallest number, and continuing until all were paid. *Held*, that the manner provided by

the ordinance for the issuance and payment of the bonds was a sufficient compliance with the statute.

In Bank. Mandamus by the city of San Diego, a municipal corporation, against Daniel Potter, as auditor of the city, to compel defendant to issue certain bonds. Peremptory writ awarded.

Geo. Puterbaugh, City Atty., for petitioner. Sam Ferry Smith, for respondent. O'Melveny, Stevens & Millikin, as amici curiæ.

ANGELLOTTI, J. Application for writ of mandate prayed to be directed against Daniel Potter as auditor of the city of San Diego. This is an application for a writ of mandate to compel defendant to perform certain ministerial acts relative to certain municipal bonds of plaintiff. It is conceded that he is bound to perform these acts if the bonds are not void, and defendant's refusal to so perform is based on the contention that they are void. The bonds were issued under the act of the Legislature enacted in the year 1901, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof" (St. 1901, p. 27, c. 32), and admittedly all the proceedings were in strict accord with the provisions of that act except as hereinafter noted.

Seventeen separate matters were specified in the resolution adopted by the common council expressing the determination of the council as to the public interest and necessity, with a statement of the estimated cost of each, and the ordinance subsequently adopted calling a special election submitted to the electors 17 separate propositions for incurring a bonded indebtedness, one proposition as to each of the matters specified in the former resolution. Each of 14 of these propositions received at such special election the requisite number of votes to carry it, and the bonds were issued thereon. The other 3 propositions were defeated. It is claimed that among the 17 propositions submitted at this election there were 3 which were not authorized to be submitted by the provisions of the act (2 of which were carried), and that the effect of including the same was to render the election a nullity as to all the propositions submitted.

The propositions attacked are the following:

"Fourth. Shall the city incur a bonded indebtedness of \$70,000, other and different than any other indebtedness proposed in this ordinance, for the extension and improvement of the street and highway system of the city, all as shown in the said resolution and in the recital thereof in the preamble of this ordinance?" In such resolution and preamble the matter is stated thus: "(4) The building, construction, and acquisition of the following lines of boulevards in said city, namely"—followed by a designation and general descrip-

tion of various boulevards, and a statement of the estimated cost of each.

"Fifth. Shall the city incur a bonded indebtedness of \$5,000, other and different than any other indebtedness proposed in this ordinance, for the building, construction, and acquisition of a road from the intersection of M and Thirty-Second street to Mount Hope Cemetery, all as shown in the said resolution and in the recital thereof in the preamble of this resolution?" In such resolution and preamble the proposition is put in the same way, except that after the words "Mount Hope Cemetery" the following is stated: "Together with the acquisition of the land on which such road may be located, according to the survey thereof made by the city engineer of said city, and filed with the city clerk thereof," etc.

"Seventeenth. Shall the city incur a bonded indebtedness of \$5,000, other and different than any other indebtedness proposed in this ordinance, for the construction of three public lavatories to be hereafter located in the city," etc.

The fourth and fifth propositions may be considered together. It is established by the decision of this court in *Redondo Beach v. Cate*, 136 Cal. 146, 68 Pac. 586, that the general act of March 19, 1889 (St. 1889, p. 399, c. 26), did not authorize the issuance of bonds except for a purpose for which the ordinary revenues of the city might be lawfully expended. This doctrine has not been modified by any subsequent decision. The act of February 25, 1901, is the same as the general act of March 19, 1889, in every respect material to this question, and is not susceptible of a different construction. If, therefore, any proposition included a purpose for which the ordinary revenue of the city could not be used, it was not authorized by the act of 1901. It is clear that the fifth proposition included, in addition to the building and construction of the road to Mount Hope Cemetery, the acquisition of the land on which the road was to be located. We think it is equally clear that the fourth proposition included, not only the building and construction of certain boulevards, but also the acquisition of the land upon which at least some of them were to be constructed. The term "acquisition" used in relation to the boulevards is certainly broad enough to include the obtaining of the lands upon which they are to be laid out. The building and construction of streets, highways, and boulevards are objects for which the legislative body of a city or town may, in their discretion, expend the ordinary revenues of the city (section 26, Vrooman Act [St. 1885, p. 161, c. 153] as amended by St. 1891, p. 206, c. 147), and for that reason fall within the purposes for which bonds may be issued under the act of 1901, besides being included in the term "street work" used in said act, which has been defined to mean "work upon a street—work in repairing or making a street." See *Mill Valley v. House*, 142 Cal.

700, 76 Pac. 658. And bonds may be issued for those purposes under the act of 1901, notwithstanding the existence of the public park and boulevard act of March 19, 1889. St. 1889, p. 361, c. 248. See *City of Oakland v. Thompson* (Cal. Sup.) 91 Pac. 387. But if there be included with these authorized purposes an unauthorized purpose, for the whole of which a single aggregate sum is specified, it is impossible to separate the good from the bad, and the whole must fall.

Defendant's claim in this regard is that there is no law that authorizes the common council of the city of San Diego to pay for the land to be used for roads, streets, highways, or boulevards from the ordinary revenues of the city. This claim does not appear to us to be well founded. The city charter expressly empowers the council to widen any road, and to open or lay out any new street or highway through public or private property, and makes the general laws of the state relative to such matters applicable. The general laws applicable appear to be the act of 1889 (St. 1889, p. 70, c. 76), and the act of 1903 (St. 1903, p. 376, c. 268), under either of which it was the right of the city to proceed (St. 1903, p. 386, c. 268, § 36). As is claimed by learned counsel, the act of 1889 does provide for the payment of the expenses of acquiring the necessary land, etc., from a fund to be collected by an assessment upon the property of the district benefited thereby; but the effect of section 22 thereof clearly is to authorize the council to pay the whole thereof from the ordinary revenues of the city, if they deem the improvement of such general benefit to the city that the whole city constitutes the district to be benefited thereby. The section is practically the same in effect in the respect under discussion as section 26, Vrooman Act (St. 1885, p. 161, c. 153, as amended by St. 1891, p. 206, c. 147), authorizing the council to pay the whole or any portion of the cost of street work out of the ordinary revenues of the city. We are of the opinion that this is a complete answer to the objection made by learned counsel to the fourth and fifth propositions, based upon the decision of this court in *Redondo Beach v. Cate*, supra; the propositions being for certain designated boulevards and roads which the council had in effect declared to be of such general benefit to the city that the city should pay the whole cost thereof. These propositions were therefore within the act of 1901, and this is true notwithstanding the existence of the public park and boulevard act. *City of Oakland v. Thompson*, supra.

The seventeenth proposition, the proposed issuance of bonds for \$5,000, for the construction of three public lavatories, was not carried at the election, and no bonds have been issued thereon. The question whether it was an authorized proposition under the act of 1901 is therefore important only in the event that it be held that the submission of a proposition for an indebtedness not author-

ized by the act at an election held under the act would invalidate the election as to all the other propositions submitted. The contention to this effect is based on the language of the act which, after providing that the legislative body of the municipality, having first determined by resolution that the public interest or necessity demands the acquisition, construction, or completion "of any municipal improvement, including bridges, waterworks, water rights, sewers, light or power works or plants, buildings for municipal uses, * * * street work, or other works, property or structures necessary or convenient to carry out the objects, purposes, and powers of the municipality," provides that such legislative body may at any subsequent meeting, call a special election, and submit thereat "the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted, provided that propositions of incurring indebtedness for more than one object or purpose may be submitted at the same election." The proviso as to different propositions being submitted at the same election was enacted for the first time in the act of 1901; the former act covering the same subject-matter, and that of March 19, 1889 (St. 1889, p. 399, c. 261), not containing any such proviso. The proviso was not essential to the proper submission at the same election of more than one of the propositions included in the act, for without it the act clearly permitted such submission, and such was undoubtedly the practice under the former act. See *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900; *City of San Luis Obispo v. Haskin*, 91 Cal. 549, 27 Pac. 929. It is to be noted that the former act, without the proviso, provided, immediately after the limitation above quoted, that "the ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred," which is a confirmation of this construction of the previous language. We cannot assume that the object of the insertion of the proviso in the act of 1901 was simply to authorize that to be done which was already fully authorized by the language of the former act. It appears clear to us that the object of the proviso was to limit the prohibition immediately preceding by making it inapplicable to any proposition of incurring indebtedness. This is the plain literal meaning of the language used in the limitation and proviso, and such meaning appears to us to give full effect to the legislative purpose.

The argument of learned counsel that the purpose of the prohibition was to secure a free and fair expression of the will of the voters on the propositions for indebtedness, unaffected by the consideration of other questions, and without the opportunity of political trades and combinations that would be afforded by the submission at the same time of

other propositions, may be conceded to be well based; but, as we view the language of the act, it must be held that the Legislature deemed that this purpose would be sufficiently attained by a limitation of the electors to a consideration of propositions for indebtedness, unembarrassed by the consideration of propositions of a different nature. It will be noted that the act of 1901 is broad enough in terms to include the issuance thereunder of bonds for practically every kind of municipal improvement that a city is empowered to make by the law applicable to it, and it can hardly be assumed in the face of language admittedly permitting the submission at the same election of propositions for indebtedness for the many different purposes authorized by the act that the Legislature was in any degree seeking to avoid possible evils resulting from the submission at one time of many different propositions for indebtedness. We cannot see that the fact that a proposition for indebtedness submitted is one for an indebtedness which the city has no power to incur affects the question at all. Although unauthorized, it is nevertheless a proposition of incurring indebtedness, the submission of which is not prohibited by the prohibitory clause relied on, and therefore its submission does not invalidate the election as to the remaining authorized propositions. In view of our conclusion upon this point, it is unnecessary to determine whether the city of San Diego had the power to expend municipal funds for "public lavatories."

The demurrer of defendant also makes the point that a proposition for a bonded indebtedness of \$25,000 for the acquisition of a park was unauthorized. This proposition was, like the public lavatory proposition, defeated at the election. What we have said in regard to the lavatory proposition is applicable to this. However, in view of the decision in *City of Oakland v. Thompson*, supra, it must be held that the proposition for this indebtedness was properly submitted under the act of 1901.

We see no force in the contention that the proceedings for the issuance of the bonds are void for failure on the part of the council to designate in their ordinance calling the election, or in some order or record prior to the election, whether the bonds proposed for boulevards and parks were to be issued under the park and boulevard act of 1889, or the general act of 1901. It seems to us that it was apparent on the face of the record that the proceeding was one under the act of 1901, but whether this be so or not it is clear that the provisions of the act of 1901 as to notice, etc., were literally complied with, and that there is nothing in the law requiring the designation referred to.

The only other objection made is one to the ordinance adopted after the election providing for the issuance of the bonds. The

act of 1901 provides in section 5 that bonds issued under the act shall be payable substantially in the manner following: "A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, at the city treasury, to be fixed by the legislative branch of the municipality," etc. As to the bonds to be issued in the sum of \$59,108.55 for a certain indebtedness authorized by the electors, the ordinance provided that there should be 119 of said bonds, 118 of which should be of the denomination of \$500, and one of the denomination of \$108.55, the \$500 bonds to be numbered from 1 to 118, consecutively, and the \$108.55 bond to be numbered 119, and also: "Three of said bonds shall become due and payable annually at the time and in the manner hereinafter specified, the order of payment beginning with the smallest numbered bond, and continuing from the less to the greater until all of said bonds shall have been paid." It is said that as 119 is not a multiple of three it would be impossible for the ministerial officers charged with the duty of preparing the bonds to prepare them so as to make them payable three each year. We see no room for misunderstanding as to the requirement of the ordinance in this regard. What it means and provides is that the 119 bonds shall be so prepared that, commencing with the smallest numbered bond, three shall become due and payable each year, leaving two to become due and payable the last or fortieth year.

We have now noticed all of the objections made by counsel to the bonds, and are of the opinion that none is well based. It follows that plaintiff is entitled to the relief sought.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J., not having heard the argument in this case, does not participate herein.

153 Cal. 356

TRACY et al. v. COFFEY, Judge of Superior Court. (S. F. 4,872.)

(Supreme Court of California. April 3, 1908. Rehearing Denied April 30, 1908.)

1. WILLS—PROBATE PROCEEDINGS—ORDERS—ENTRY IN MINUTE BOOK OF COURT.

Code Civ. Proc. § 1704, provides that orders in probate proceedings must be entered at length in the minute book of the court. An order admitting a will to probate recited in the caption: "In the Superior Court of the City and County of San Francisco, * * * Department 9. Probate." The order was signed by the judge. In thereafter entering the order in the minute book the quoted words in the caption were omitted, and the word "said" in

the phrase "the said proofs" in the order was also omitted. *Held* that, in the absence of a statute expressly authorizing the making of a memorial of the terms of an order by the method of writing it on a separate piece of paper signed by the judge, the entry of the order was sufficient notwithstanding the discrepancies between the entry and the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 809.]

2. SAME—TIME TO APPEAL—COMMENCEMENT OF PERIOD—ENTRY OF ORDER.

The time within which to appeal from an order admitting a will to probate begins to run from the date of the entry of the order in the minute book of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 823.]

In Bank. Application for writ of mandate by Laura E. Tracy and others against James V. Coffey, as judge of the superior court of the city and county of San Francisco, to compel respondent to settle a bill of exceptions. Denied.

Horace W. Philbrook (W. J. Bartnett and Wm. T. Baggett, of counsel), for petitioners. J. C. Campbell and Thomas H. Breeze, for respondent.

SHAW, J. The petitioners apply for a writ of mandate to compel the respondent, as judge of the superior court of the city and county of San Francisco, to settle a bill of exceptions relating to the proceedings and evidence taken upon the making of an order admitting to probate the will of Jacob Z. Davis, deceased, the purpose of the petitioners being to use the said bill of exceptions upon an appeal to the Supreme Court from said order.

The order in question was made on August 17, 1897, and was entered at length in the regular minute book of the department of the superior court on September 5, 1897. The time for taking the appeal therefrom expired on November 4, 1897. Before this entry the order was reduced to writing and signed by the judge. The document as signed had a caption at the top of its first page beginning with the words: "In the Superior Court of the City and County of San Francisco, State of California, Department 9. Probate." In entering the order in the minute book this part of the caption was omitted. At another place in the entry the word "said" of the phrase "the said proofs," as the order was drawn in the document, was omitted. Claiming that these omissions vitiated the act of entering the order and rendered the entry null and void, the petitioners caused it to be again entered in the minute book of the court on July 31, 1907, with the aforementioned part of the caption and the word "said" carefully inserted. Their contention now is that this latter entry is the only valid and effectual entry of the order that has ever been made, and that the time wherein they could appeal therefrom did not begin to run until that date. Acting upon that theory, they took proceedings for an appeal to this court within 60 days after the said date, and

asked for the settlement of the proposed bill of exceptions.

The variations aforesaid of the minute book entry of September 5, 1897, from the signed order, did not vitiate it, or annul its effect as an entry of the order. It is admitted that that entry was made in the proper minute book. The part of the caption omitted was not a necessary part of the order, and the omission of the word "said" did not affect the meaning of the phrase, and was of no importance or significance. There is no statute expressly authorizing the making of a memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper, and having the judge attach his signature thereto. It has become customary to do so in many instances, and the courts have often recognized such a memorial as competent evidence of the terms of the order. But the Code (Code Civ. Proc. § 1704) expressly requires probate orders to be entered in the minute book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which, under our decisions, set the time running for an appeal. In making entries in the minute book it is neither necessary, nor, so far as we are advised, customary, to begin the entry of each order with a statement of the name of the court in which it is made. The fact that another memorial exists consisting of a document filed with papers in the case, and that there are some slight discrepancies, such as those above mentioned, between the filed order and the entry in the minute book, would not affect the validity of the minute entry, nor extend the time of appeal until another entry was made. The petitioners have no valid appeal, and no right to any bill of exceptions on the appeal they are attempting to take.

The petition is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.

153 Cal. 307

GREAT WESTERN GOLD CO. v. CHAMBERS. (Sac. 1,444.)

(Supreme Court of California. April 1, 1908.)

1. APPEAL — ORDER DENYING NEW TRIAL — SCOPE OF REVIEW.

Upon an appeal from an order denying a new trial, review is limited to the grounds upon which such a motion may be based, enumerated by Code Civ. Proc. § 657, and upon which the new trial was asked; and questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

2. SAME.

The failure of a trial court to find upon a material issue is an error of law, and error in denying a new trial asked on that ground may be reviewed on appeal from the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

3. SAME—RECORD—CONTENTS—PRESENTATION OF GROUNDS FOR REVIEW—MOTIONS FOR NEW TRIAL.

Though it was not essential that defendant's notice of intention to move for a new trial, on judgment for plaintiff, be incorporated in the statement on appeal or the bill of exceptions, it is essential to the Supreme Court's right to review the trial court's action on the motion that it should appear by the record that the ground for a new trial presented on appeal was presented by the motion, and mere general specifications in the statement or bill of exceptions that the court erred in rendering judgment for plaintiff and against defendant are not sufficient to constitute such a showing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2306-2309.]

4. TRIAL—FINDINGS—FAILURE TO MAKE NOT SHOWN.

Failure to find upon any issue of fact, in an action for damages, is not shown, in that the judgment being for \$40,000, while the findings show, not only \$40,000 damages on one transaction, but also \$11,700 on other transactions, there is nothing by which the sum awarded can be referred to any one or more of the particular transactions alleged.

5. APPEAL — REVIEW — SCOPE—MATTERS NOT NECESSARY TO DECISION.

On appeal from an order denying defendant a new trial on judgment for plaintiff in an action for damages, based on several transactions, the Supreme Court need only review findings and alleged errors material to one transaction, where, if the trial court's action in regard to that transaction was correct, it appears that the judgment would have been the same as it is, though the findings upon all the other transactions had been in defendant's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3331.]

6. PRINCIPAL AND AGENT — EXECUTION OF AGENCY—FRAUD—PURCHASE OF PROPERTY—RIGHT TO RECOVER.

A company having directed its agent to purchase or contract to purchase property, and he having conspired to defraud the company by procuring title to be taken for \$90,000 by one who gave the company an option to purchase for \$150,000, \$20,000 being paid down, the company did not lose its right to recover from the agent by thereafter paying, with knowledge of the fraud, \$110,000 to close the purchase, the company not being bound to rescind nor to resort to an action to compel a conveyance for \$90,000.

7. SAME—MEASURE OF DAMAGES.

Where a company's agent for the purchase of certain property conspired to defraud it by procuring title to the property to be taken for \$90,000 by one who gave the company an option to purchase for \$150,000, the company could recover from the agent the difference between the price it was required to pay to complete the contract and acquire the property and the sum for which the agent and his confederates actually acquired the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 147.]

8. APPEAL—REVIEW—ORDER REFUSING NEW TRIAL.

On appeal by defendant, in an action for damages, from an order denying a new trial on judgment for plaintiff, he may not assert the defense of accord and satisfaction, nor of release by the release of a joint tort-feasor, since, so far as the facts upon which defendant relies are shown by the complaint as amended and the findings, the question of the sufficiency of the complaint and findings to support the judgment cannot be considered, and since neither defense was pleaded below, and there being no finding relative to the matter other than

the finding in accord with the allegations of the amendment to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3482.]

In Bank. Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by the Great Western Gold Company against James J. Chambers. From an order denying defendant a new trial on judgment for plaintiff, he appeals. Affirmed.

Milton S. Hamilton, for appellant. Bush & Perry, Sweeney & Sissons, and Rickel, Crocker & Tourtellot (Morrison, Cope & Brobeck, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal by defendant from an order denying his motion for a new trial. The complaint as originally filed was for an accounting, and for judgment for such amount as should be found due plaintiff thereon. It was alleged that defendant, as the agent and general manager of plaintiff in Shasta county, Cal., received large sums of money for the transaction of the business of plaintiff, and for the purpose of purchasing for plaintiff certain mining properties, and failed to account for the same, and converted a large portion thereof to his own use. Various transactions relative to the Vandevere group of mines, the Murray mine, and the Roan and Putney mines, whereby defendant improperly obtained from plaintiff and converted to his own use sums aggregating \$11,700, were alleged. It was further alleged that on or about September 20, 1902, defendant, while acting as the agent and trustee of plaintiff, was directed to proceed to Salt Lake City and purchase or procure for plaintiff a contract for certain mines in Shasta county known as the "Afterthought" for not exceeding \$150,000; that, acting under said instructions, defendant proceeded to Salt Lake City, and for the purpose of defrauding plaintiff in the matter of said purchase entered into an agreement and conspiracy with one Snyder and one Mitchell, whereby Snyder was to take the title to said mines from the owner, one Tabet, for \$90,000, and Snyder was thereupon to give plaintiff an optional contract for the purchase for \$150,000; that plaintiff, without knowledge of said conspiracy, accepted the contract from Snyder at the suggestion of defendant, and paid thereon to Snyder \$20,000 as a first payment (\$10,000 of which was divided between defendant, Snyder, and Mitchell), the balance to be paid, \$90,000 on September 20, 1903, and \$40,000 on March 20, 1904. During the trial the complaint was amended by adding an allegation that thereafter plaintiff paid on said contract to Snyder the sum of \$110,000 in full payment and discharge of the same, making in all the sum of \$130,000 paid thereon, whereby there was lost to plaintiff and plaintiff was damaged by reason of said fraudulent agreement and conspiracy in the full sum of \$40,000. This allegation was apparently deemed denied. The trial court found in accord with the allegations of the complaint as thus

amended in regard to the Afterthought transaction, as well as in regard to the other transactions alleged, and, plaintiff waiving all claims except the right to recover \$40,000, rendered judgment against defendant for that sum.

This being simply an appeal from the order denying the motion for a new trial, some of the points made by learned counsel for appellant in their briefs cannot be considered. Upon an appeal from an order denying a new trial the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based (Code Civ. Proc. § 657), and upon which the new trial was asked. It is well established that questions relating to the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment cannot be considered on such an appeal. *Swift v. Occidental M. Co.*, 141 Cal. 161, 74 Pac. 700; *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *Co. Bank v. Jack*, 148 Cal. 438, 83 Pac. 705, 113 Am. St. Rep. 285; *Wheeler v. Bolton*, 92 Cal. 167, 28 Pac. 558; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186. The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and error in overruling a motion for a new trial made on that ground may be reviewed on appeal from the order. *Swift v. Occidental M. Co.*, supra. There is, however, nothing in the record to indicate that any such failure was a ground of the motion made in the lower court. The notice of intention to move for a new trial was not incorporated in the statement or bill of exceptions, and it was not essential that it should be; but it is essential to our right to review the action of a trial court on motion for new trial that it should appear by the record that the ground for a new trial presented here was presented by the motion in the trial court. The record being otherwise silent upon the matter, this may be made to appear by proper specification of error in the statement or bill of exceptions (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Williams v. Hawley*, 144 Cal. 99, 77 Pac. 762); but manifestly the mere general specifications that the court erred in rendering judgment for plaintiff and against defendant are not sufficient to constitute such a showing. Upon the record before us we cannot assume, for the purpose of reviewing the action of the trial court, that one of the grounds specified on the motion in the lower court was that the decision was against law. Regardless of what we have said upon this point, however, it is not pointed out by counsel wherein the trial court failed to make a finding upon any material issue. The point in this connection appears to be that the judgment being only for \$40,000, while the findings show, not only the \$40,000 damage arising from the Afterthought transaction, but also \$11,700 damage arising from the other transactions specifically alleged, there is noth-

ing by which the sum awarded can be made referable to any one or more of the particular transactions alleged. This clearly does not show a failure to find upon any issue of fact. Upon the record here we are therefore limited to a consideration of the contention that the evidence was insufficient to support the material findings of fact and the alleged errors of law committed by the trial court in ruling upon evidence. It is further clear that only those findings and alleged errors that are material to the Afterthought transaction need be considered here; for, if the action of the trial court in regard to that matter was free from error, it is apparent that the judgment would have been the same as it is, even though the findings upon all the other matters had been in favor of defendant. *Robinson v. Placerville, etc., R. R. Co.*, 65 Cal. 266, 3 Pac. 878; *White v. Douglass*, 71 Cal. 119, 11 Pac. 860.

There is ample support in the pleadings and evidence for the findings in accord with the allegations of the original complaint as to the Afterthought transaction, and also for the findings in accord with the allegations of the amendment relative to the subsequent payment by plaintiff of the further sum of \$110,000 in full payment of the amount due under the Snyder option, as reduced by stipulation of the parties. It is earnestly contended that the finding as to the damage resulting to plaintiff therefrom, which is as follows: "Whereby there was lost to said plaintiff, and plaintiff was damaged by reason of said fraudulent agreement and conspiracy and acts upon the part of said defendant in the full sum of \$40,000"—is not sustained by the evidence. This finding appears to have been attacked by proper specification of insufficiency of evidence to support it. The contention in this behalf is based on the fact alleged to have been shown by the evidence that all the money paid to Snyder by plaintiff on account of such transaction, except the \$20,000 paid at the time of the giving of the option, viz., \$110,000 was paid after plaintiff had obtained full knowledge of the fraudulent conspiracy between defendant, Snyder, and Mitchell, and it is also claimed that, although plaintiff, to obtain the property covered by the option, paid \$40,000 more than it would have paid if it had not been for the wrongful and fraudulent acts of its agent, if any injury was caused plaintiff in the matter, it was caused solely by the payment voluntarily made by plaintiff with full knowledge of all the facts. We are unable to see how defendant can be heard to assert that this loss was not caused by his wrongful acts. By reason of his willful and fraudulent breach of trust plaintiff had accepted an option to purchase for \$150,000 property which it desired to acquire, and for which it was willing to pay, if necessary, as much as that sum, when, as a matter of fact, the purchase price to the defendant was only \$90,000, and plaintiff, but for the fraudulent

acts of defendant in regard thereto, would have been given an option to acquire the property for a consideration of \$90,000. If by reason of such acts it paid more than \$90,000 for the property, it was necessarily damaged thereby to the extent of the difference between \$90,000 and the sum actually paid. Admittedly plaintiff, desiring to have the property, was not required to rescind upon discovery of the fraud. Nor was it required to resort to an action to compel a conveyance upon payment of \$90,000. Notwithstanding knowledge of the fraud on the part of plaintiff, the result of such action might be in some degree uncertain, and plaintiff was not required to take the chance of thus losing the opportunity of purchasing the property. It is not disputed that a party thus defrauded may upon discovery of the fraud complete his contract, and then maintain an action for the damages caused him thereby. Such damage in the case at bar, it appears very clear to us, was the amount of the difference between the price which plaintiff was required to pay to complete the contract and acquire the property and the sum for which defendant and his confederates actually acquired the option. See *King v. Wise*, 43 Cal. 628; *Calmon v. Sarraille*, 142 Cal. 642, 76 Pac. 486. It does not assist defendant in his contention that the evidence is insufficient to sustain the finding of \$40,000 damage that plaintiff obtained a reduction of \$20,000 on the original price from Snyder, thereby reducing the amount of damage from \$60,000 to \$40,000. By the contrivance of defendant, and for the purpose of enabling him to profit at the expense of his principal, the property which plaintiff desired to acquire had been placed within the control of Snyder, and plaintiff could not obtain the same without acceding to the demands of Snyder under the option given, except by resorting to an action against him to compel a conveyance, which might well turn out to be impracticable or without efficacy. This chance of losing the property it was not required to take. It had the clear right to pay Snyder the full amount of the \$130,000 that remained due on the option, and then maintain an action against the defendant for the \$60,000 loss which would thus have been caused, and the only effect of obtaining from Snyder a reduction of \$20,000 on the amount to be paid to obtain the property, so far as the amount of damage caused by defendant's acts was concerned, was to reduce the amount of damage by \$20,000 to defendant's benefit. It still remained that plaintiff was damaged by the acts of defendant in the sum of \$40,000.

It is urged that the acceptance by plaintiff of the proposition of Snyder to accept \$20,000 less than the amount originally named as the purchase price in the option, and the payment by it to Snyder of the \$110,000 thereunder, had the effect to release the defendant from all liability for damages "upon the principles governing accord and satisfaction,"

and that in any event defendant was released from all claim of damage by what is said to have been a release of Snyder, a joint tortfeasor. It is not necessary to discuss on its merits either of these points, for it is clear that neither is available to defendant on this appeal. So far as the facts upon which defendant relies in this behalf are shown by the complaint as amended and the findings of the trial court, it is only necessary to again state that the question of the sufficiency of the complaint and findings to support the judgment cannot be considered on an appeal from an order denying a new trial. Neither the defense of accord and satisfaction nor that of release, both of which are affirmative defenses, was pleaded by defendant in the lower court, and there is no finding of fact relative to the matter other than the finding in accord with the allegations of the amendment to the complaint which we have already set forth. Except as to the damage thereby found to have been suffered by plaintiff by reason of defendant's acts, this finding was not attacked by any specification of insufficiency of evidence to sustain it, and the evidence shows it to be in accord with the undisputed evidence given on the trial.

Only three alleged errors in rulings on evidence are pointed out in appellant's briefs. The first two rulings claimed to be erroneous could not by any possibility have affected the result as far as the Afterthought transaction was concerned, and it is unnecessary to determine whether they were technically wrong. The third ruling was one excluding certain documentary evidence offered by defendant. The evidence so offered was clearly immaterial and irrelevant to any issue in the case, and the ruling of the lower court was correct.

The order denying a new trial is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.

153 Cal. 314

PEARSALL et al. v. HENRY et al. (S. F. 4,355.)

(Supreme Court of California. Nov. 19, 1907.)

1. CONTRACTS—WRITTEN CONTRACTS—MODIFICATION BY PAROL—"EXECUTED AGREEMENT."

Under Civ. Code, § 1698, providing that a written contract may be altered by a contract in writing or by an executed oral agreement, and section 1661, declaring that an executed agreement is one the object of which is fully performed, an oral agreement altering a written contract is not enforceable, unless its terms have been fully performed by both parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

2. SAME — SUBSTITUTION OF PAROL AGREEMENT.

Where the parties to a written contract made an oral settlement of their differences due to disputes as to their rights under the contract, and the oral settlement imposed new obligations on the parties, and each, in consideration of the new promises, agreed to do things which he

was not bound to perform under the contract, the contract was abrogated, and the oral settlement took its place, and it was not affected by Civ. Code, § 1698, providing that a contract in writing may be altered only by a contract in writing or by an executed oral agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1123.]

3. SPECIFIC PERFORMANCE — PART PERFORMANCE OF PAROL CONTRACT WITHIN THE STATUTE OF FRAUDS.

An oral agreement bound plaintiff to convey to defendant land in one county, and bound defendant to convey to plaintiff an interest in land in another county. Plaintiff performed his part of the agreement. *Held*, that he could, notwithstanding the statute of frauds, compel performance by defendant, under the rule that, where there is an oral agreement by which each of the parties is to convey land to the other, the conveyance by one on the faith of the agreement is such part performance as will in equity take the case out of the operation of the statute, though he could not sue at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 120, 121.]

4. SAME—ACTS CONSTITUTING PART PERFORMANCE.

Acts to constitute a part performance of a parol contract, unenforceable under the statute of frauds, must have been done with a view to carry out the contract, and, when so done, the contract is enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 124.]

5. SAME—QUESTION OF FACT.

Whether acts were done with a view to carry out a parol contract unenforceable under the statute of frauds, so as to constitute a part performance thereof, is a question of fact.

6. APPEAL — REVIEW — FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

Where the evidence is conflicting, the findings of the trial court are conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

7. TRIAL—FINDINGS OF FACT—SUFFICIENCY.

Where the ultimate question was how much a party had expended in purchasing land, and the court found on sufficient evidence the amount expended, an error in a finding as to the price per acre was immaterial.

8. EVIDENCE—PAROL EVIDENCE — WRITTEN CONTRACTS—WANT OF CONSIDERATION.

Want of consideration for a contract in writing may, when properly pleaded, be shown by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1981–1989.]

9. SAME — PAROL CONTRACT SUPERSEDING WRITTEN CONTRACT—PROOF—ADMISSIBILITY.

Parol evidence of a contract superseding a contract in writing is competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2052.]

10. SAME—AMBIGUOUS CONTRACTS—EVIDENCE—ADMISSIBILITY.

Where a written contract is ambiguous, proof of the circumstances surrounding its execution and of what was said in regard to the ambiguous provisions is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2085–2101.]

11. APPEAL — HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The erroneous admission of evidence, which does not support the claim of the successful party, does not justify a reversal on the appeal of the defeated party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4160.]

12. SAME—DISPOSITION OF CAUSE ON APPEAL.

Where the error in the findings of fact on one issue, arising from the insufficiency of the evidence to support it, does not affect the proper findings on other issues, the cause will be remanded for retrial on such issue alone.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. May Pearsall and another against James E. Henry and others, copartners under the firm name of J. E. Henry & Sons. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Louis Titus, H. M. Wright, and Titus, Wright & Creed, for appellants. Campbell, Metson & Campbell and J. N. Gillett (Philip Mansfield, of counsel), for respondents.

SLOSS, J. This action was brought by Clarence E. and H. May Pearsall, husband and wife, against James E., George E., John H. and Charles B. Henry, copartners under the firm name of J. E. Henry & Sons. The complaint alleges that the plaintiff Clarence E. Pearsall during the months of February, March, and April, 1901, purchased a tract of redwood timber land in Del Norte county, in this state, and paid thereon as part of the purchase price and for securing the title the sum of \$39,009.61, \$6,400 of which belonged to his wife, H. May Pearsall; that the said Clarence E. Pearsall also expended as incidental and necessary expenses in purchasing said lands the further sum of \$5,000, or thereabouts. It is alleged that on or about the 23d day of April, 1901, the defendants promised and agreed with the plaintiffs that, if the plaintiffs would convey said lands to them, they, the defendants, would in the latter part of May, 1901, pay to plaintiffs the money they had paid upon such lands as aforesaid, and the moneys expended by Clarence E. Pearsall as expenses in obtaining the same. It is then averred that the plaintiffs, relying upon this promise, conveyed all of said lands to the defendants, but that said defendants have failed and refused to pay any part of said moneys to plaintiffs. The complaint sets forth an assignment by Clarence E. Pearsall to H. May Pearsall of all his right, title, and interest in and to said sums of money, and asks judgment against the defendants for the amounts so alleged to have been paid for securing the lands and for expenses.

The defendants answered, denying, among other things, the making of the alleged agreement, and denying that the lands had been conveyed to them pursuant to any such agreement. The position of the defendants is clearly set forth in their pleadings, which include, in addition to an answer, a counterclaim and a cross-complaint. They allege that the conveyance set forth in the complaint had been made pursuant to the terms of two written agreements between the defendants and the plaintiff Clarence E. Pearsall. The first of these bears date the 20th day of October, 1900,

and after reciting that the parties of the first part (the appellants herein) contemplate purchasing from the California Redwood Company a tract of land in the county of Humboldt containing 16,800 acres, or thereabouts, at the price of \$30 per acre, and that said California Redwood Company has promised to Pearsall a commission of 2½ per cent. on said price for making said sale, declares that the Henrys agree that, in the event of their purchasing the said tract of land from the California Redwood Company, they will sell to Pearsall at the price of \$40,000 an interest in the tract, bearing such relation to the whole tract as \$40,000 bears to the entire purchase price, less the commission. By this agreement Pearsall agrees to purchase said interest and that he "will, in addition, pay said parties of the first part any and all commission he may receive from the California Redwood Company." This agreement considered by itself had no reference to the lands mentioned in the complaint herein, but it was supplemented by the making of a second agreement dated February 8, 1901, which provides that, "in consideration of certain favors extended to the party of the first part (Pearsall) by the party of the second part (J. E. Henry & Sons) in the purchase of redwood timber lands in the county of Humboldt, the party of the first part hereby agrees to purchase for the party of the second part certain redwood timber lands in the county of Del Norte, in the state of California," in certain described townships and sections. The agreement goes on to recite that Pearsall has already secured options on the lands which the parties of the second part expect to purchase, and that papers in escrow are lodged in bank, and provides that Pearsall is to make out a list showing the above tracts of land on which he has options, together with the names of the owners and number of acres contained in each tract, and the price per acre which the several owners are to receive for their lands. On such tracts as the purchase price is \$15 per acre or under, Pearsall is authorized by J. E. Henry & Sons to purchase, paying for same the prices agreed upon between the present owners and Pearsall, but Pearsall is not to buy any of the tracts of land mentioned for a price exceeding \$15 per acre, without special instruction from the Henrys, "all deeds to be made in the names of the parties of the second part, who are to pay the prices at which the lands are now deeded in escrow." The Henrys agree to furnish Pearsall necessary funds to secure the different tracts. The parties of the second part further agree to pay the expenses of the party of the first part while he is engaged in securing the deeds provided for, said expenses not to exceed \$250. It is the purchase of the land in Del Norte county described in this agreement of February 8, 1901, that gives rise to the present controversy.

In the pleadings on the part of the defendants it is alleged that in December, 1900, they purchased the 16,800 acres of land in Hum-

boldt county mentioned in the agreement of October, 1900, and that Pearsall received as a commission for making such sale the sum of \$89,000. This is alleged to be far in excess of any sum paid by Pearsall for the lands purchased by him under the contract of February, 1901. By their counterclaim the defendants ask judgment against Pearsall for the excess, and by their cross-complaint they seek an accounting of the balance of commissions that may remain in Pearsall's hands. The cross-complaint also seeks to compel the conveyance of 320 acres of land claimed to be a part of the tract purchased by Pearsall for the Henrys, and by Pearsall conveyed to J. N. Gillett, who is made a party defendant to the cross-complaint. The answer to the cross-complaint does not deny the execution of the written instruments in question, but alleges that these instruments were executed by Pearsall without consideration; alleges that, after the making of these agreements, differences had arisen between Pearsall and the defendants regarding their rights and obligations arising out of their several contracts; and that subsequently Pearsall and the Henrys entered into a new agreement for the purpose of settling all of the matters in controversy; and that, by this new contract, it was agreed that the parties were to convey to the defendants all of the lands secured by Pearsall, and that the defendants should pay to the plaintiffs all sums of money paid by them for the purchase of lands in Del Norte county, and the expenses incurred in securing the same. The defendants also agreed, as is alleged, to waive all claims which they had for commissions received by Pearsall on the sale of the lands in Humboldt county purchased from the California Redwood Company, except 2¾ per cent. of the purchase price, which had heretofore been paid by Pearsall to the defendants. Plaintiffs allege that their conveyance of the land in Del Norte county was made in reliance upon this agreement. From this summary of the pleadings it will be seen that there is no controversy about the fact that plaintiffs did convey to defendants the land in Del Norte county. The real dispute is as to the agreement under which this conveyance was made; the defendants claiming that it was made by virtue of the written agreement above described, and the plaintiff contending that these written agreements were abrogated and superseded by a new and different agreement. More specifically, the difference between the parties relates to the commissions to be paid by Pearsall to the Henrys upon the sale of the lands in Humboldt county. If, as claimed by the plaintiffs, only 2¾ per cent. of the purchase price paid on the Humboldt transaction was to be turned over, defendants are largely indebted to the plaintiffs. On the other hand, if, as is contended by the defendants, Pearsall was bound to account to them for the total commission amounting to \$89,000, this amount was sufficient to repay him for all advances made in acquiring the Del Norte

lands, and to leave a large balance due from him to the defendants.

The findings and judgment were in favor of the plaintiffs. So far as concerns the conveyance of the Del Norte lands to defendants, the court finds that the written agreements of October 20, 1900, and February 8, 1901, respectively, were executed as alleged in the answer and cross-complaint; that between the 1st day of February, 1901, and the 23d day of April, 1901, the plaintiff Clarence E. Pearsall purchased in his own name, and partially paid for from his own funds, a tract of redwood timber land situated in Del Norte county, containing 8,115 acres; that he expended in purchasing said land the sums of \$4,650 for expenses, and \$39,009.61 on account of the purchase price, the cost of said land to him having been \$12.50 per acre, exclusive of expenses. It is found that Pearsall received \$89,000 as commissions on the sale of the 16,800 acres of Humboldt land, and that of this sum \$14,000 had been paid to defendants. It is further found that in the month of April, 1901, disputes arose between Pearsall and the defendants growing out of their written agreements; Pearsall claiming that the agreement of February 8, 1901, had been obtained from him by fraud, and the defendants claiming that they were entitled to the lands purchased by Pearsall at the exact price paid for the same, without allowing any commission or expenses, which claim was by said Pearsall denied, he claiming that the defendants were to pay \$15.20 per acre for said lands. The defendants also demanded that said lands be immediately deeded to them; Pearsall claiming that there should be no conveyance until he had been paid at the price of \$15.20 per acre. The finding as to the new agreement upon which this suit is founded is in the following words: "That upon the 23d day of April, 1901, plaintiff Clarence E. Pearsall, and the defendant James E. Henry, representing the firm of J. E. Henry & Sons, met in the city of Eureka, state of California, and made a full and complete verbal settlement of all accounts existing between them as follows: Said James E. Henry, for said J. E. Henry & Sons, agreed with said Pearsall that for and in consideration of said Pearsall waiving all claims and demands against defendants over and in excess of \$12.50 per acre upon the lands which had been purchased by him, to wit, the 8,115 acres in the county of Del Norte, state of California, and deeding said lands at once to defendants, that defendants would faithfully carry out the terms of the agreement of October 20, 1900, in relation to deeding said Pearsall the amount of said lands represented by his \$40,000 purchase as shown by said agreement; that defendants would waive any and all claims to any commissions under said agreement, save and except 2¾ per cent. which defendants had theretofore received, and would repay said Pearsall the entire amount of mon-

ey he had paid out of his own and his wife's funds in the purchase price of said 8,115 acres of land in Del Norte county aforesaid, and would repay said Pearsall any and all expenses he had incurred in the purchase of said lands, and that said defendants would pay said sums of money on or about the first day of June, 1901; that said Pearsall accepted the terms of said agreement and fully agreed thereto." The court found that Pearsall made the conveyance as provided in said agreement; that no part of the moneys paid by him for said lands or expenses incurred by him has been repaid; that he had transferred his claim against defendants to his coplaintiff, H. May Pearsall, and directed judgment in favor of H. May Pearsall for the sum of \$43,650.61, with interest, the total amounting, at the date of the findings, to \$51,876.95. Judgment for this amount and costs followed, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

Many of the findings of the court are attacked as unsupported by the evidence. Before proceeding to the examination of these points, we shall consider the contention of the appellants that the findings, even if sustained by the evidence, do not support the judgment. The argument in this regard is based primarily upon the proposition that the alleged agreement of April 23, 1901, by virtue of which the parties settled all of their then existing differences, and agreed upon an immediate conveyance by Pearsall of the lands, was void and unenforceable because not in writing. The defendants urge that this oral agreement of April 23d was a mere modification or alteration of some of the terms of the agreements of October, 1900, and February, 1901; and since it was still executory was void under the provisions of section 1698 of the Civil Code. That section reads as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." According to section 1661 of the Civil Code an executed agreement is one "the object of which is fully performed. All others are executory." If the agreement of April 23, 1901, is to be regarded as a mere modification or alteration of the then existing agreements, it must be conceded that it was not executed within the meaning of section 1698, and is therefore not now enforceable. An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute. *Henehan v. Hart*, 127 Cal. 657, 60 Pac. 426; *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 105; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Mackenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; *Harloe v.*

Lambie, 132 Cal. 133, 64 Pac. 88. But we think the agreement of April 23, 1901, as the same is found by the court, was not a modification or alteration of the written agreements, but was a new agreement superseding those then existing. The finding which has already been quoted at length does not indicate that the parties intended to alter one or more of the terms of the written agreements, leaving those agreements in other respects to remain in force. The idea conveyed by the finding is that these agreements were virtually abrogated, and that the new oral agreement was to take their place. It imposed new obligations upon the parties, and each, in consideration of new promises then made by the other, agreed to do acts which, according to his own contention, he was not then bound to perform. To such new agreement, substituted for an existing written agreement, section 1698 of the Civil Code has no application. *Stockton, etc., Works v. Glenn's Falls Ins. Co.*, 121 Cal. 167, 175, 53 Pac. 565. See, also, *Adler v. Friedman*, 16 Cal. 139.

But it is urged by appellants that, even if the agreement of April 23, 1901, is not to be treated as an unexecuted oral modification of a written agreement, it is still, as an oral agreement for the sale of real property, invalid under subdivision 5 of section 1973 of the Code of Civil Procedure. Unquestionably this agreement which provided for the conveyance by plaintiffs of the 8,000 odd acres of land in Del Norte county, and the transfer by defendants of an undivided interest in the lands in Humboldt county, was an agreement which, by the provisions of the statute of frauds, was required to be in writing. But where the plaintiffs have, as it is here found they have, fully executed the agreement on their side, are the defendants in a position to raise the objection that the contract was not in writing? While full performance of so much of the contract as would bring it within the statute of frauds will enable either party to sue upon the remaining stipulations (*Browne*, Statute of Frauds [5th Ed.] § 117), the statute will still prevent recovery when any stipulation which is itself required to be in writing remains unperformed. Here the contract as found required the defendants to convey an interest in the Humboldt lands. This stipulation being unperformed, and the contract being undoubtedly entire, the rule as just stated would make the bar of the statute applicable to any suit upon said contract. *Fuller v. Reed*, 38 Cal. 100. But this rule refers merely to the effect of the statute as a legal defense. Notwithstanding the applicability of the statute as a bar at law, there may still have been such part performance as will impel a court of equity to specifically enforce the contract. Where there is a verbal agreement under which each of the parties is to convey land to the other, it is generally held that a conveyance by one on

the faith of the agreement constitutes such part performance as will in equity take the case out of the operation of the statute. *Caldwell v. Carrington*, 9 Pet. (U. S.) 86, 9 L. Ed. 60; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Farwell v. Johnston*, 34 Mich. 342; *Baker v. Scott*, 2 Thomp. & C. (N. Y.) 606. See *Swain v. Burnette*, 89 Cal. 564, 569, 26 Pac. 1093. The case at bar is within the principle of these decisions, and the conveyance by plaintiffs therefore places them in a position to compel compliance by the defendants with the undertakings on their part.

It is further argued that the conveyance by plaintiffs cannot be treated as a part performance of the alleged oral agreement of April 23d upon the ground that acts claimed to constitute a part performance must clearly appear to have been done with a view to carrying out the oral contract relied upon. *Browne*, Statute of Frauds (5th Ed.) § 454; *Williams v. Morris*, 95 U. S. 456, 24 L. Ed. 360; *Blum v. Robertson*, 24 Cal. 142; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828. But whether or not the acts do so clearly appear to have been done is primarily a question of fact for the trial court, and the trial court here has found that the conveyance to the defendants was made pursuant to the oral agreement of April 23d. This is sufficient to meet the requirements of the rule. We are satisfied that, if the evidence sustains the findings of the court, those findings were properly held to result in the judgment entered. Are the findings sustained by the evidence? The principal attack is directed against the finding of the making of the oral agreement of April 23, 1901. The appellants make an elaborate argument with a view to showing that the conveyance by Pearsall was made in recognition of his obligations under the written agreement of February, 1901, and that no oral agreement, as claimed by the plaintiffs and found by the court, was in fact entered into. It is not to be denied that there are certain circumstances appearing in the record which lend support to this contention. Apart from the suspicion which must always attach to a claim that a formal agreement in writing has been superseded by an oral contract, much more favorable than the writing to the party who asserts the making of the new agreement, Pearsall's own testimony was greatly shaken by the production of letters in which he had made statements entirely at variance with his position at the trial. But his testimony as to the making of the agreement of April 23d was corroborated by several witnesses, and the degree of credit to be accorded to him, as to the other witnesses, was a question for the trial court. The witnesses for the plaintiffs testified that the agreement in question had been made. The witnesses for the defendants testified that it had not been. It was for the trial court to decide which set of witnesses was telling the truth. While it may be that the court reached the

wrong conclusion on this question of fact, its decision is conclusive in this court, if there was a substantial conflict of evidence, and it cannot be doubted that there was such conflict here. It is found that Pearsall had expended in purchasing the lands and securing the options the sum of \$4,650 as necessary and incidental expenses. The only testimony as to these expenses is that of Pearsall himself. Adding together all of the items testified to by him, the sum falls considerably short of the amount found by the court to have been expended by him. Indeed, the respondents make no attempt to point out any evidence which will sustain the finding that \$4,650 was so expended. The findings as to the amount paid out by Pearsall on account of the purchase price of the land are by no means satisfactory when measured by the evidence. The court made two findings relating to this item. Finding 8 is that Pearsall had paid upon the purchase price of the land the sum of \$39,009.61. Finding 9 declares that the actual cost of said lands to Pearsall had been the sum of \$12.50 per acre, exclusive of expenses. The record discloses absolutely no evidence in support of the latter finding. Nowhere in the testimony is there any suggestion of a price of \$12.50 per acre. Pearsall and those from whom he claims to have bought all say the price to him was \$12 per acre. But, since the ultimate and important question in this connection is how much Pearsall had expended in purchasing the land, an error in the finding as to the price per acre is of no consequence, if finding 8 that he had expended \$39,009.61 is supported by the evidence. We think the record does contain sufficient evidence to support this finding, although that evidence is not as clear as might be desired. Pearsall testified that he had bought and paid for the 8,115 acres at the rate of \$12 per acre. The amount so claimed to have been expended, after deducting advances made by the defendants and \$14,000 due them (according to Pearsall's contention) on account of commissions, left a sum greater than that found by the court to have been expended by Pearsall. While it is difficult, if not impossible, to ascertain from the record how the court arrived at the exact figure of \$39,009.61, there was some evidence, not directly contradicted, tending to show that that amount or more had been expended by Pearsall. The other findings, so far as they are material, are supported by sufficient evidence.

We come to the exceptions taken to the rulings of the court in sustaining and overruling objections to evidence. There are more than 100 of these exceptions, and they must necessarily be treated briefly. Many of them are based on the action of the court in admitting correspondence and evidence of conversations of the parties prior to the agreement of February 8, 1901. It is urged that this violated the rule that the execu-

tion of a written contract supersedes all negotiations preceding its execution. See Civ. Code, § 1625. But here the plaintiffs in their answer to the cross-complaint averred that the two written agreements relied on by the defendants had been executed by Pearsall without any consideration whatever. That want of consideration for the execution of a writing, when properly pleaded, may always be shown by parol proof, is elementary, and the testimony in question was relevant to the issue framed. Testimony of the oral agreement of April 23, 1901, was objected to on the ground that it was an oral unexecuted modification of a written agreement. That objections of this character were properly overruled follows from what has been said in discussing the sufficiency of the findings to support the judgment. If, as is shown in an earlier part of this opinion, the agreement of April 23, 1901, constituted, not a modification of the written agreements, but a new contract superseding them, oral evidence of such new contract was competent. Pearsall was allowed to testify to the conversations which took place between him and some of the defendants at the time of signing the contract of October 20, 1900. This conversation related to the provision for turning over the commissions to be received by him on the Humboldt sale, and the purpose of the testimony was to show that the understanding was that only 2½ per cent. of the purchase price, and not the entire commission, was to be accounted for. There was no error in this. The writing which recited that the commission was to be 2½ per cent., and then contained an agreement to pay over all commissions, was ambiguous. Whether by its terms Pearsall was to turn over only the 2½ per cent. stated to be the amount shown, or was to turn over all commissions, whatever might be their amount, was fairly open to doubt. To clear up this ambiguity which appeared, when it was shown that the commissions were in fact much more than 2½ per cent., it was proper to allow the plaintiffs to show the circumstances surrounding the execution of the writing, and all that was said in regard to these clauses. *Balfour v. Fresno Co.*, etc., 109 Cal. 221, 41 Pac. 876. Some of the testimony offered to show what money had been paid by Pearsall through a bank in Crescent City was immaterial because not directly connected with the transactions in dispute. But we cannot see that the admission of this evidence was in any substantial way prejudicial to appellants. The most that can be said is that it had no tendency to support the claim of Pearsall as to the amount expended by him in the purchase of the lands. If it had no such tendency, its admission was not a matter of sufficient importance to justify a reversal. The exceptions taken in connection with the testimony regarding Pearsall's expenses in acquiring the land need not be considered in view of

our conclusion that the evidence does not support the finding as to such expenses. On the whole case, we find no substantial error except that involved in the finding just mentioned. Since this does not affect the other issues, it will not require a retrial of the entire case. *Emerson v. Yosemite G. M. Co.*, 149 Cal. 50, 85 Pac. 122; *Robinson v. Muir* (Cal.) 90 Pac. 521.

The judgment and order are reversed, and the cause remanded, with directions to the trial court to retry the issues raised regarding the expenditures made by C. E. Pearsall on account of incidental expenses in purchasing the lands mentioned in the complaint, and to enter a judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other findings.

We concur: SHAW, J.; ANGELLOTTI, J.

(153 Cal. 314)

PEARSALL et al. v. HENRY et al. (S. F. 4,355.)

(Supreme Court of California. April 1, 1908. Rehearing Denied April 30, 1908.)

1. EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS.

Parol evidence is admissible to show a substitution of a new parol agreement for a prior written one; Civ. Code, § 1698, providing that a written contract may be "altered" by a contract in writing or by an executed oral agreement, and not otherwise, not being applicable.

2. FRAUDS, STATUTE OF—ORAL AGREEMENT TO TRANSFER LAND — ESTOPPEL — PART PERFORMANCE.

Where a party to an oral agreement to convey land conveys it, and the other parties accept it under the contract, they are estopped to raise the objection that the contract was not in writing as required by the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

3. SAME.

The mere fact that an act relied upon as part performance of an oral contract within the statute of frauds was an act which the performing party was bound to do under a prior written agreement is not conclusive against the claim of part performance of the new oral agreement, as there is no hard and fast rule on that question, but it is one of fact for the determination of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

4. SAME.

The rule as to the effect of part performance of an oral agreement invalid under the statute of frauds is based on equitable considerations, and, when it clearly appears that there has been such a performance by a party of his part of the agreement as to make it inequitable to allow the other party to repudiate it on the ground that it was not in writing, he will be estopped from doing so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287, 289.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Opinion in department affirmed, and judgment below modified and affirmed.

For departmental opinion, see 95 Pac. 154.

Louis Titus, H. M. Wright, and Titus, Wright & Creed, for appellants. Campbell, Metson & Campbell and J. N. Gillett (Philip Mansfield and Thomas H. Breeze, of counsel), for respondents.

PER CURIAM. A rehearing of this appeal was ordered after decision in department. Upon further consideration, we adhere to the department opinion. As stated therein, section 1698 of the Civil Code must be held to be inapplicable where the offer is to prove a substitution of a new agreement for the prior written agreement. This is very clearly shown in the opinion in *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786, where it was held that one sued upon a written agreement could show by parol evidence that a subsequent written agreement was executed upon the consideration and agreement between the parties that the former agreement should be canceled, and all claims of the plaintiff against the defendant thereunder waived. Speaking of such evidence, the court said: "Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case, the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action. The objection that the written agreement could be altered only by an agreement in writing, or by an executed oral agreement (Civ. Code, § 1698), has no application to the facts offered to be shown. The offer was to show that the subsequent written agreement had been substituted for the original agreement, and the oral agreement of which proof was offered was the agreement to make this substitution. It was not an offer to prove an executory oral agreement, but an oral agreement that had been fully executed by the substitution. This, in effect, was an offer to prove a novation. *Farmers' N. G. Bank v. Stover*, 60 Cal. 387." See, also, *Adler v. Friedman*, 16 Cal. 138. It is true that to effect a substitution the new agreement must be valid in itself (*Adler v. Friedman*, supra), and, solely by reason of the statute of frauds, the new agreement was one that was required to be in writing in order to be valid. But the objection on this score is fully answered by what is said in the department opinion on the effect of the performance of Pearsall

of his part of the contract, the conveyance to the defendants of the Del Norte county lands. Having accepted such conveyance under the new contract (which is the effect of the findings of the trial court), the defendants are no longer in a position to raise the objection that such new contract was not in writing. We do not understand the authorities relied on by learned counsel for defendants to hold that the mere fact that the act relied on as part performance was something which the party performing had been obligated to do under a prior agreement is conclusive against the claim of part performance of the new oral agreement. Some of them say that, to constitute part performance, the acts relied on must be referable exclusively to the oral contract (see *Page on Contracts*, § 719), but, as we understand it, this means no more than that in the light of all the circumstances of the particular case such acts are so referable. There is no hard and fast rule under which the mere existence of a prior obligation to do the acts bars all inquiry on the subject. The rule as to the effect of part performance is based entirely on equitable considerations, and, when it is clearly and unequivocally made to appear that there has been a performance by a party of his part of an oral agreement required by the statute of frauds to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so. The question whether there has been a part performance of the oral agreement is necessarily one of fact to be determined by the trial court. If the testimony of plaintiffs' witnesses be taken as true, as to which the trial court was the sole judge, it affords unequivocal and satisfactory evidence of the particular oral agreement alleged by Pearsall, and showed acts of part performance referable exclusively, under all the circumstances, to such oral agreement. The findings of the trial court sufficiently show a consideration for the oral contract in the existence of the disputes between the parties and the settlement thereof, and there is sufficient evidence to sustain such findings.

In department it was held that the evidence was insufficient to support the finding as to the amount of incidental expense incurred by Pearsall in acquiring the Del Norte county lands, and for which, under the oral contract, he was entitled to reimbursement. The trial court found this amount to be \$4,650, and included such amount, with interest from July 1, 1901, in the judgment. The judgment of this court was that the judgment and order be reversed, with directions to the trial court to retry only the issues regarding the expenditures on account of such incidental expenses, and to enter judgment in favor of H. May Pearsall for the amount, if any, found to have been so expended, together with the amounts due by reason of the other

findings. Plaintiffs, for the purpose of obviating any further proceedings, have filed in this court their waiver of any further claim on account of such incidental expenses, and their consent that the judgment be modified by deducting therefrom the said amount of \$4,650, with interest thereon from July 1, 1901, leaving plaintiff H. May Pearsall entitled at the date of the judgment (April 22, 1904) to the sum of \$46,443.11, with interest from said date at the rate of 7 per cent. per annum, and costs of suit taxed at \$189.55. This obviates the necessity of a new trial.

The order denying the motion for a new trial is affirmed. The judgment is modified by inserting the amount of \$46,443.11 as the amount which plaintiff H. May Pearsall shall receive in lieu of the \$51,876.95 awarded, and, as so modified, said judgment is affirmed as of its original date. Defendants shall recover the costs of this appeal.

BEATTY, C. J. I dissent.

153 Cal. 347

PEKIN MIN. & MILL. CO. v. KENNEDY
et al. (Sac. 1,609.)

(Supreme Court of California. April 2, 1908.)
APPEAL—REVIEW OF FORMER DECISION.

On an application by one not a party to an action to review a decision of the Supreme Court rendered many years ago, which repeated the substance of certain findings of the trial court reflecting upon the integrity of petitioner, it is impossible for the court to attempt to amend or correct the findings of the trial court, and so impossible for it to afford him specific relief, though all the evidence on a full examination fully and completely exonerates the applicant.

In Bank. Action by the Pekin Mining & Milling Company against James Kennedy and others. Application by Frank B. Ogden for review of former decision of the Supreme Court of California as reported in 81 Cal. 357, 22 Pac. 679. Application denied.

McFARLAND, J. In 1889 this court handed down a decision in the above-entitled case, which will be found reported in 81 Cal. 357, 22 Pac. 679. In its opinion this court made reference to, and repeated the substance of, certain findings of the trial court, which findings reflected upon the fair dealing of Frank B. Ogden, petitioner herein. The gist of these findings was that the said Ogden improperly and in fraud of the rights of James Kennedy and others, defendants, represented at an execution sale of certain mining claims of the Oro Fino Mining Company, that the Oro Fino Mining Company was not the owner of the property, and, after the sale, wrote his name in the constable's certificate of sale under execution. In the answer of Kennedy and others in the above-entitled suit no charge of fraud was made against Ogden, and there was no intimation that he was to be charged with fraud. Nothing in the answer tended to give notice that any such

fraud was claimed. At the trial of the cause Ogden was called, testified, and went his way. Upon his examination neither his integrity nor the fairness of his acts was called in question. He never was informed during or after the trial of the cause that his testimony had been disputed, or his fair dealing questioned. He had no interest in the litigation, and the first knowledge that he acquired that the findings of the trial court in any way reflected upon him was from reading the reported decision of this court. Immediately upon becoming aware of this decision, the said Ogden himself presented the matter to the Bar Association of Alameda county, of which he was a member, with a request that an immediate investigation of his conduct be had. Such investigation was had, and resulted in his complete exoneration, and the Bar Association of Alameda county addressed a letter, early in the year 1890, to the justices of this court, declaring that, after examination, the said Ogden, who at that time had become a judge in the county, was about to request a hearing before this court of the matters touching his integrity, and asked that such hearing be granted him. The judges of the superior court of Alameda county, expressing from their own knowledge the highest opinion of the character of Judge Ogden, united with the Bar Association in this request. The request which was urged upon this court personally by Judge Ogden, and also by a committee of the Bar Association of Alameda county appointed for that purpose, was to the effect that this court should in some appropriate manner investigate the matter of the alleged fraud of Ogden, and report its conclusions thereon in some suitable way by footnote or appendix to the case of Pekin Mining & Milling Co. v. Kennedy, already reported. The justices of this court, each and all expressing willingness to do anything to subserve the ends of justice, pointed out the impossibility of adding such footnote to the volume because it was already in print, and suggested, moreover, that as the judgment of this court in the case had been a judgment ordering a new trial it would be possible for Judge Ogden, upon such new trial, to have the facts thoroughly investigated, and a finding in accordance with those facts declared by the trial court. Judge Ogden then immediately communicated with Marcus P. Bennett, Esq., who had been the attorney for the plaintiff in the litigation, urging him to press the case for retrial, and offering to bear all the cost and expenses attending such trial, for the sole purpose, so far as he was concerned, of presenting to the court all of the evidence upon the question of his alleged fraudulent practice. Judge Bennett replied that a new trial was impracticable, as the hostile interests had been consolidated and the case had passed from his management and control, concluding his letter by offering his assistance to do whatever he could "to remove the blot from your good name, which I

believe has been most unjustly attached to it."

Judge Ogden then requested Judge Bennett to confer with Judge Williams, who was the trial judge, and learn from him whether he would not be willing to take evidence and report upon this single matter, it being urged that he could do so without impairment of any of the rights under the decision, since his judgment had been reversed by the Supreme Court, and his finding of the fraudulent practice of Ogden was not within the issues of the case and in no way necessary to sustain the judgment. Judge Williams, in turn, could not see his way clear to try any portion of the case by piecemeal and declined to do so. Appeal was also made to George G. Blanchard, Esq., who had been the attorney for the defendants in the case, asking his aid that the matter might be thoroughly investigated and cleared up, and Mr. Blanchard wrote that he "exonerated Mr. Ogden from all imputation or wrong in the matter you refer to. * * * I am ready to do anything in my power to relieve Mr. Ogden in the matter you speak of. Judge Williams has gone out of office and of course can make no order in the case. Say to Mr. Ogden to prepare such a paper as will meet the facts of the case, and it shall be done with as he may suggest."

Being thus unable to obtain relief from any quarter, Judge Ogden was constrained to give over his attempts, and in this situation the matter rested until 1893. In that year Judge Ogden's name was under consideration by Governor Markham for appointment to the position of judge of the superior court of Alameda county. Confronted by the case in the eighty-first volume of our Reports, his excellency appointed a commission, composed of the three judges of the superior court of Alameda county, to take proofs on the matter and report their findings to him. Such proofs were taken, and the following findings were made:

"The transaction which bears most heavily against the said Ogden is found in the decision of the Supreme Court, expressed in this language: 'It had been agreed between Miller, Bargion, and Kennedy that the latter should bid off the property in his own name. But it had also been agreed between Miller and Frank B. Ogden, that said Ogden should attend the sale for the purpose of procuring the title to said mine to be taken in his (Ogden's) name. Ogden attended the sale, and it was agreed between him and Kennedy that, for the purpose of deterring bidders, Ogden should give public notice at the sale that the mine did not belong to said Oro Fino Corporation, but was the property of him (Ogden). Such notice was accordingly given, and the mine was bid in by Kennedy, as before stated, but another complication arose. Ogden volunteered his assistance to the justice of the peace to write out the certificate of sale, and inserted therein his own name as purchaser,

instead of that of Kennedy. This was not known to or discovered by the constable (Cline) or Kennedy.' Upon these matters we make the following findings: Said Ogden did attend the sale and give public notice that the mine did not belong to said Oro Fino Corporation, but was the property of him, Ogden. This notice was given in the belief, honestly entertained by said Ogden, that the title to said mine was in fact and in law in him, the said Ogden, under his deed from Schenck. This belief was at the time shared by Kennedy, Bargion, and Miller. There was no attempt to defraud the judgment creditor, Phelps, or prevent his obtaining from the sale the full amount of his judgment, and, in fact, the full amount of his judgment and costs was bid and the judgment creditor, Phelps, received all of the money from the sale of the property to which he was entitled under his judgment. It is true that Ogden volunteered his assistance to the justice to write out the certificate of sale, and inserted therein his own name as purchaser. It is not true that this was done without the knowledge of Kennedy or in fraud of Kennedy or Bargion, or in fraud of any person soever. We find that the said Ogden volunteered his services merely as penman. That he wrote his name in the certificate of sale because it was the understanding and agreement between Miller, Bargion, and Kennedy that he should do so. And here we proceed to a brief analysis of the testimony before us on this point:

"Manifestly there was no fraud and no impropriety in the said Ogden writing his name in said certificate, if in fact it was understood between Kennedy, Bargion, and Miller that the certificate should be issued in the name of Ogden as purchaser. Miller swears that it was the understanding between himself, Bargion, and Kennedy that the certificate should be taken in Ogden's name, and states the reasons therefor in his affidavit. Peter Bargion is now dead. His wife, however, makes affidavit to the high opinion which her husband always entertained of the character of the said Ogden, and her recollection that the certificate of purchase at the sale, under the Phelps judgment, should be taken in the name of Frank B. Ogden. The said Ogden testifies to like effect as Miller. In addition to this we have the evidence of Hon. Walter Van Dyke (now judge of the superior court of Los Angeles county, at that time attorney for said Miller), in the form of a letter addressed to said Ogden, bearing testimony to the honorable conduct and character of Ogden, and to the fact that the mine 'was sold under the Phelps claim, and was bid in by Ogden, Kennedy paying the money at the sale'—a payment understood, at the time, to be a payment on account of his indebtedness to Miller—which evidence is strongly corroborative of that of Ogden and Miller. We have next the testimony of George G. Graham, likewise in a letter, to the effect that he was present at the sale, and drove Ogden and Kennedy to the

mine. That at the sale Ogden stated, and the constable, Cline, announced, that the property was sold to Frank B. Ogden. That after the sale at the time Kennedy referred to the fact that the certificate was in the name of Frank B. Ogden. There is also the testimony of the justice of the peace, Tracy, taken upon the trial of the case, to the effect that Ogden wrote the certificate at his, the justice's, dictation, and that he, the justice, saw Ogden write his name in the certificate. And here it can scarcely be believed that if it was not by the justice at that time known to be the proper name therein to be inserted, he would have done as he testifies that he did, said nothing about it until a month or two thereafter. There is also the additional fact, undisputed by the evidence, that the said Ogden wrote the certificate in duplicate, each containing his own name, left them for the constable to sign, with instructions to the constable to file one for record, and it in fact was filed, and to deliver the other to Kennedy upon the payment by Kennedy of the money. One was actually filed for record and carried as matter of law, constructive notice to the world, of its contents, and the other was actually delivered to Kennedy long prior to July 1st, the date of his difference and trouble with said Miller. It is difficult to believe that any person would attempt the perpetration of so palpable a fraud, and one in its nature almost impossible to escape detection, and attempt the perpetration of such a fraud, the justice himself knowing that Ogden's name was written therein, the constable being called upon to sign them as his official act, one being placed of record, the other delivered to Kennedy himself, it is difficult, we say, to believe that under all these circumstances the fraud should have gone undetected, until nearly a month after the date of the beginning of the troubles between Kennedy and Miller.

"We are of the opinion that the more rational view is that the charge of fraud was simply an afterthought of defendant Kennedy. In this we are sustained by the opinion of Hon. Marcus P. Bennett, then attorney for plaintiff, now judge of the superior court of El Dorado county, who says in his letter above quoted, 'I contended for a very different finding, and argued the case on the theory of your entire innocence in taking the certificate in your own name, and supposed that the court would find in accordance with that theory, and was mortified and surprised that it did not.' Also the opinion of Hon. George C. Blanchard, found in his letter to A. A. Moore, above quoted, to the effect, that he exonerated Mr. Ogden 'from all imputation of wrong in the matter,' and that he had already willingly executed a declaration to that effect. As against all this testimony the charge of fraud has to be sustained, if sustained at all, upon the testimony of the single witness, Kennedy. And the proposition briefly stated is this: If Ogden wrote his name in the certi-

cate of sale, without the knowledge and consent of Kennedy, he was guilty of a fraud. If he wrote his name in the certificate, with the knowledge and consent of Kennedy, he was entirely innocent of any fraud. Kennedy says this was done without his knowledge and consent. Giving to the testimony of Kennedy all the weight to which it is entitled, as the testimony of a single, credible witness, it is still greatly overweighed by all of the other testimony before us, which is entirely in favor of the account given by said Ogden.

"But is the testimony of Kennedy to be treated as the testimony of a credible witness? Assuredly not. No testimony impeaching Kennedy was before the trial court of El Dorado county, and little testimony in favor of Ogden was before the court; for, as has been hereinbefore set forth, it could not be determined by Ogden, and was in fact unknown to Ogden, that his integrity was to be questioned in that case. The answer of Kennedy, on file in the action, raises no such issue, and it was not to be supposed by Ogden or by the attorney for the plaintiff in that case, that his good name would be involved in the litigation. In illustration of this fact it may be noted that the Hon. Walter Van Dyke, who was familiar as an attorney and adviser with all of the matters, testified in the case by deposition. He could and would doubtless then, as he does now, bear witness to the good faith of Ogden in all of the transactions. But his deposition is silent upon the question. No interrogatories were put to him upon the subject of the certificate, because no one upon the plaintiff's side at that time knew that foul play would be charged in relation to the certificate. It is not for one moment to be supposed that had all of this evidence now before us been taken in the trial court the finding in question would have been made.

"In addition to that we have stated that Kennedy is not to be considered as a credible witness, and this is so because of the certified copies of papers now before us, and here marked as exhibits, it is proved that the said Kennedy had been convicted and sentenced in the state of New York for the crime of conspiracy committed as follows: 'The said Kennedy conspired with one Thomas and procured insurance upon the life of one Edward G. Burnham, a fictitious and nonexisting person, in the sum of \$10,000. Thereafter the said Kennedy procured a corpse, represented to the insurance companies that the corpse was the corpse of the said Burnham, caused the said corpse to be buried, and sought to collect the insurance. Also that said Kennedy fled to the state of California, from the state of New York, to escape meeting four several indictments preferred against him by the grand jury of the city of Buffalo in 1883 (the transactions here under consideration took place in 1884), accusing said Kennedy of forgery and false pretenses as set forth in Exhibit G.' Also that the said

Kennedy was at that time a lawyer, and was after due process disbarred by the Supreme Court of Erie county, New York, for his wicked, corrupt, and felonious practices, and that his license to practice law was by said court canceled and revoked. Also that upon coming to this state the said Kennedy procured himself to be admitted to practice before the superior court of El Dorado county upon presentation of his said canceled certificate from the state of New York, and upon representation that the said certificate was in full force and effect, and upon testimony of his good moral character, furnished by the constable, Cline, who was a witness against said Ogden in the Pekin Mill & Mining Company suit. Thereafter the fact being made known to the judge of the superior court of El Dorado county, who was the same judge who tried the Pekin Mill & Mining Company's suit, and made the said finding against the said Ogden, supported largely, if not wholly, by the testimony of said Kennedy, the said Kennedy failing to appear before the court to explain his conduct in the premises was by the court ordered disbarred and forbidden to practice.

"As against this evidence of dishonesty of said Kennedy, there is before us abundant evidence of the highest kind and of the strongest nature in support of the character and reputation of the said Ogden for truth, honesty, and integrity; and, moreover, the judges of this court from long knowledge of and personal acquaintance with the said Ogden are themselves, and each of them, able to bear evidence, and do hereby bear evidence, that the said Ogden during all his life has borne and now deservedly bears the highest reputation for truth, honesty, and integrity, and is known and accredited in the community in which he resides as a man of the utmost rectitude in all the affairs of life.

"In conclusion, therefore, the judges of this court find that in none of the transactions mentioned or referred to in the Pekin Mill & Mining Company's suit was the said Ogden guilty of any fraud; but, to the contrary, his conduct throughout was entirely free from fraud, and characterized by the best motives."

The foregoing findings from the record before us are abundantly substantiated. Notwithstanding that the citizens of Alameda county have repeatedly expressed their conviction of Judge Ogden's integrity, by continuously and uninterruptedly electing him to the office of judge of the superior court, nevertheless the record of the case in the eighty-first volume of our Reports stands, and, unless corrected, will stand against him, his children, and his children's children as a monument of infamy. For this reason, and upon this showing, he asks this court to afford him relief.

The statements in 81 Cal., 22 Pac., were based, of course, exclusively upon the find-

ings made by the trial court. They were in no sense the result of an examination by this court, nor could they in any sense be construed as expressing the views of this court upon the matter. It is manifest that the exoneration of Judge Ogden upon the showing thus made is full and complete. This court also, from personal knowledge of Judge Ogden, joins in the expression of confidence embodied in the findings of the judges of the superior court of Alameda county. But, from the character and limits of the jurisdiction of this court, it is impossible for it to attempt to amend or correct the findings of the trial court, and, so, impossible for it to afford Judge Ogden this specific form of relief. However, the publication of the foregoing must suffice for his complete exoneration.

We concur: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

7 Cal. App. 597

CARMICHAEL v. CAMPODONICO. (Civ. 398.)

(Court of Appeal, Third District, California. Feb. 22, 1908.)

PUBLIC LANDS—LAND ACTUALLY OCCUPIED—HOMESTEAD ENTRY.

Even though land belonged to the United States when the state conveyed it to plaintiff, yet he having inclosed, improved, cultivated, and been in the actual possession of it, it was not subject to entry under the United States homestead laws, so that notwithstanding defendant made such entry he was not authorized to go on the land and oust plaintiff, so that plaintiff may recover it by ejectment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 53.]

Appeal from Superior Court, Mariposa County; N. D. Arnot, Judge.

Action by J. Carmichael against E. Campodonico. Judgment for plaintiff. Defendant appeals. Affirmed.

J. A. Adair, for appellant. J. M. Corcoran, for respondent.

BURNETT, J. The complaint is in the usual form for an action in ejectment. The denials of the answer present a striking illustration of the "negative pregnant," but they were treated as putting in issue all the material allegations of the complaint. The affirmative averment upon which defendant relied is as follows: "All the land above mentioned was prior to and up to June, 1905, public land of the United States; that on the 10th day of June, 1905, this defendant entered as a homestead said 160 acres of land in the United States Land Office at Stockton, Cal.; that he now holds the land office receipt No. 7933, entitling this defendant to the lawful possession and occupancy of the last above-mentioned tract; that he now holds and occupies said premises entered as a homestead under and by virtue of the laws of the United States."

At the trial defendant admitted that a patent was issued by the state of California on November 9, 1871, to John Wilson; that the plaintiff deraigned title from the said patentee by mesne conveyance; that the patentee and his successors in interest were in the actual and continued possession of said land from November 9, 1871, until the same was sold to plaintiff about five years ago. This was supplemented by the testimony of plaintiff that said land was inclosed by a substantial fence, and had improvements thereon and was used for agricultural purposes, and that it was in the actual possession of his tenant, one John Lord, who was ousted by defendant at the time of the latter's entry in June, 1905.

The foregoing facts justify the findings and judgment of the court below in favor of plaintiff. The case of *Gragg v. Cooper*, 150 Cal. 584, 89 Pac. 346, is decisive of the controversy here. It is there held, as stated in the syllabus: "Public land of the United States, actually occupied and possessed by one who has it inclosed by a substantial fence, and is using it for agricultural purposes, without other right, is not subject to entry by a qualified claimant under the homestead laws of the United States; and the process of obtaining from the officers of the United States a certificate of such entry and a receipt for fees paid, in pursuance of a declaration of his intention to settle upon the land as a homestead, filed with them, does not authorize him to go upon the land so possessed and oust the prior possessor, or to recover possession in an action against him."

We see no necessity to continue the discussion, as the other questions suggested by appellant are entirely immaterial. It is probably true that the state had no title to convey to Wilson, and that the premises in controversy are still a part of the public land of the United States; but defendant is in no position to litigate these questions in this proceeding, and the possession of plaintiff as aforesaid and his ouster by defendant constitute sufficient ground for the action of ejectment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 568

**FERGUSON v. BOARD OF EDUCATION
OF SONOMA COUNTY et al. (Civ. 422.)**

(Court of Appeal, Third District, California.
Feb. 20, 1908. Rehearing Denied
April 2, 1908.)

1. MANDAMUS — PLEADING — SUFFICIENCY OF ANSWER.

In mandamus to compel a school board to issue to plaintiff a high school certificate to teach, and to set aside an order suspending such certificate, plaintiff alleged that he repeatedly demanded of the board and its members that they set aside the order suspending the certificate and issue to him his high school certificate. The answer denied that plaintiff did repeatedly demand or did at any of the times mentioned in the complaint demand of the board that they set aside the order suspending the plaintiff's cer-

tificate as alleged in the complaint, and further denied that the board or any of its members at any of the times mentioned in the complaint or at all refused wrongfully, or that they or any of them still continued to refuse, to issue to the plaintiff his certificate or to set aside the order suspending it. *Held*, that the averments in the complaint of the demand were sufficiently traversed by the answer to warrant the court in taking evidence upon that issue.

2. APPEAL—REVIEW—PRESUMPTIONS.

Where, in mandamus, the findings as to demand having been made upon defendants before suit supported the judgment, it would be presumed on appeal that the evidence as to demand supported the findings, and that the question was heard and determined by the court as though made an issue by the pleadings.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Mandamus by James Ferguson against the county board of education of Sonoma county and Minnie Coulter, superintendent of schools, to compel defendants to issue and deliver to petitioner a high school certificate. From a judgment denying the writ, plaintiff appeals. Affirmed.

S. V. Costello and Costello & Costello, for appellant. C. H. Pond and R. L. Thompson, for respondents.

CHIPMAN, P. J. Mandamus. Petitioner prayed for a writ directing defendants to issue and deliver to him a high school certificate. Defendants had the judgment, from which plaintiff appeals on the judgment roll alone.

It is alleged in the complaint that on August 1, 1901, there was duly issued to him a high school certificate by defendant board, which said certificate was to continue in force for the period of six years from its date; that pursuant to proceedings taken by said board on July 9, 1904, it wrongfully and unlawfully passed the following resolution: "Be it resolved that the certificate of the said James Ferguson (plaintiff) be and is hereby indefinitely suspended for unprofessional conduct and evident unfitness for teaching." It was alleged "that said plaintiff has repeatedly demanded of the said board of education, and of and from the said members thereof, first above named, that they set aside the said alleged order suspending said certificate, and issue and deliver to him his high school certificate, as aforesaid," and "that said board and said members still continue to refuse and fail to issue and deliver to said plaintiff his certificate or to revoke, annul, or set aside said alleged order of suspension of said certificate." The court found that plaintiff "never made demand upon the defendant the county board of education of the county of Sonoma, California, nor upon any of its members, to be reinstated as a regularly authorized teacher of said county, nor to revoke said order of said board of education indefinitely suspending the plaintiff's certificate as a teacher * * * nor to restore the plaintiff's said certificate to teach * * * prior to the com-

mencement of this action, nor at all." As conclusion of law the court found that no legal demand was made upon defendants "to reinstate the plaintiff's authority to teach * * * nor to revoke the order * * * suspending the teacher's certificate of the plaintiff * * * nor to restore plaintiff's said certificate * * * revoked by said board of education on the 9th day of July, 1904; that said demand is a necessary precedent to the maintaining of said action, and to the issuing of a writ of mandamus in said matter." The writ was therefore denied. The sole point made on the appeal is "that a demand is admitted upon the pleadings, and the findings do not therefore support the judgment."

By the answer the defendants "deny that the plaintiff did repeatedly demand, or did at any of the times mentioned in the amended complaint herein or at all demand, of the said board * * * that they set aside the said order or resolution indefinitely suspending the plaintiff's certificate as alleged therein; and further specifically deny that said board of education or any of the members thereof * * * at any of the times mentioned in said amended complaint, or at all, refused, wrongfully * * * or that they or any of them refused wrongfully * * * or at all, or that they or any of them still continue to refuse to issue or deliver to the plaintiff herein his said certificate, or to revoke or annul or set aside said order indefinitely suspending said certificate." The principal issue presented by the complaint was the validity of the board's action in suspending plaintiff's certificate, and the remedy he was asking was a revocation of this alleged order of suspension, the effect of which would have been to leave his certificate in force. But whether or not this would follow we think the averments of demand were sufficiently traversed to warrant the court in taking evidence upon that issue, and we must presume that the evidence so taken supported the findings. It is a rule of law that before making an application for the writ of mandamus demand must be made on the defendant to perform the act sought to be enforced by the writ. *Price v. Riverside L. & I. Co.*, 56 Cal. 431.

Respondents contend that under section 1088 of the Code of Civil Procedure it was incumbent upon appellant to allege and prove demand whether denied or not. Where default is made the section seems to uphold this view; and in *Jackson School District v. Cuthbert*, 134 Cal. 508, 66 Pac. 741, where the defendant failed to answer, it was said: "If the trial court cannot grant the relief on the pleadings, it would seem to follow that this court cannot reverse a judgment denying writ, unless it is made to appear that such showing was made before the lower court as would require the issuance of the writ." This decision seems to be in con-

flict with the decisions in *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, and *Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545. In the *Pereria* Case there was no answer; in the *Hayward* Case there was an answer. Section 1088 reads: "The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not." In the *Pereria* Case the court seems to have relied upon section 1094 of the Code of Civil Procedure, which reads: "If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court. If no answer be made, the case must be heard upon the papers of the applicant." As we think the issue of demand was sufficiently presented, and as the presumption is, in the absence of the evidence, that the findings were supported by the evidence, we prefer not to express an opinion upon the point suggested by respondents.

Furthermore, on the appeal from the judgment alone it must be presumed that the evidence supported the findings, and, as the latter support the judgment, we must presume that the question of fact as to the demand was heard and determined by the court as though made an issue by the pleadings.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 606

MEEK v. SOUTHERN CALIFORNIA RY. CO. (Civ. 346.)

(Court of Appeal, Second District, California, Feb. 25, 1908.)

APPEAL—REVIEW—DENIAL OF NEW TRIAL—MOTION FOR INSUFFICIENT EVIDENCE.

The refusal of a motion for new trial, based on the ground that the evidence did not support the findings, cannot be reviewed; the statement for the motion not having advised the court which of the findings was claimed to be unsupported, and there being evidence to support one of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1743.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Mae Meek against the Southern California Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Bernard Potter and Frank James, for appellant. T. J. Norton, E. E. Millikin, and E. W. Camp, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment of the superior court of Los Angeles county in favor of defendant, and from an order denying a new trial. The action was by a passenger who had been ejected from a train by defendant's servants, without cause, and in a violent manner. The complaint stated facts sufficient to entitle plaintiff to general damages, and, in addition, set out certain facts entitling her to special dam-

ages. The answer denied the various allegations of the complaint, and by way of further defense pleaded an accord and satisfaction. The court found in favor of plaintiff upon each of the allegations of the complaint relating to general damages, but against plaintiff on her plea of special damages, and found in favor of defendant upon the plea of accord and satisfaction.

The findings are sufficient to support the judgment. The only specifications of error found in the statement on motion for a new trial are that "the plaintiff gave and duly served and filed her notice of intention to move for a new trial, upon the grounds that the evidence is insufficient to justify the findings and decision of the court; that the findings and decision of the court are against law." We cannot consider the statement on motion for a new trial to determine whether or not the evidence supports the findings and decision, for the reason that the statement contains no specifications of error, as provided by section 648 of the Code of Civil Procedure. That section provides that, "when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." It is insisted by appellant that this section has no application when a single finding only is against the appellant, and all the other findings are in her favor. Under the record in this case it is unnecessary to pass upon this question, for, as a fact, there are two findings against appellant, and from the general specifications it is not possible to ascertain which finding is attacked. In *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 168, 74 Pac. 700, it is said, in speaking of the rule established by the section referred to: "That the object of the rule requiring these specifications is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter." The statement on motion for a new trial in the case at bar only purports to contain such evidence as is material to the case, which must be construed as a statement that it is all of the evidence material in connection with the findings specified as unwarranted. "The specifications should in some form distinguish each particular proposition of fact excepted to from all others found by the court." *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *De Molera v. Martin*, 120 Cal. 546, 52 Pac. 825. Treating the grounds of motion for new trial found in the statement as being specifications of error, the trial court was not advised, either when settling the statement or hearing the motion for new trial, as to what particular finding of fact the moving

party claimed was unsupported. It cannot be said that there was no evidence in support of either finding against plaintiff, for on the plea of special damages the finding is entirely warranted from the evidence. Hence the rule applying where there is an entire absence of evidence is not applicable here.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 580

WIENER v. H. GRAFF & CO. et al.
(Civ. 431.)

(Court of Appeal, Third District, California.
Feb. 20, 1908.)

1. LANDLORD AND TENANT—LEASE—RENEWAL—CONSTRUCTION—"SIGNIFY."

Where a lease entitled the lessees to a renewal, provided they signified their acceptance in writing to the lessor on or before September 1, 1904, such provision only required the lessees to make known, manifest, notify, or express in writing their acceptance or desire to continue the lease, such terms being synonymous with "signify," as used in the lease, any writing adequate for that purpose being sufficient to operate as an election to renew.

2. SAME—TIME.

Where a lease provided for a renewal on the same terms, if the lessees signified their acceptance in writing on or before September 1, 1904, it was incumbent on the lessees to give notice of their election to renew within the time specified, and on the giving of such notice they became entitled to hold for another term under the original lease and not under the notice, the lease being regarded as extended for the new term.

3. SAME—NOTICE—REQUISITES—SIGNATURE.

Where a lease provided for renewal on notice to the lessor, and within the time specified a member of the lessee firm forwarded to the lessor by registered mail a letter enclosed in one of the firm's business envelopes, with the firm name and address in the corner, reciting a description of the lease, and stating that H. Graff & Co., as the lessee firm, "elects to avail itself of the renewal privilege and requests the continuance of the lease for a new term," such notice was sufficient, though no signature was subscribed thereto.

Appeal from Superior Court Fresno County; H. Z. Austin, Judge.

Action by Selma S. Wiener against H. Graff & Co. and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. H. H. Welsh, Bernhard & Southerland, George Cosgrave, M. F. McCormick, and Crichton & St. John, for respondents.

CHIPMAN, P. J. This is an action to recover the possession of certain real property situated in the city of Fresno, alleged to be unlawfully withheld from plaintiff by defendants. Defendants claim possession under the provisions of a lease from the owner to H. Graff & Co. and by subleases by the latter.

It appears that the property in question

was the subject of a lease between the owner, one J. J. Konigshofer, as lessor, and H. Graff & Co., a copartnership, lessees, dated December 1, 1899, for the term of five years, from its date, at the yearly rental of \$1,500, payable monthly in advance, on the first day of each month, in equal monthly installments of \$125. The lease contained the following provision: "And it is hereby further agreed, that the parties of the second part (lessees) shall have the privilege of one year's additional lease on the same terms and at the same rental as heretofore, provided that they signify their acceptance in writing to the party of the first part (lessor) on or before September first, nineteen hundred four;" that the rental was paid at all times, as agreed in the lease, to W. T. Mattingly for the lessor, who appears to have been his agent to receive the rental, up to December 1, 1904, and was thereafter tendered, on the first of each month, to Mr. Mattingly but was refused, no reason for such refusal being given; that in June, 1904, H. Graff, a member of the firm of H. Graff & Co., forwarded in a letter by registered mail to Konigshofer at Alameda, Cal., inclosed in one of the firm's business envelopes "with the firm name and address in the corner," the following notice: "Fresno, Cal., June 7, 1904. J. J. Konigshofer: Take notice that H. Graff & Co., the lessee named in that certain indenture of lease made by you as lessor, to H. Graff & Co., as lessee, on December 1st, 1899, which said lease is recorded in Volume H. of Leases, page 133 et seq., thereof, Fresno County Records, and whereby the said lessor did lease to the said lessee that certain real property, situated in the county of Fresno, state of California, and described as follows, to wit: In the Wiener Block in the city of Fresno, county of Fresno, better described as the three stores nearest the alley in said block, said Wiener Block being on Tulare Street between I and J Sts., Fresno, Cal. And which said lease contains the following covenant: 'It is hereby further agreed that the parties of the second part shall have the privilege of one year's additional lease on the same terms and at the same rental as heretofore, provided that they signify their acceptance in writing to the party of the first part on or before September 1st, 1904,' does hereby elect to avail itself and accept the privilege contained in said covenant just described, and requests the continuance of said lease under the same terms as are now contained in said lease for the period of one year from and after the first day of December, 1904. ———."

No explanation is given why this acceptance happened not to be signed. It appears further that Mr. Graff "received back the registry card receipting for the letter," which was introduced in evidence "and is signed by Mr. Konigshofer receipting for the letter containing the notice forwarded by the witness and referred to in his testimony"; before

sending the notice Graff gave it to Mattingly who handed it back to Graff, and told him he would have to furnish it to Mr. Konigshofer, and gave him the latter's address at Alameda. It appeared that H. Graff & Co., was incorporated in 1901 and made an assignment to the corporation of the following property: "The stock of merchandise, furniture and fixtures, horses and wagons, certificates of stock, warehouse, all bills receivable and all indebtedness due, together with the good will of that business heretofore conducted by us in the city of Fresno * * * and known as the merchandise business of H. Graff & Company. It being the intention * * * to sell and convey * * * all their right, title and interest and ownership in and to the said copartnership business of H. Graff & Company and in and to all personal property of every kind and character owned and possessed by said partnership on this date." Whether this assignment carried with it the lease in question or was so intended does not appear otherwise than from the above description of the property assigned.

The contention of appellant is that the notice given by the lessees failed to meet the requirements of the lease which required that in the event of seeking a renewal thereof they should "signify their acceptance in writing to the party of the first part on or before September first, 1904"; that something more than giving notice was required; "that the writing itself in and of itself signify and prove the acceptance of the lease and its extension for the additional term," which it failed to do because not signed by the lessees. It is not disputed that if the notice or acceptance, which was in fact served upon the lessor in due time, had been signed by the lessees it would have effected its object and would have secured the additional term of one year. The sole question, therefore, would seem to be, was the notice ineffectual to accomplish this object? It seems to us that the phrase "provided that they (the lessees) signify their acceptance in writing to the party of the first part (the lessor)" means simply that the lessees were to make known, manifest, notify, or express in writing their acceptance or desire to continue the lease, for these terms are synonymous with the term "signify" as used in the lease. It is doubtless true that it was intended not only that the lessees should so make known or signify in writing their acceptance as to secure the privilege of the additional term, but also that the lessor could hold them to its performance; the acceptance, in short, should be mutually enforceable.

It is also true, we think, that the contract was one for the renewal of the lease and it was incumbent upon the lessees to give notice of the option within the time limited in the lease (*Shamp v. White*, 106 Cal. 220, 39 Pac. 537); and this they did. We think further that upon compliance with the condition as to giving notice the lessees would then be en-

titled to hold for the additional term under the original lease and not under the notice—the lease would then become a lease for both the original and extended terms. *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886.

Appellant cites several cases in support of her contention. *Klockenbaum v. Pierson*, 16 Cal. 375, was a case where the maker and indorser of a note were sued. On the day the note matured the notary left a notice at the residence of the indorser—who was absent at the time—describing the note and stating that it was protested by him for nonpayment, and that the holder looked to the indorser for payment. The court said: "This notice was without any signature of any kind, nor did it indicate in any way from whom it proceeded. It was ineffectual, therefore, to charge the indorser." There was nothing in the body of the notice or attached to it in any way to show by whom the notice was given. In *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152, it was held that the officer taking the acknowledgment of a deed must subscribe the certificate, and that his name written in the body of the certificate is not sufficient. Held similarly, also, as to the transcript of a justice's judgment, where the same was not signed, in *Bigelow v. Booth*, 39 Mich. 624. So held in *Clark v. Wilson*, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143, as to the certificate of a notary, the reason in part being that the statute required the officer to subscribe his name to the certificate. 4 *Encyclopedia of Law* (2d Ed.) 200, is cited to the effect that to constitute the signing of a bill or note the drawer's or maker's name must be written with intent to authenticate and give effect to the contract thereon; but at page 109 of the same volume it is stated that, apart from statutory requirements, the name need not be subscribed, and it is sufficient if it appear in any part of the instrument; thus, where it is declared that "I, J. S., promise to pay" is as good as "I promise to pay," signed "J. S." Note 2. The intent, then, is not alone shown by the instrument being subscribed by the party to be charged. See *Auzerais v. Naglee*, 74 Cal. 60, 69, 15 Pac. 371; *California Canneries Co. v. Scatena*, 117 Cal. 447, 49 Pac. 462. See, also, 25 *Ency. of Law*, p. 1065, where it is stated that in neither ordinary nor legal language is the word "sign" or "signature" confined to the writing of the name at the bottom of the paper. We are cited to *Hoffman v. Anthony*, 6 R. I. 282, 75 Am. Dec. 701, to the point that where a notice of mortgagee's sale was not signed it was held invalid. It appeared that the notice did not state who made the mortgage or to whom it was made; nor who advertised the sale; nor who was to conduct the sale, and, finally, no means were pointed out by which any one could ascertain the terms of the power to sell or the conditions upon which it might be exercised. Very properly the notice was

held to be insufficient. In *Thomas et al. v. Caldwell et al.*, 50 Ill. 138, the action was to recover for labor and material furnished in the erection of a church building under a written contract. One Short, with others, was sued upon this contract, and although his name appeared in the body of the contract he did not sign it, and it was held that he was not a party to the agreement, and it was error to render a decree against him for the payment of the money. To like effect, it is claimed, is *D'Argy v. Godefroi*, 1 Mart. (O. S.; La.) 75, but we have not been able to find this case. Obviously these were instances involving the binding force of contracts which at no stage had been signed by the parties sought to be charged. *Clemmons v. Brownfield*, 19 Mo. 118, is cited, but we find no such case in that volume. *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797, was an action in which the defendant, by way of cross-complaint, relied upon a contract to furnish certain building material. The court said: "It appears without conflict that it was the understanding and agreement between plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but for some reason which does not appear never was signed by the plaintiff, Spinney. It, therefore, never became a binding or subsisting obligation upon either." The reason for this was "that the proposed contract contained reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other." In that case the intention was that the contract should be signed by both parties, but here there is no intention express or necessarily implied that the lessees should subscribe the acceptance before it should be a binding obligation, nor was the signature of the lessor necessary. The notice was to be in writing and sufficiently authenticated, but we do not think that such authentication could be manifested only by signing the paper at its bottom. It was addressed to the lessor and directed him to take notice that the lessee (naming the firm) "does hereby elect to avail itself and accept the privilege contained in said covenant just described (the notice identified the lease by stating its date and place of record and set forth the particular clause granting the option), and requests the continuance of said lease under the same terms as are now contained in said lease for the period of one year from and after the first day of December, 1904." On its face and in its body it appeared to have emanated from H. Graff & Co., the lessees, and the purpose of the notice is stated with clearness and precision. When it was delivered to and received for by the lessor he could not have doubted by whom it was sent nor the purpose intended in sending it. Notice, when required by statute has been held not the equiva-

lent of knowledge, but "notice of itself," said the court in *Williams v. Bergin*, 108 Cal. 166, 171, 41 Pac. 287, 288, "imports that the information given thereby comes from an authentic source, and is directed to some one who is to act or refrain from acting in consequence of the information contained in the notice." In *Michigan State Ins. Co. v. Soule*, 51 Mich. 312, 16 N. W. 662, the validity of a foreclosure sale was challenged on the ground, among others, that the notice of sale was not properly signed. The court held that as the statute did not require the party foreclosing to sign his name to the notice "it was sufficient if the name appeared therein." See, also, *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681. It was held in *Evans et al. v. Backer et al.*, 101 N. Y. 289, 4 N. E. 516, that "the omission to indorse upon papers served or filed the post-office address or place of business of the attorney, as required by rule 2 of the Supreme Court is a mere irregularity, and entitles the party served either to return the paper, or move to set it aside; but he cannot, after receiving it without objection, safely disregard the function which the paper is designed to perform."

Respondent cites an English case quite in point. *Carleton v. Hobart*, 14 Wkly. Rep. 772. A lease contained a clause enabling the tenant "to surrender and deliver up the premises" at the end of every three years, he first giving the lessor "six calendar months' previous notice of his intention so to surrender the said premises." The notice given was as follows: "Notice to surrender. Sir. I hereby give you notice that I will surrender and deliver up to you, the quiet and peaceable possession of all that and those house and lands of Altavilla, which I hold from — as tenant. Dated the 22nd day of September, 1863. To John Parker Carleton, Esq., and all whom it may concern." The notice bore no signature. The action was for rent notwithstanding the surrender of the possession by the tenant and his placing a keeper in charge on the day noticed. "O'Hagan, J. There are two points in the case; first, was the notice sufficient under the terms of the contract? and, secondly, was everything done by the defendant necessary to determine his tenancy after the service of notice? On both points I agree with the majority of the court below. There is nothing about names or signatures in the proviso, and the question substantially is, whether, on the face of the notice, the parties, lands, dates, and so forth, are sufficiently set forth to convey the intention of the tenant to the landlord. The only question is as to the person from whom the notice purports to come, and though he is not specified by name, yet he calls himself the tenant of the lands of Altavilla, and the expression 'surrender' also shows that he regards the relation of landlord and tenant as subsisting between them. I think this conforms to the requirements of the deed. The parol evidence merely showed what is neces-

sary to show by parol in every case of notice — i. e., that the notice was served and understood." With him concurred four justices — one other dissenting. The notice in the case at bar is stronger in its facts than the case cited, for it clearly shows "from whom the notice purports to come." Nor can we see that a different rule would apply where the notice is intended to convey an intention to hold over than where the intention is to surrender the premises. Appellant would distinguish the two cases on the ground that in *Carleton v. Herbert* the question was as to what amounts to sufficient "written notice," while here the question is what is a sufficient "written acceptance." The view we take of the matter admits no such distinction. It is written notice of acceptance — i. e., notice of the lessee's intention to renew the lease, with which we are to deal as it was in the *Carleton* Case written notice of surrender; and, after all is said, it comes to this: What, under the circumstances, was sufficient "written notice"? With this notice in his possession, served in June, 1904, the lessor expressed no objection and made known no dissent until November 9, 1904, when he served notice on all of the defendants that the tenancy would expire on December 1st following, and requiring them to yield up possession. The lessees thereafter, regularly on the first of each month, tendered the rental, but it was refused, and this action was commenced January 28, 1905.

Just what point plaintiff relies upon in showing the incorporation of H. Graff & Co. and the assignment of the firm's partnership business to the corporation is not clear. It may have been to hold the corporation as subtenant with other defendants, and it is urged also in the argument to show that the notice was insufficient because the lessor could not determine from it whether it came from the partnership or from the corporation. The record states the fact of the incorporation, but does not state that plaintiff knew the fact or was in any way misled by it or acted upon it. We do not see that this feature of the case in any wise affects the principal question argued by appellant.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 571

DAVIS v. BOARD OF SUP'RS OF MERCED COUNTY et al. (Civ. 424.)

(Court of Appeal, Third District, California. Feb. 20, 1908. Rehearing Denied by Supreme Court April 20, 1908.)

1. INTOXICATING LIQUORS—LIQUOR LICENSES — ORDINANCES—CONSTRUCTION.

Under an ordinance of a county providing that no saloon license within territory embraced in any election precinct shall be granted where the number of electors equal in number to a majority of the whole number in the precinct within one mile of the proposed place of business sign a protest, or where it appears that

the applicant is not a fit and proper person, etc., a protest against the issuance of a license signed by the requisite number of electors is alone sufficient to defeat an application for a license whether or not the applicant is a proper person.

2. SAME.

A county ordinance providing that no saloon license in territory embraced in any election precinct shall be granted by the board of supervisors where a designated number of electors sign a written protest, or where it appears that the applicant is not a fit person, etc., though construed to require the denial of an application on the filing of a protest signed by the requisite number of electors, irrespective of the question of whether or not the applicant is a fit person, is not invalid as allowing the electors to decide whether a license shall be granted, and thereby take the determination away from the board of supervisors.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Mandamus by M. Davis against the board of supervisors of Merced county and others to compel defendants to issue a retail liquor license. From a judgment denying the writ, plaintiff appeals. Affirmed.

John A. Wall, for appellant. H. S. Shaffer and Frank H. Farrar, for respondents.

CHIPMAN, P. J. This is an action for a writ of mandate commanding the defendants to issue to plaintiff a license to conduct a retail liquor saloon business in the town of Le Grand, Merced county, pursuant to Ordinance No. 107, duly made and passed by defendants. The writ was denied, and plaintiff appeals from the judgment.

Section 25 of Ordinance 107 is as follows: "No license shall be granted to carry on such business within the territory embraced in any election precinct in said county if a number of electors equal in number to a majority of the whole number of electors residing in said election precinct within one mile of the proposed place of business shall sign a written protest and file the same with the clerk of said board at or prior to the time of said hearing, or if, from any other cause, it shall appear to said board upon said hearing that said applicant is not a fit and proper person to be intrusted with such license to conduct such business, or if it shall appear that such application is not made in good faith, or that the proposed location of said business is objectionable, or that any rule of said board would be violated, or that any of the statements made in such application are willfully untrue, or for any other reason deemed by the board sufficient for such refusal, whether presented by protest filed with the clerk of said board or otherwise.

* * * If upon such hearing it shall appear to the said board that the applicant is a proper person to be intrusted with the conduct of such business, and the place designated in said application is a proper place for the carrying on said business, the board shall make an order approving said application and directing the clerk of said board to issue

to said applicant a permit to carry on said business."

Plaintiff filed his application with said board pursuant to said ordinance, which later came on duly to be heard, and was heard. Prior to the hearing there was filed with said board, and at said hearing was considered, the protest in writing of a majority of the whole number of electors residing in the election precinct within one mile of the proposed place of business of plaintiff. The board of supervisors made an order which, after certain recitals, reads as follows: "It appearing that a majority of the electors residing within one mile of the proposed place of business have signed the petition objecting to the granting of a license, it is unanimously ordered that the application of M. Davis (petitioner) be and the same is hereby denied."

The following stipulation was entered into at the trial: "It is stipulated and agreed that the averments, as a defense, contained in the answer of the defendants, particularly showing that the denial of the application of the plaintiff for a liquor license was solely and entirely by reason of the filing of the protest, designated as 'Exhibit A' in said answer, are true. It is admitted that the Commercial Hotel in the town of Le Grand would be a proper place for the conduct of a saloon business, provided a majority of the electors of Plainsburg precinct residing within one mile of said Commercial Hotel did not object to having any saloon in said town of Le Grand."

Appellant makes but two points: First, that the board of supervisors cannot, upon a protest alone, refuse the license, but that it must appear that the applicant is an unfit person, of which latter fact the protest is but evidentiary; secondly, that in granting or refusing a license the board acts in a judicial capacity, and cannot delegate its authority to any number of citizens.

1. Appellant's first point seems to rest upon a construction to be given the ordinance itself, which he contends does not give the board authority to refuse the license upon the fact alone that the protest mentioned in the ordinance has been filed. We cannot agree with appellant. It seems quite clear to our minds that the ordinance was intended to declare, and clearly does declare, that, where a majority of the electors in any election precinct residing within one mile of the proposed saloon sign and file a written protest against granting the license, no license shall be granted. This provision of the ordinance is not limited or restricted by the subsequent provisions, but the protest itself is sufficient to defeat the application regardless of the fact as to whether or not the applicant is "a fit and proper person to be intrusted with such license to conduct such business." It is but a form of limited local option. There is nothing in *Reed et al. v. Collins et al.*, 90 Pac. 973, in conflict with this view. No such ordi-

nance as we have here was involved in that case.

2. We are unable in the provision commented upon to discover any delegation of judicial power conferred by the ordinance upon the board of supervisors. Aside from this question, the power to enact the ordinance is not assailed, and we need not discuss its constitutionality upon any other ground. The point is that the giving of conclusive effect to the protest is equivalent to allowing the electors to decide, thus taking the determination away from the board. Appellant cites *In re Bickerstaff*, 70 Cal. 35, 11 Pac. 393, quoting as follows: "The condition only relates to the mode of applying for a license, not the power to issue it. Jurisdiction to issue is put in motion by the petition and certificate; and upon the petition fortified by the required certificate and report as evidence, the city council acts judicially in making the order." This was said with reference to an ordinance which required the petition to be accompanied by a certificate of five respectable citizens to the good moral character, sobriety, and suitableness of the applicant to keep and conduct a saloon. The court further said: "But the means prescribed for procuring the license constitute the law of the application to exercise the right to carry on the business, and it is necessary to comply with the law in order to enjoy the right, if the law is valid and reasonable. It was entirely competent for the city council, in passing the ordinance, to annex as a condition to granting a license to carry on business that an applicant for the license shall show himself a suitable person to carry on the business, and to provide that it shall be conducted in such a way that the business itself shall not threaten or become dangerous to the social order of the municipality." We see no essential difference in the two cases. In the case cited the license could not be granted unless a certain certificate of citizens attested the good moral character of the applicant, while here the license is not to be granted if a certain number of certain electors protest against it. In both cases the ordinance prescribes the condition on which the applicant may hope for the success of his application. In the one case his application is made to depend upon his obtaining a certificate of certain persons; in the other it will be denied if certain persons object.

Ex parte Christensen, 85 Cal. 208, 24 Pac. 747, involved an ordinance not unlike that in *Ex parte Bickerstaff*, supra, the supervisors being restrained from granting the license except upon the written consent of a majority of the board of police commissioners, or in case of their refusal, then upon the written recommendation of not less than 12 citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer is to be carried on. The objection there made was that the license was made to depend upon the arbitrary will of the

board of police commissioners or of the property owners. The court said: "But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. And if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases."

Let us suppose an ordinance requiring that a majority, instead of 12, as in the *Christensen Case*, of the electors in the election precinct first give their written consent before the board is empowered to grant the license; is there any essential difference in such a case from that where it is made unlawful for the board to grant the license if before the board has acted a majority of the electors file a written protest against granting the license? We see none. The law has prescribed the condition upon which the license may or may not issue, and the issuing of the license is but made to depend upon the condition prescribed by the law.

State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313, arose under an act of the Legislature (Acts 1895, p. 248, c. 127), section 9 of which provided that, if a remonstrance in writing, signed by a majority of the legal voters of any township, shall be filed with the auditor of any county three days before any regular session of the board of commissioners against the granting of a license to any applicant for the sale of spirituous liquors within said township, it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of filing such remonstrance. Among other objections it was urged against this law that it delegated legislative powers to the county commissioners, and that it empowered a majority of the voters of a township to suspend the operation of general laws. In an elaborate opinion the act was sustained. The principle there discussed and decided is the same as in the present case, and meets our entire approval.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 601

PEOPLE v. OLIVER. (Cr. 72.)

(Court of Appeal, Second District, California.
Feb. 25, 1908.)

1. CRIMINAL LAW — SENTENCE — LESS THAN MINIMUM — EFFECT.

A sentence of seven years' imprisonment on a conviction of grand larceny after a previous conviction of burglary is not void, though Pen.

Code, § 666, provides 10 years' imprisonment as minimum punishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3282.]

2. SAME — APPEAL — DISPOSITION OF CASE — FAVORABLE ERROR.

A judgment of conviction will not be reversed on defendant's appeal for error in imposing a shorter term of imprisonment than the statute authorizes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3188.]

3. WITNESSES — ACCUSED PERSONS — FORMER CONVICTION.

Pen. Code, § 1025, providing that where one is accused of an offense and also of a previous conviction and pleads not guilty, and admits the previous conviction, the charge of such conviction must not be referred to on the trial, does not prevent the people asking accused on his cross-examination if he has ever been convicted of a felony; the section not being intended to prevent the people from impeaching accused's testimony by the rules applied to other witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1129-1132.]

4. CRIMINAL LAW—EXCLUSION OF PROSECUTING WITNESSES—DISCRETION.

The exclusion of witnesses for the prosecution at defendant's request is not an absolute right in all cases, but rests in the court's sound discretion, including the power to except one or more witnesses from the operation of an order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1549.]

5. SAME.

It is proper to permit an officer active in a prosecution to remain in the courtroom to advise the district attorney as to the facts, interest, character of witnesses, etc., though the prosecution's witnesses generally are excluded, and charges that such officer or witness has abused his privilege should be first brought to the knowledge of the trial court; suggestions of such abuse made for the first time in the appellate court not being subject to consideration in the absence of any showing in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1551.]

6. SAME—REFUSAL OF INSTRUCTIONS—INVASION OF JURY'S PROVINCE.

An instruction singling out accused as a witness to call special attention to the weight and defects of his testimony, and to declare exclusive rules by which his testimony alone is to be considered, and in effect instructing the jury that, however unworthy of belief he might be, the jury must give some weight to his testimony, is properly refused, as conflicting with the rule that the jury are the exclusive judges of the weight of the testimony and the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1748.]

7. SAME—INSTRUCTIONS COVERED.

Instructions covered by those given are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

8. SAME — APPEAL—REVIEW — INSUFFICIENT PRESENTATION OF OBJECTIONS.

Rulings refusing instructions will not be reviewed where neither the record nor the briefs specify wherein the refusal was error.

9. SAME—APPEALABLE ORDERS.

An order denying a motion in arrest of judgment is not appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2591.]

10. SAME—CREDIBILITY OF WITNESSES.

The jury is the judge of the truthfulness of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1719.]

11. SAME—FINDINGS—CONCLUSIVENESS.

The jury's findings are conclusive on appeal, where sustained by evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3076.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Harrison Oliver was convicted of grand larceny, and he appeals from the judgment and from orders denying a new trial overruling his motion in arrest of judgment. Judgment and order denying a new trial affirmed.

Henry H. Roser, J. C. Crouch, and M. C. Hester, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. Defendant was informed against for the crime of grand larceny, and by the information also accused of a previous conviction of burglary. He confessed the previous conviction, and pleaded not guilty to the charge of grand larceny. Upon the trial of the offense charged, the jury returned a verdict of guilty, and the defendant was sentenced to imprisonment in the state prison for the term of seven years. He appeals from the judgment, from an order of the trial court denying his motion for a new trial, and from an order of that court overruling his motion in arrest of judgment.

The first point made on the appeal is that the sentence imposed (seven years) is less than the minimum term of imprisonment provided by the statute (Pen. Code, § 666) in cases of conviction of grand larceny after a previous conviction of burglary (ten years), and therefore void. As said in *In re Reed*, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138, such a judgment is not void. It is within and not in excess of the statute. *Ex parte Soto*, 88 Cal. 629, 26 Pac. 530. Even where the term imposed is in excess of the maximum fixed by the statute, it is merely erroneous, and, if the judgment be reversed for this reason, the appellate court will remand the cause with directions to proceed to judgment on the verdict. *People v. Riley*, 48 Cal. 549. The application of such a rule to the case at bar would result in inflicting a penalty upon the defendant for appealing from the erroneous action of the trial court. This is not the policy of the law, which appears to be that, where a defendant complains of an error in his own favor, such error will not be corrected to his detriment. For instance, where a verdict was set aside and a new trial granted by the trial court on the ground that the verdict was too favorable to the defendant, the Supreme Court reversed the order, and directed the trial court to proceed to pronounce judgment on the verdict rendered. *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128. The court

applied to the case simply the rule that, the error committed not being to the prejudice of the defendant, he cannot complain of a determination of his case more favorable to him than the evidence warranted. *People v. Barnhart*, 59 Cal. 381; *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; Pen. Code, § 1404.

The defendant was a witness upon his own behalf, and the district attorney was permitted, against objection, to ask him on cross-examination if he had ever been convicted of a felony. This is assigned as error and a violation of the provisions of section 1025 of the Penal Code that, "in case the defendant pleads not guilty and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." The previous conviction charged in the information was a specific "burglary," while the question of the district attorney was addressed to a "felony" generally; so that it can hardly be said that the conviction which defendant admitted by his plea was necessarily the same felony referred to by the district attorney in his question. But, if it be conceded that this distinction cannot be drawn, it was not error to permit the question to be asked. Prior to the re-enactment of section 1025 in 1905, it was held that the direction in section 1093 that "the clerk in reading it (the indictment or information) shall omit therefrom all that relates to such previous conviction" did not make it error to ask this question of defendant upon cross-examination where he had offered himself as a witness in his own behalf. *People v. Arnold*, 116 Cal. 686, 48 Pac. 803. The reasons for that opinion, addressed to the distinction drawn between section 1093 of the Penal Code and section 2051 of the Code of Civil Procedure, appear equally applicable here upon a comparison of the latter section (section 2051, Code Civ. Proc.) with section 1025 of the Penal Code. Says the court: "The obvious purpose of this section [Pen. Code, 1093] was to give the defendant the benefit of withholding from the jury a knowledge of such prior conviction in all instances other than where, by the conduct of his own case, the production of such fact is rendered essential to a proper presentation of the case of the people. It was not designed thereby to change or affect the ordinary rules of evidence for the elucidation of truth, to which a defendant, like any other witness, subjects himself upon taking the witness stand. Under the rule established in this state, the defendant's character for truth, honesty, and integrity is in issue when he offers himself as a witness, and he thereupon becomes, as held in *People v. Hickman*, 113 Cal. 80, 86, 45 Pac. 175, 'subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness.'" It is clear that it was not the intention of the Legislature by the re-enactment of section 1025, any more than it was by the enactment of section 1323, to give to a de-

fendant the opportunity of making any statements upon his direct examination that he might choose, and preclude the prosecution from testing the truth or falsity of such statements, or to prevent the people from impeaching the defendant's testimony by the same rules applied to the testimony of other witnesses. *People v. Gallagher*, 100 Cal. 476, 35 Pac. 80; *People v. Bishop*, 134 Cal. 689, 66 Pac. 976; *People v. Buckley*, 143 Cal. 388, 77 Pac. 169.

The refusal of the trial court to exclude the witness Wright from the courtroom with the other witnesses, at the request of the defendant, was the exercise of a proper discretion upon the part of the court; no prejudice from its action being shown. The exclusion of the witnesses for prosecution at the request of defendant is not an absolute right in all cases, but rests in the sound discretion of the court (*People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Garnett*, 29 Cal. 622), and this includes the power to specially except one or more witnesses from the operation of an order made for this purpose. It is the general practice, as observed by the court in ruling, to permit some officer, active in the prosecution of the case, to remain for the purpose of advising the district attorney as to the facts, the interest and character of witnesses, etc. Such a practice is proper, and charges that such officer or witness who has abused his privilege should be first brought to the knowledge of the trial court, that they may be corrected, if there be any ground for the charge. Suggestions of such abuse made for the first time in the appellate court cannot be considered in the absence of any showing in the record.

In presenting as error the court's refusal to give certain instructions requested by the defendant quite a number are mentioned, but no reasons are assigned or argument presented why the action of the court was error. One alone (No. 20) is specifically referred to. This instruction is open to the objection, so often before the court, that it singles out the defendant as a witness to call especial attention to the weight and defects of his testimony, and to declare exclusive rules by which his testimony alone is to be considered. It in effect, instructs the jury that, however unworthy of belief they may find the defendant, they must give some weight to his testimony. This is directly in conflict with the rule of evidence that the jury are the sole and exclusive judges of the weight of the testimony and the credibility of the witnesses, which was given in another instruction by the court. The refusal of this instruction was not error. *People v. Winters*, 125 Cal. 329, 57 Pac. 1067; *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Monreal* (Cal. App.) 93 Pac. 385. Many of the other instructions refused were clearly duplicates of those given by the court, and some were open to the same objection as No. 20, and the court properly refused to give

these. If there is any reason why the action of the trial court in refusing to give the other instructions asked by defendant was error, it has neither been specified in the record nor presented in the briefs filed. Nothing being urged and no suggestion made why the trial court's action was erroneous, it is not necessary for us to consider these instructions.

The attempted appeal from the order denying defendant's motion in arrest of judgment is ineffective, as no such appeal is authorized by the Code or our system of practice. *People v. Lonnen*, 139 Cal. 635, 73 Pac. 586. No presentation of any matters which might be considered in connection with this ruling has been made upon the appeal from the judgment. The order denying the motion for a new trial is also assigned generally as error, without specification, other than that the evidence is insufficient to sustain the verdict and judgment. Under the latter head, it is contended that the evidence does not establish an exclusive possession of the stolen property by defendant, and that proof of possession is not alone sufficient to sustain a conviction of larceny. The latter proposition may be conceded as a question of law, but it has no application to the facts of the case at bar. The evidence for the people, if true, sustains the verdict in every respect. Its truthfulness was a question for the jury, and this court will not disturb their finding in this regard.

No prejudicial error appearing, the judgment and order denying motion for new trial are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 588

Ex parte FLOYD. (Cr. 128.)

(Court of Appeal, First District, California.
Feb. 21, 1908.)

1. CRIMINAL LAW—NATURE AND ELEMENTS OF CRIME—ATTEMPTS—DEFINITIONS—"ATTEMPT TO COMMIT CRIME."

An attempt to commit a crime is an endeavor carried beyond mere preparation, but falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 51.]

For other definitions, see Words and Phrases, vol. 1, pp. 622-627.]

2. SAME—SOLICITATION AND PREPARATION.

The law recognizes an intention to commit a crime and an attempt to commit such crime. An intention not followed by an overt act cannot be punished, and there is also a distinction between an attempt to commit a crime and merely soliciting one to commit it, as there is between an attempt and mere preparation. Merely soliciting one to commit a crime is not a punishable crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 21-28, 51.]

3. FORGERY — ATTEMPTS — SOLICITATION — CRIMINAL RESPONSIBILITY.

An agent for a tobacco company, without authority, authorized a publishing company to print a large number of certificates entitling the holder to one or more cigars, reading on its face, "Good for one, twelve and one-half cent cigar at any of our stores on the Pacific Coast. M. A. Gunst & Co." Nothing further was done by either party, and the publishing company did not intend to print any of the certificates without express authority from the tobacco company (M. A. Gunst & Co.). *Held*, that the facts did not show an attempt to commit the crime of forgery, but a mere solicitation.

Application by J. D. Floyd for habeas corpus to secure his release from custody under an order of a magistrate's court binding him over to answer to the charge of an attempt to commit forgery. Prisoner discharged.

Jas. P. Sweeney, for petitioner.

COOPER, P. J. On the 28th day of September, 1907, a complaint was filed in the police court of the city and county of San Francisco, charging the defendant with "Attempt to make, alter, forge and counterfeit a certain instrument and due bill for the payment of property, in the words and figures following, to wit: That the face of said instrument and due bill was figures, to wit: 'Good for one 12½c cigar at any of our stores on the Pacific Coast. M. A. Gunst & Co.'" An examination was held by a magistrate of said police court, and defendant was held to answer to the superior court for the crime of "attempt to commit forgery." He now applies to this court to be discharged upon the ground that the evidence taken before said magistrate does not show that any public offense has been committed.

The evidence is before us with the petition, and shows the facts to be as follows: The prisoner had for some time prior to May 31, 1907, been in the employ of M. A. Gunst & Co., dealers in cigars and tobacco in the city and county of San Francisco. About the 25th of September, 1907, he went to the place of business of one Lyons, a publisher, and after some conversation as to printing gave Lyons an order or request in writing as follows: "September 25, 1907. I hereby authorize the Pacific Goldsmith Publishing Co. to print 50,000 tickets like sample, to wit, 30,000 for five cigars ea, 12½ cent cigars; and 20,000 for one cigar each for 12½ cent cigars. Purchasing Agent for M. A. Gunst & Co. Price to be \$5 per thousand. [Signed] J. D. Floyd." Lyons took the order, and told the prisoner that he would see about it, and, if everything was correct, he would print the tickets as per the order. M. A. Gunst & Co. had not authorized the prisoner to have any such tickets printed. The above is all that was done either by the prisoner or by Lyons. Lyons did not commence to print the tickets, nor did he intend to do so without authority from M. A. Gunst & Co. Do the above facts show an attempt to commit the crime of forgery?

An attempt to commit a crime is an endeavor carried beyond mere preparation, but

falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause. The law recognizes a distinction between an intention to commit a crime and an attempt to commit such crime. An intention followed by no overt act cannot be punished. There is also a distinction between an attempt to commit a crime, and merely soliciting one to commit it, as there is between an attempt and mere preparation. Mere soliciting one to commit an act which would constitute a crime, if committed, is not made criminal by our Penal Code. It was said by Blackburn, J., in the early case of *Regina v. Cheeseman*, Leigh & C. 140: "There is no doubt a difference between the preparation antecedent to the offense and the actual attempt; but, if the actual transaction is commenced which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime." In the case of *People v. Murray*, 14 Cal. 159, where the evidence disclosed declarations of the defendant of his intention to contract an incestuous marriage with his niece, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony, it was held that the acts fell short of an attempt to commit a crime. It was said by Field, J.: "It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparations for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made." In *People v. Stites*, 75 Cal. 570, 17 Pac. 693, the court said: "Mere intention to commit a specific crime does not itself amount to an attempt as that word is employed in the criminal law. There must in addition to the intent—the *mens rea*—be some act done toward the ultimate accomplishment of the proposed crime. But even such acts do not always of themselves amount to an attempt or to an offense of which human laws will take cognizance; for, if they be but acts of preparation, however elaborate, our municipal law would not assume to deal with them." In *People v. Compton*, 123 Cal. 403, 56 Pac. 44, it was said by Henshaw, J., in discussing an erroneous instruction in a case where the defendant was charged with forgery: "The portion of the instruction above quoted is directed to the third class of acts; that is to say, to the attempt to pass. By it the jury was told that if one, having a forged instrument in his possession, knowing it to be forged, delivers it to another with intent to have it uttered, published and passed

as genuine, he is guilty of forgery. But such was not the common law, and such is not the law under our Code. In general, before an attempt to commit a crime can be made out, some overt act towards its commission other than a mere act of preparation for its commission must be established. * * * Now, the essence of the third class of forgeries is the attempt to injure an innocent person by foisting upon him a known false instrument. As is aptly said in *People v. Rathbun*, 21 Wend. (N. Y.) 509, where the subject is learnedly and exhaustively considered: "Uttering implies two parties—the party acting, and the one acted upon. If it be by way of sale, there must be a vendee. If by pledge, there must be a pledgee. If by offer, there must be some person to hear the offer. If it simply declare its goodness, there must be some one addressed as reader or hearer." Therefore, if one deliver to his agent a false instrument with the design that the agent shall utter or pass it, the crime of uttering or attempting to pass is not complete until after some overt act done by the agent to this end, for until this shall come to pass, in contemplation of law, the paper is still within the control of the principal, and all the steps are but steps of preparation. Equally true is it that if A. and B. should conspire to commit a crime, and A. should deliver a forged instrument to B., by whom it was to be uttered, and B. should destroy the paper without attempting to pass it, the crime of uttering or attempting to pass would not have been committed, for there would have been no effort to foist it upon an innocent person, and, as has been said, if the uttering is by offer, the offer must be made to some one." Applying the reasoning in that case to the present, Lyons was but the agent, or rather, the person selected by the prisoner to do the thing the prisoner had in mind. The instrument or ticket that was to be forged or counterfeited or duplicated was still, in contemplation of law, in the possession and under the control of the prisoner. He could have gone to Lyons and countermanded the order, and taken back the ticket or instrument at any time. Lyons never set a type, procured paper or materials, or in any way or manner began the work of printing.

We therefore conclude that the acts of the prisoner amounted to nothing more than solicitation, and that an actual attempt to commit the crime, within the meaning of the law and as defined by the authorities, was not made. However wrongful may have been the intention of the prisoner, or however criminal may have been his motives, we cannot hold under the authorities that the mere preparation or solicitation, as disclosed by the evidence in this case was an attempt to commit the crime charged against the prisoner.

It is therefore ordered that he be discharged.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 592

BUHMAN et al. v. NICKELS & BROWN BROS. (Civ. 315.)

(Court of Appeal, Third District, California.
Feb. 21, 1908.)

1. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING.

Defendant leased property from executors under an agreement to surrender the premises when they were sold, upon 30 days' notice and payment to him of his actual expenses in putting in crops, etc., and the land was thereafter sold by the executors and due notice given to defendant to quit the land, which he refused to do, and also refused to furnish a statement of his expenses in putting in crops. Defendant appealed from the decree confirming the executors' sale of the premises, and the decree was affirmed on appeal, and thereafter this action for unlawful detainer was brought against defendant by the purchasers. *Held*, that defendant's contention that the perfecting of the appeal from the decree confirming the sale suspended further proceedings upon the order appealed from, and stayed the present action, was untenable, as at the time it set up this plea of abatement the appeal was not pending; it being essential that the matter in abatement exist at the time of the filing of the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 119-122.]

2. EVIDENCE — JUDICIAL NOTICE — JUDICIAL PROCEEDINGS—JUDGMENT CONFIRMING EXECUTORS' SALE.

The court will take judicial notice of a judgment confirming the order of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 62-65.]

3. LANDLORD AND TENANT—RECOVERY OF POSSESSION BY LESSOR—UNLAWFUL DETAINER—DAMAGES.

Where defendant leased property under an agreement to surrender the land upon its sale by the lessors, and the land was sold and due notice given, but defendant wrongfully held over under an erroneous claim that it had the right to retain possession on the ground that a perfected appeal suspended the sale, the lease having been terminated by the notice, in an action by the purchasers for unlawful detainer, they were entitled, under Civ. Code, § 3334, providing that the detriment caused by the wrongful occupation of land, except in certain cases, is the value of the use of the property for the time occupied, to recover the value of the use of the property, and not merely treble the amount of the rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 1249-1251.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by J. J. Buhman, Jr., and others against Nickels & Brown Bros., a corporation. From a judgment for plaintiffs, defendants appeal. Affirmed.

See 82 Pac. 85.

Bell, York & Bell, for appellants. Webber & Rutherford, for respondents.

BURNETT, J. The action is unlawful detainer for the recovery of certain premises in the county of Napa and damages for the detention thereof. Before trial defendant surrendered to plaintiffs the possession of said premises, thereby leaving for determination as the sole issue to be tried, the question of damages for the use and occupation of said

land from March 7, 1903, to and including August 31, 1903, the latter being the date of said surrender.

From the complaint the following facts appear: On December 15, 1900, one Charles Robinson died testate in the county of Napa; his will was admitted to probate, and D. S. Kyser and E. W. Hottel were appointed executors thereof. On September 2, 1902, by an instrument in writing, said executors leased to defendant certain premises in said county known as the "Robinson ranch" for the term of one year, with the following proviso: "It is further mutually understood and agreed by the parties hereto that in case of a sale of the demised premises the second party will quit and surrender the said premises upon thirty days' notice, and the said first party will pay to the second party the actual cost or expense said second party may have been put to in putting any crop of hay or grain upon said premises." On the 15th day of October, 1902, pursuant to the terms of the will, the executors sold the property to plaintiffs, and upon the return of said sale and after notice given the sale was confirmed by order of the superior court December 30, 1902. In pursuance of said order the executors made and delivered a deed to plaintiffs on January 19, 1903. On February 4th following plaintiffs served upon defendant a written notice as provided in the lease, demanding the possession of said premises. On the 12th of February a demand was made upon defendant to furnish plaintiffs with a statement of the actual cost that defendant had incurred in putting in any crop on said premises. Defendant refused to deliver possession, and declined to furnish any statement of the said expense incurred by it. On March 6th plaintiff offered in writing to pay defendant the sum of \$4 per acre for every acre that defendant had put to grain, said amount being sufficient to cover the entire cost. "That said defendant unlawfully holds over and continues in possession of said premises after demand made, and after the expiration of the time specified and provided in said written lease." The monthly value of the rents and profits is \$500 per month. The only defense attempted to be set up in the answer filed February 21, 1906, which we are called upon to consider is that an appeal was taken by defendant to the Supreme Court from the order of the superior court confirming the sale of the property to plaintiffs, and "that said appeal from said order or decree confirming said alleged sale to plaintiffs was at the time of the filing of the complaint herein pending and undetermined in the Supreme Court, and said appeal was not determined until the 19th day of February, 1904 (and said alleged order or decree was during all of said time and until the said 19th day of February, 1904, duly stayed)." There was a further and supplemental answer to the effect that defendant surrendered possession on August 31, 1903,

but that is not involved in this appeal. A demurrer to the answer was sustained, and, defendant declining to amend, judgment was entered for plaintiffs for \$1,255, from which the appeal was taken.

Appellant urges two grounds for reversal, but they are so manifestly untenable as to require scarcely more than a mere statement of them. The first is stated as follows: "The perfecting of the appeal from the decree confirming the sale of the premises to respondents suspended all further proceedings upon the order or decree appealed from," and quite a number of decisions is cited to the effect that "where a suit is pending in the Supreme Court on appeal the judgment below is suspended for all purposes"; but the obvious reply is that at the time this answer was filed setting up this plea in abatement the appeal was not pending in the Supreme Court at all, but it had been decided against appellant, affirming the judgment below, and had been the final judgment in the case for two years. The answer discloses the time when the said judgment was rendered by the Supreme Court, but it is silent as to its character. The court, however, would take judicial notice of the judgment affirming the order of sale. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; *Southern Pacific R. R. Co. v. Painter*, 113 Cal. 247, 45 Pac. 320. Hence, it having been finally adjudged at the time the answer was filed that plaintiffs were the owners of the property on and after January 19, 1903, and none of the allegations of the complaint having been denied, there was nothing for the court to do but to find for the plaintiffs for the value of the unlawful use of the property by defendant from March 7 to August 31, 1903. Under appellant's contention respondents could never maintain an action for the unlawful detention of the property for the reason that an appeal was taken from the judgment directing the conveyance of the property to plaintiffs. The vice of the position is found in the fact that appellant ignores the rule that "matter in abatement of the plaintiff's action must exist at the time of filing the plea. A plea of a pending suit is ineffectual unless the former suit is pending at the time the plea is filed." *California Sav. & L. Soc. v. Harris*, 111 Cal. 137, 43 Pac. 526. As we have seen, at the time the answer setting up the plea was filed, the other suit was not pending, but had been long since finally determined.

The other contention is equally without merit. It is asserted that respondents were entitled to recover only \$750, being treble the amount of the rent provided in the lease. This conclusion is based upon the erroneous view that respondents sought to recover under the lease. The lease had been terminated by the notice given, and defendant was unlawfully holding over under a claim that it had the right to retain possession by virtue

of a perfected appeal. Hence the action was for the value of the use of the property, as provided in section 3334 of the Civil Code. This value was alleged to be \$1,255, and this was not denied by the answer.

There is no merit in the appeal, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 577

RUNGE v. WILSON et al. (Civ. 426.)

(Court of Appeal, Third District, California.
Feb. 20, 1908.)

1. REPLEVIN—POSSESSION—NECESSITY.

An action brought under the claim and delivery statute asking for possession of the property and for recovery of its value, if possession could not be given, cannot be sustained against a defendant not in possession of the property at the time the action is commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 81.]

2. SALES—BONA FIDE PURCHASERS—TITLE.

A vendee of personal property claimed title through a bill of sale, but never had possession of the property which, on the death of the vendor, passed into his estate, and was sold for a valuable consideration under a power in the will, and the sale confirmed. *Held*, that the vendee could not recover the property as against the purchaser, who had no notice of the prior sale, since by Civ. Code, § 3440, a transfer of personal property not accompanied by a change of possession is fraudulent and void as against purchasers in good faith subsequent to the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 673-675.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Replevin by Constance Isabella Runge against Louisa Wilson, executrix, and another. From a judgment for defendants, and from the denial of a motion for a new trial, plaintiff appeals. Affirmed.

Webber & Rutherford, for appellant. F. E. Johnson, H. L. Johnson, and L. E. Johnson, for respondents.

CHIPMAN, P. J. This action is for the recovery of possession, or value, if delivery cannot be had, of certain personal property. The cause was tried by the court without a jury, and defendants had judgment, from which, and from the order denying her motion for a new trial, plaintiff appeals.

It appears that on October 31, 1905, one E. J. Wilson was the owner and in possession of certain personal property described in the complaint, and on that day executed a bill of sale thereof to plaintiff, but Wilson remained in possession, and plaintiff never had possession; on August 22, 1906, Wilson died testate while in possession of said property; by his will his wife, one of the defendants, was named as executrix, and she was duly appointed as such executrix on September 17, 1906; by the terms of the will she was given authority to sell the property of the

estate without any order of the court; on September 22, 1906, the executrix sold the property in dispute to defendant Heeter for a valuable consideration, who had at the time no knowledge of any claim of plaintiff upon the property nor does it appear that his codefendant, the executrix of Wilson's will, knew of the sale to plaintiff; the sale to defendant Heeter was confirmed by the court before demand made upon either of the defendants, and before the commencement of the action; defendant Heeter took immediate possession of the property upon purchase, and was in possession when the action was commenced; plaintiff made demand for possession upon both defendants prior to the commencement of the action, but was refused.

Appellant claims, and it is not disputed, that as between her and Wilson the sale was good and passed the title in the property to her, and the property could have been recovered from the grantor—citing *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495. She further contends that, no creditor complaining, Wilson's executrix was in no better position than her testate; that she had no greater title than her testate, and, having no title, could convey none, and none passed by confirmation of the sale to respondent Heeter—citing *Robinson v. Haas*, 40 Cal. 474.

Respondents' contention is: (1) That plaintiff cannot recover against respondent executrix because she was not in possession when the action was commenced—citing *Riciotto v. Clement*, 94 Cal. 107, 29 Pac. 414; *Richards v. Morey*, 133 Cal. 437, 65 Pac. 886. (2) Appellant cannot recover against the executrix, because the sale was not accompanied by an actual and continued change of possession, and the sale was therefore, as to the executrix, fraudulent and void—citing section 3440, Civ. Code; *Magraw v. McGlynn*, 26 Cal. 429; *Ex parte Smith*, 53 Cal. 208; *Francisco v. Aguirre*, 94 Cal. 185, 29 Pac. 495; dissenting opinion of the chief justice in *Murphy v. Clayton*, 114 Cal. 526, 46 Pac. 460. (3) Appellant cannot recover against defendant Heeter, because he was an innocent purchaser in good faith for value without notice, and also because the sale by Wilson was fraudulent and void as to Heeter—citing Civ. Code, § 3440; *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; *Stockton Sav., etc., Soc. v. Purvis*, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210; *Ruggles v. Cannedy*, 127 Cal. 297, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

1. This is the ordinary action in claim and delivery. The relief sought is possession of the property, or the alternative relief given by the statute, if possession cannot be had. Upon the complaint recovery for conversion against either of the defendants could not be justified. The distinction between replevin (our claim and delivery) and trover is clearly pointed out in *Riciotto v. Clement*, supra, and it was there held that, if the property was

not in the possession of the defendant at the commencement of the action, plaintiff could not recover. *Richards v. Morey*, supra. The judgment in favor of defendant executrix must therefore be sustained.

2. Appellant's title rests upon a bill of sale of personal property which appellant did not at the date of sale or ever afterwards take or have possession of, but which at all times to his death remained in the possession of the vendor. She testified that she never even saw the property. This property came into the possession of the executrix of the last will of the vendor as property belonging to his estate, and was by her sold in due course to defendant Heeter under a power given by the will, and the sale was confirmed by the court. The vendee, Heeter, was a purchaser in good faith for value subsequent to the sale to appellant, and without knowledge of plaintiff's claim, and is brought directly within the provisions of section 3440 of the Civil Code. *Ruggles v. Cannedy*, supra.

It is not necessary to decide the question suggested in respondents' second point, as the other two points are well taken.

Judgment and order affirmed.

We concur: BURNETT, J.; HART, J.

7 Cal. App. 599

McFARLAND v. MATTHAI et al. (Civ. 374.)

(Court of Appeal, Third District, California.
Feb. 22, 1908.)

1. EJECTMENT—RIGHT OF ACTION—GROUNDS.

The allegations essential to an action of ejectment in form are the estate of plaintiff, possession by defendant at the commencement of the action, and his wrongful withholding of the same, and where plaintiff was for many years prior to the commencement of the action, and at its commencement, the owner of premises and entitled to exclusive possession, and defendants had been, and were at that time, in possession of the premises and wrongfully withheld possession, plaintiff was entitled to recover, and a general demurrer was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 155.]

2. SAME — PLEADING — "CROSS-COMPLAINT" — SUFFICIENCY—STATUTE.

In an action of ejectment, where defendants filed a purported cross-complaint, which did not relate to the land for the recovery of which the action was brought, it was not a "cross-complaint" within Code Civ. Proc. § 442, permitting defendant seeking affirmative relief against any party, relating to or depending upon the transaction upon which the action is brought, or affecting property to which the action relates, to file, with his answer, a cross-complaint, and hence a demurrer was properly sustained thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 198.

For other definitions, see Words and Phrases. vol. 2, p. 1761.]

3. APPEAL — APPEAL ON JUDGMENT ROLL — QUESTIONS REVIEWABLE.

In an action of ejectment, there being no bill of exceptions, and defendant having appealed on the judgment roll alone, statements in appellant's brief that the judgment below was procured through false testimony cannot be consid-

cred on appeal, as it will be presumed that the evidence is sufficient to support a finding upon which the judgment rests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

4. SAME—FINDINGS BY COURT—CONCLUSIVE-NESS.

Whether testimony is false must ordinarily be left exclusively to the determination of the trial court, and, when so determined, is usually conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Abel McFarland against Louise Matthai and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Louise Matthai and Rose Matthai (Warner Temple, of counsel), for appellants. Theo. A. Bell and Bell, York & Bell, for respondent.

HART, J. Action in ejectment. The appeal is from the judgment, and is brought up on the judgment roll alone. The complaint is in the usual form in actions for the recovery of possession of real property. It alleges that the plaintiff for many years prior to the commencement of the action had been, and "he now is, the owner and entitled to the exclusive possession" of the premises in dispute, and that the "defendants have been and now are in possession of said premises," and "have wrongfully and unlawfully withheld, and do now wrongfully and unlawfully withhold, the possession of said premises and the whole thereof from plaintiff."

A general demurrer to the complaint was overruled by the court, and properly so. The essential allegations necessary to an action in ejectment in form are the estate of plaintiff, possession by defendants at the commencement of the action, and their wrongful withholding the same. *Haggin v. Kelly*, 136 Cal. 483, 69 Pac. 140; *Hihn Co. v. Fleckner*, 106 Cal. 97, 39 Pac. 214; *Hihn v. Mangenberg*, 89 Cal. 268, 26 Pac. 968; *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. 867; *Payne v. Treadwell*, 16 Cal. 246.

No error was made by the court in its order sustaining the demurrer to the alleged cross-complaint. The land concerning which complaint is made by defendants in their so-called "cross-complaint" is not the land referred to in plaintiff's complaint. The affirmative matters set out by defendants in no sense constituted a cross-complaint. See *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Nelson v. O'Brien*, 139 Cal. 628, 73 Pac. 469; *Phillips v. Hagart*, 113 Cal. 554, 45 Pac. 843, 54 Am. St. Rep. 369; *Mining Co. v. Mining Co.*, 83 Cal. 589, 23 Pac. 1102. The affirmative relief sought by the purported cross-complaint does not relate to or depend upon "the contract or transaction upon which the action is brought," or does not affect "the property to which the action relates." Code Civ. Proc. § 442.

The statement in the brief of appellants to

the effect that the judgment was procured through false testimony cannot be considered here. There is no bill of exceptions, the appeal being from the judgment on the judgment roll alone. The presumption is that the evidence is sufficient to support the findings upon which the judgment rests. Besides, the question as to whether testimony is false or not is one which must ordinarily be left exclusively to the determination of the trial court, and, when so determined, is usually conclusive on appeal.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

153 Cal. 331

In re BELL'S ESTATE.

BELL v. THOMPSON et al. (S. F. 4,582.)
 (Supreme Court of California. April 2, 1908.
 Rehearing Denied May 1, 1908.)

1. JUDGMENT—CONCLUSIVENESS.

A judgment of a court having jurisdiction is conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

2. SAME.

The widow, appointed administratrix with will annexed, after the removal of the executor, filed her account in which she sought credit for a family allowance accruing between the date of the return of the inventory and an order granting an allowance entered October 14, 1895. On January 12, 1893, the court made an order for a family allowance. The inventory was filed June 17, 1893. On October 14, 1895, the court reduced the family allowance and on May 4, 1898, another order reducing the allowance was entered. *Held*, that a decision of the court denying the credit on the ground that the order of January 12, 1893, ceased to be operative on the return of the inventory, and that the allowance provided for by the orders entered had been paid, was conclusive, and the widow could not claim under an alleged order of May 1, 1894, granting an allowance, which order was not entered in the minutes and of the existence of which she had no knowledge at the time of the settlement of her account.

3. SAME.

A judgment determining the rights of parties to a controversy cannot be overcome by showing new or additional evidence which the party was unable to produce on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1162.]

4. SAME.

The rule that a judgment rendered by a court having jurisdiction is conclusive is based on considerations of public policy, and the enforcement thereof is essential to the maintenance of social order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1150.]

5. SAME.

The general rule is that where it is sought to bind a person by a former judgment it is

necessary that he should have been not only a party to both actions, but must have appeared in both in the same capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1185, 1200.]

6. SAME.

A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, she being in both proceedings the real party in interest, asserting individual, and not representative, rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1185.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Bell, deceased. From an order of the probate court giving an allowance to Teresa Bell, widow of decedent, Louisa J. Thompson and others, creditors of decedent, appeal. Reversed.

James M. Allen, Drown, Leicester & Drown, Garret W. McEnerney, W. B. Bosley, John S. Drum, and Maurice V. Samuels, for appellants. T. Z. Blakeman, for respondent.

LORIGAN, J. This in an appeal by some of the creditors of the estate of Thomas Bell, deceased, from an order of the probate court entered in said estate on February 24, 1905, *nunc pro tunc* as of May 1, 1894, directing that a family allowance of \$2,000 a month continue to be paid from June 17, 1893, to Teresa Bell, as widow of said deceased, till the further order of the court, and from a judgment and order that a balance due her under said *nunc pro tunc* order of \$32,665.80 be paid her from the estate of said deceased. A clearer understanding of the point involved in this appeal may be had by a preliminary statement of certain conceded facts.

Teresa Bell is the widow of Thomas Bell, who died October 16, 1892, and whose will was admitted to probate. On January 12, 1893, on petition of said widow an order of court was made for a family allowance of \$2,000 a month payable to her commencing from the date of the death of decedent till the further order of the court. The inventory in the estate was filed June 17, 1893. On October 14, 1895, the court made an order reducing the family allowance from \$2,000 to \$1,500 a month, and on May 4, 1898, made still another order reducing said family allowance to \$100 a month. On March 24, 1900, the powers of the executor of deceased—George Staacke—were suspended, subsequently revoked, and said Teresa Bell appointed special administratrix. After the order revoking his letters was on the appeal of said executor affirmed by this court (Estate of Bell, 135 Cal. 194, 67 Pac. 123), said Teresa Bell was appointed administratrix with the will annexed of said estate. She

subsequently, on February 10, 1902, filed her account as special administratrix in which she credited herself with payments of family allowance which she claimed were due and unpaid between June 17, 1893, and October 14, 1895. These items of credit were contested by the creditors of the estate, on the ground that no order for a family allowance prior to the order of October 14, 1895, except the order of January 12, 1893, was made; that the latter order became null and void on the return of the inventory of the estate on June 17, 1893, and that all the installments of family allowance accruing prior to June 17, 1893, had been paid her by the executor of the estate. The probate court overruled these objections of the creditors, and settled said final account of said Teresa Bell as special administratrix with said credits for family allowance after the return of said inventory and up to October 14, 1895, sustained and allowed. The creditors appealed from said order, and this court reversed it, holding (and this is all that it is necessary to be stated now) that the order of January 12, 1893, directing that a family allowance be paid, ceased to operate on the return of the inventory on June 17, 1893; that as the only order made subsequent to said June 17, 1893, was the order of October 14, 1895, the court erred in crediting said Teresa Bell with all items for family allowance under the order of January 12, 1893, subsequent to the return of said inventory and prior to the order of October 14, 1895. Estate of Bell, 142 Cal. 97, 75 Pac. 679. This decision was made in February, 1904.

Immediately following its rendition said Teresa Bell filed a petition in the probate court in the matter of said estate, in which she alleged (referring to the allegations in a general way) the making of the first two orders for family allowance above referred to; that no order for such allowance was made subsequent to the filing of the inventory on January 17, 1893, until October 14, 1895; that subsequent to the filing of said inventory it was considered and believed by the petitioner, the executors, the judge of the court, the creditors of the estate, and all the parties interested, that the order of January 12, 1893, continued in full force till the making of the subsequent order of October 14, 1905; that until January 1, 1894, the executors regularly paid said \$2,000 a month family allowance; that after the said month, on account of delay on the part of the executors in collecting the income of the estate, petitioner agreed with said executors to allow the ready money in the estate to be used by them in paying assessments on certain stocks owned by the estate for their preservation and for the benefit of the estate, and to await payment of her allowance until a later date, when it was agreed by the executors that all her accrued allowance should be paid her; that under this arrangement only certain amounts were paid on said

family allowance during the years 1894, 1895, 1896, 1897, and 1898 (the particular items for each year were set forth) aggregating \$29,213.59; that she was unable to support the family on the sums paid, and was compelled to borrow on the security of her separate estate certain amounts yearly (specified in the petition) aggregating \$25,000. It is then alleged that during all the time from June 17, 1893, to October 15, 1895, the estate was amply able to pay a family allowance of \$2,000 a month. The concluding allegations are that all arrears of family allowance had never been paid, but that a large portion had been paid by the executors subsequent to October 16, 1895, upon orders and judgments of the court in the matter of said estate recognizing said balance and arrears on October 14, 1895, and directing said payments to be made on account of said arrears, which said orders and judgments were not in the record upon which the Supreme Court decided that the order of January 12, 1893, became inoperative after June 17, 1893. The prayer of the petition was in the alternative, that an account be taken of the family allowance paid petitioner since October 15, 1895, and chargeable by the orders and judgment of the court made subsequent to October 15, 1895, to the balance of the family allowance due petitioner from the time prior thereto, and for an order directing the payment of any balance of said sums in arrears to petitioner, or for an order allowing and fixing the family allowance of petitioner for the period of time from June 17, 1893, to October 15, 1895, at the sum of \$2,000 a month as in accord with the purpose and intent of the court and all parties interested in said estate at that time, and after deducting the amounts paid by the executors from June 17, 1893, to October 16, 1895, for family allowance, the balance be paid to petitioner.

The appellants jointly demurred to the petition and moved to strike out certain portions of it which, being overruled and denied, they answered, denying the allegations of the petition save as to the orders of the court for family allowance and the allegation therein as to the matter decided by this court, and averred that all amounts due said petitioner for family allowance had been paid and exceeded the sum of \$83,541. As a further defense they set up the proceedings in the matter of said estate settling the account of George Staacke, the executor of the will of deceased as to the amount paid to petitioner by said executor for family allowance prior to August 6, 1898, which was contested between the creditors of the estate and petitioner; the order of settlement of said account by the probate court about January 5, 1900, and an appeal to this court by certain of said creditors and the decision of this court on said appeal, and pleaded said decision (Estate of Bell, 131 Cal. 1, 63 Pac. 81, 668) as barring and estopping petitioner in this pending proceeding from claiming that

the amount paid her up to said August 6, 1898, for family allowance was less than \$80,000. They likewise set up the proceedings for the settlement of the final account of petitioner as special administratrix of said estate filed February 10, 1902, to which we have heretofore referred, in which she sought credit for items of family allowance between the making of the order of January 12, 1893, and that of October 14, 1895, the objections and contests thereto by said creditors, the matter of the appeal to this court from the order settling said account by allowing such credits the decision and judgment of this court reversing said order (Estate of Bell, 142 Cal. 97, 75 Pac. 679), and pleaded such judgment of this court as final and conclusive and as barring and estopping petitioner from asserting any alleged right to a further family allowance as set forth and asserted in her pending petition. The statute of limitations was further interposed against the claim or right of petitioner to the relief demanded.

Upon the issues thus made the matter proceeded to a hearing, and while the petitioner was presenting her case to the court it developed from the evidence (at least that was the claim of petitioner and the court took that view of it) that the executors of the estate had on February 2, 1894, petitioned the court for a reduction of the family allowance, which petition was opposed by the widow; that the matter of the petition for said reduction coming on to be heard, the executors were examined, the condition of the estate inquired into, and thereafter the matter continued from time to time on the calendar of the court; that on May 1, 1894, the matter coming on again for further hearing, and the attorneys for the executors and for said widow having reached some agreement in the matter, they asked the court to dismiss the petition for a reduction. This the court declined to do, but ordered the application for a reduction of the family allowance by said executors off the calendar, and further ordered that the allowance of \$2,000 a month remain and continue until the further order of the court; that the clerk of the court had entered in the minutes the first part of the order directing the petition for reduction off the calendar, but had omitted to enter the balance of the order. Upon this showing from the evidence the petitioner immediately applied for and obtained, over the objection of appellants, leave of court to amend her petition to conform to the facts thus proven, and an amended petition was filed, it being stipulated that the answer to the former petition should stand as the answer to the amended petition, and that all new matters alleged in the petition should be deemed denied by the creditors who had answered. The amendment which was made to the petition by leave of the court and to meet the alleged proof of the making of the order of May 1, 1894, was

substantially as follows: The allegation in the original petition that no order was made by the court after the order of January 12, 1893, and until the order of October 14, 1895, was stricken out, and it was alleged that after the filing of the inventory it was believed by petitioner, the executors, the court, and the creditors that an order of court existed granting petitioner an allowance of \$2,000 from and after the date of the filing of the inventory, as well as prior thereto, and until the order of October 14, 1895. The prayer of the petition was also changed to conform to the amendment made, to the extent of asking that an order nunc pro tunc as of May 1, 1894, be entered in conformity to the order of the court made on that day but not entered, continuing the family allowance from June 17, 1893, to October 14, 1895, at \$2,000 per month. The amended petition being filed, the trial proceeded, and upon a submission of the evidence upon both sides the court made its findings of fact in favor of the petitioner, in accordance with the allegations of the amended petition and against the appellants as to all defenses interposed by their answer. The court specifically found that on the 1st day of May, 1894, the court had ordered and directed that the family allowance of \$2,000 a month should remain and continue and be paid to the said widow until the further order of the court, but that through the mistake or inadvertence of the clerk of the court, it had not been entered in the minutes of the court, and that there remained unpaid to the petitioner the sum of \$32,665.80 as a balance due her under said order.

The court further specifically found against the appellants on the defenses interposed by their answer, namely, that the petitioner was barred and estopped by the judgments of the Supreme Court, which were pleaded, from asserting a claim for family allowance based on said order of May 1, 1894, or from asserting that any family allowance accrued in her favor between the return of the inventory on June 17, 1893, and the order of October 14, 1895. As conclusions of law from the findings the court held the petitioner entitled to have an order nunc pro tunc as of May 1, 1894, entered, directing that a family allowance of \$2,000 a month remain and continue to be paid to said petitioner as widow of said deceased from the assets of said estate until further order of the court, and made a further order directing payment from said assets to her of the balance of family allowance due her under said order of court rendered on the 1st of May, 1894, and entered nunc pro tunc as of that date, amounting to the sum of \$32,665.80. An order to that effect was accordingly made.

Various points are urged by appellants for a reversal. The main attack, however, is directed against the findings, the claim of appellants being, in effect, that none of the essential findings of the court are supported by

the evidence, and it is particularly contended that this is true as to the findings with reference to the effect of the pleaded decisions of this court. As to them it is claimed that they are not only not sustained by the evidence, but that they are directly contrary to it, and that the conclusions of the trial court as to the effect of those decisions upon the present claim of petitioner are erroneous.

In the view we take of the sufficiency of the attack by appellants upon the findings relative to the prior decisions of this court pleaded by them as a bar, it will be unnecessary to discuss the many other findings which are also attacked. In fact, as far as the finding relative to the decision of this court in the Estate of Bell, 131 Cal. 1, 63 Pac. 81, 668, we shall not discuss it at all, because at most that decision bears only upon some of the minor matters involved in the present proceeding which are claimed to have been affected by it. Our consideration will be devoted solely to the findings in as far as they relate to the effect of the decision pleaded and reported in the Estate of Bell, 142 Cal. 97, 75 Pac. 679. We say the effect of the decision, because that is the question presented by the attack upon the findings relative to it. There is no question of conflicting evidence embarrassing the consideration. A transcript of the record on that appeal and the decision of the court based upon it were offered in evidence and constituted the evidence upon which this finding was made. The claim of the appellants under this evidence addressed to their answer pleading the decision in bar of petitioner's right to assert relief under the order of May 1, 1894, was, among other things, that the decision pleaded was a final and conclusive adjudication that there was no such order of May 1, 1894, or any order of the probate court in said estate making any family allowance, save the three orders of January 12, 1893, October 14, 1895, and May 4, 1898. The finding of the court respecting this decision was of a negative character; that it did not debar or estop the petitioner from asserting or enforcing any alleged right to a further family allowance, nor was the cause of action or relief set forth in the petition barred by such decision. So that, as we say, under this finding the question is what was the effect of that decision on the present asserted right of petitioner; what was decided by this court.

It will be observed that while this finding relates to the effect of the decision upon a further family allowance to petitioner, that proposition, while involved in the original, is not involved under the amended petition. Under the amended petition the right to the payment of the allowance was asserted to have accrued under the alleged existing order of May 1, 1894, an order which had been made but not entered, and which the court ordered entered nunc pro tunc, and upon which it based its award for an accrued allowance up-

on it of \$32,665.85. It is the effect of the decision of this court in the Estate of Bell, 142 Cal. 97, 75 Pac. 679, upon the right of petitioner asserted under this order which is to be determined, and we are satisfied that the position of these appellants with respect to it is correct; that that decision was final and conclusive against the existence of any other order than the orders of January 12, 1893, October 14, 1895, and May 4, 1898; that it was *res adjudicata* that no order for family allowance of May 1, 1894, or other order save these three above mentioned had been made prior to 1902 when the account of petitioner as special administratrix, in which she sought credit for family allowance between June 17, 1893, the date of the return of the inventory, and October 14, 1895, was contested and determined, and that all she was entitled to under any then existing orders had been fully paid her. This appears to us to be so clear from the record which was before this court on appeal from the order settling the account of petitioner as special administratrix, the decision of this court upon it, and the application of the doctrine of *res adjudicata*, that no extended elaboration of the matter is called for.

The general rule as to *res adjudicata* is that: "Matters which have been judicially determined cannot be again drawn into controversy between the same parties. The judgment of a court having jurisdiction directly upon the point in controversy is, as a plea, a bar; and, as evidence, competent and conclusive as between the same parties and their privies; not only where the subject-matter is in all respects the same, but where the point comes incidentally in question in relation to a different matter." *Garwood v. Garwood*, 29 Cal. 514; *Green v. Thornton*, 130 Cal. 482, 62 Pac. 750. "An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." *Harris v. Harris*, 36 Barb. (N. Y.) 88; *Gray v. Dougherty*, 25 Cal. 266. "Where a court of competent jurisdiction had adjudicated upon a particular matter, that matter is not open to inquiry in a subsequent action for the same cause, between the same parties, notwithstanding the defendant may have discovered new evidence not in his power at a former trial." *Kilheffer v. Herr*, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658.

Now, applying this doctrine to the matter under consideration, it appears from the transcript on appeal in the matter of the application of petitioner as special administratrix that she sought credit in the settlement of her account for items of family allowance aggregating the sum of \$20,000, payment of

which she had made to herself under a claim that they were due as such family allowance, and had accrued between the date of the return of the inventory and the order of October 14, 1895. Petitioner was appointed special administratrix in March, 1900, and her account was filed in February, 1902. The creditors of the estate (the same appellants here) filed a contest against the allowance of such items on various grounds, among others: (1) That no order making any family allowance out of said estate was given or made at any time subsequent to the filing of the inventory and prior to October 14, 1895; (2) that no order or orders making any family allowance out of said estate had at any time been given or made other than, or in addition to, the said three orders so made respectively on January 12, 1893, October 14, 1895, and May 13, 1898; (3) that the amounts of family allowance payable under said orders immediately referred to had been fully paid; (4) that all family allowance at any time ordered by said court had been paid in full prior to the appointment of petitioner as special administratrix. Upon these issues raised by this contest a trial was had culminating in an order overruling the objections of the contestants to the allowance of said items. An appeal was taken by the contestants from the order settling the account so far as it allowed the special administratrix said contested amounts of family allowance paid to herself and the order allowing them was reversed by this court in the decision referred to—Estate of Bell, 142 Cal. 97, 75 Pac. 679. An examination of that decision, demonstrates that this court decided that the orders of family allowance made by the probate court in said estate were those of January 12, 1893, October 14, 1895, and May 13, 1898; that the first order ceased to be operative on the return of the inventory on June 17, 1893; that all family allowance which had accrued under said three orders had been paid, and directed the court to settle the final account by rejecting the payments in controversy, which were amounts asserted to have accrued under the order of January 12, 1893, and between the return of the inventory and the order of October 14, 1895.

We perceive no ground for any claim that this decision is not conclusive upon the right asserted by petitioner in the present proceeding. Her claim under it now, and the right she presently asserts, is for an order directing the payment of these same items of family allowance—which this court decided on the appeal referred to she was not entitled to—by virtue of an order claimed to have been made on May 1, 1894, but never entered in the minutes, and of the making of which she claims she was not advised until during the hearing on the present proceeding. But the fact that such an order was made and was either forgotten or its making un-

disclosed to her by the attorney who represented her when it was made and who subsequently ceased to do so, cannot affect the conclusiveness of the judgment on appeal, which is in fact a determination that no order for the payment of family allowance was made or existed after the return of the inventory and up to the making of the order of October 14, 1895.

In her account as special administratrix she sought credit for the payment to herself of this allowance as having accrued in her favor between those dates. She could only have been entitled to such credits by virtue of the existence of some order of court making a family allowance which authorized the payments they represented. The contestants objected to their allowance expressly on the ground that there was no such order or any orders for family allowance, save the three which have been mentioned. There was, therefore, raised a direct issue as to what orders for payment of family allowance had been made which would support the claim to the credits asserted by petitioner. In support of her right to a credit for such payments, the administratrix offered the three orders above referred to, but no other. If the order of May 1, 1894, had then been made as found by the court in the present proceeding, it would have supported the claim petitioner asserted in her account as administratrix and which was contested for want of its existence, and it was essential to sustain such claim that she should have proved it. Whether that order, or any order authorizing their payment existed, was the issue in the contest and it was necessarily determined by the decision on appeal in that matter that no order, other than the orders specially referred to, was in force from the return of the inventory to October 14, 1895, under which any allowance asserted to have accrued during that period could be supported or sustained. If there was any order in force during that time, then the contested accounts were properly payable under it for that period, and instead of being rejected would have been allowed by this court by virtue of such order. In determining, however, that the amounts sought to be credited in her account were payments made to herself under the order of January 12, 1893, asserted to have accrued between the date of the return of the inventory and the order of October 14, 1895; that that order ceased to operate on the return of the inventory; that all allowance which had accrued under the orders of 1895 and 1898 had been fully paid; and that the account of the administratrix should be settled by the lower court by rejecting the contested items—this court decided that there was no order of court under which such contested payments could be sustained. That decision is final and conclusive against the existence of the order upon which petitioner now bases her right to the payment of these same amounts.

It is insisted by counsel for respondent that

the decision of this court referred to has no bearing upon the order of May 1, 1894, which he denominates a separate and distinct order, because that order was not before this tribunal for consideration. But if the order was separate and distinct that fact cannot affect the question of the conclusiveness of the decision under consideration, because, whatever its character, its existence was a point at issue in the contested account proceeding. The question directly at issue was whether there was any order of court which could sustain the contested items. It was not a question as to a particular order, but what orders had at any time provided for a family allowance which would support them. If the order of May 1, 1894, was made, it would have sustained their payment. It would have been direct, as it was in fact essential, evidence necessary to support them, and was evidence that existed and which might have been produced at the hearing of said contest. The most that can be claimed by respondent now is that she was not aware of this order when the contest over the account was being had. But this only amounts to an insistence that the conclusiveness of the decision against the existence of any other orders during the period involved in said contest, save the three orders mentioned, may be overcome by showing that new evidence—the existence of another and fourth order—can now be produced. But under the authorities the conclusiveness of a judgment cannot be avoided for that reason. A solemn judgment determining the rights of parties to a controversy cannot be overcome by showing that new or additional evidence can now be produced upon the issue there involved and decided, which the party was unable to produce upon the former trial. If such a rule could obtain, judgments would never be conclusive. The rule as to the conclusiveness of judgments is based upon considerations of public policy—that there may be an end to litigation. The Supreme Court of the United States in *Southern Pacific R. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, referring to the general rule as to the binding effect of judgment on matters definitively put in issue and directly determined, says: "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, or the aid of judicial tribunals would not be invoked for a vindication of rights of persons and property, if, between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect to all matters of property put in issue and actually determined by them."

It is further insisted by respondent that the decision we have been discussing is not binding upon her in the present proceeding, because, here, she appears individually, and in the former proceeding she appeared as ad-

ministratrix; that where it is sought to bind a person by a former judgment it is necessary that he should have been not only a party to both actions, but must have appeared in both in the same capacity or character. As a general rule this is true, but it can have no application here. While it is true that petitioner was acting in her official capacity as administratrix when she was seeking to sustain her right to the payments involved in the contest over her account, it was for her own individual benefit and for her sole advantage that she was asserting it. It involved nothing with relation to her official capacity, save that she had paid it to herself individually. She was asserting her claim in her own right as the real party in interest; she was not asserting any right proceeding from her official capacity as administratrix. Both then, and now, she was insisting upon the right to the allowance upon exactly the same ground; that she was entitled to it as having accrued in her favor during the period between the date of the filing of the inventory and the order of October 14, 1895, under orders of the court awarding it. Under these conditions it cannot be said that she appeared in either matter in a different capacity or character. In both proceedings she was the real party in interest, asserting individual, and not representative, rights, and is bound by the judgment. 1 Greenleaf, Ev. § 535; 1 Freeman on Judgments (4th Ed.) § 174; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

We have pursued this discussion sufficiently. The finding of the trial court as to what was determined in the decision in the Estate of Bell, 142 Cal. 97, 75 Pac. 679, and the conclusions of that court as to the effect of that decision, are erroneous. It decided, and was conclusive to the point, that no order of court, save the orders specially mentioned in it, existed making an allowance to petitioner between the return of the inventory and the order of October 14, 1895, and determines that all allowances under any order of court making them had been fully paid to respondent.

Under this view, it is, as we have said, unnecessary to consider any other of the various grounds urged by appellants for a reversal.

The order appealed from is reversed, with costs to the appellants.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

153 Cal. 345

In re BELL'S ESTATE.

BELL v. NATIONAL BANK OF D. O. MILLS. (S. F. 4,583.)

(Supreme Court of California. April 3, 1908.
Rehearing Denied May 1, 1908.)

ADMINISTRATORS — ALLOWANCE TO WIDOW — JUDGMENT — REVIEW.

A judgment denying to a widow a family allowance as prayed for by her in an amended

petition therefor, rendered on appeal by certain creditors of the decedent from a judgment awarding an allowance, precludes the widow from further proceeding under the original petition, and inures to the benefit of all creditors of decedent, and a creditor appealing generally from the judgment and order granting an allowance is entitled to a reversal though he stood on his demurrer to the original petition which was overruled, and took no further part in the proceedings, during which the petition was amended so as to withstand the demurrer, by alleging other distinct grounds for the same relief.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Bell, deceased. From an order giving Teresa Bell, the widow of the deceased, a family allowance, the National Bank of D. O. Mills appeals. Reversed.

James M. Allen, Drown, Leicester & Drown, Garret W. McEnerney, W. B. Bosley, John S. Drum, and Maurice V. Samuels, for appellants. T. Z. Blakeman, for respondent.

PER CURIAM. This is an appeal from the same judgment and order in favor of respondent for payment of family allowance as was involved in the appeal of Louisa J. Thompson et al. (S. F. 4,582 this day decided and reversed) 95 Pac. 372. Unlike that appeal, however, the present one involves the validity of an order of court overruling the joint, general demurrer to the original petition of respondent interposed by this appellant and the other creditors of the estate represented in the Thompson appeal, and the order denying their motion to strike out certain parts of the petition. This appellant rested on its demurrer and motion to strike out, and after the order of court respecting them, while the other demurring creditors answered, this appellant did not in any manner further appear in the cause by answer or otherwise, except to take this appeal after the proceeding had culminated in the judgment and order awarding petitioner her claim for a family allowance. The transcript on this particular appeal is identical with the transcript in the Thompson Appeal. It appears therefrom that the other creditors had answered, and during the trial of the proceeding the petition of respondent was amended, and the relief thereby asked was based on allegations substantially different from those contained in the original petition and were sufficient to withstand a general demurrer. See decision in the Thompson Appeal, supra.

In the Thompson Appeal we held that the decision in the Estate of Bell, 142 Cal. 97, 75 Pac. 679, was conclusive against the right of petitioner to recover upon the cause of action stated in her amended petition. Such reversal on that ground precludes petitioner from further proceeding under the present petition as it stands, and such reversal inures to the benefit of all the creditors of the estate, as well as this appellant, as the credi-

tors presenting the Thompson appeal. As far as the petition to which appellant demurred is concerned, it has no further legal existence as a petition, and no possible action can be taken on it which will affect this appellant. Under these circumstances, as appellant appeals generally from the judgment and order of the court, a general reversal of the order appealed from, as far as this appellant is concerned, should be had, and it is so ordered.

7 Cal. App. 622

PEOPLE v. WHITE LAW. (Cr. 94.)

(Court of Appeal, First District, California. March 3, 1908. Rehearing Denied by Supreme Court April 30, 1908.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

Defendant and three others were jointly charged with robbery committed March 4, 1903. A witness testified that on the evening of March 1st she heard N., one of the defendants, state to the others in front of a restaurant that she (N.) knew an old woman who had \$2,000 or \$3,000 and some diamonds that were easy to get, that the best time would be when the children were at school, and that witness saw three of the defendants together leave the premises where witness and some of the defendants resided on the afternoon of March 2d. Another witness who resided in the house that was robbed testified that on March 2d defendant followed her home, and pretended to have been sent by a real estate agent with whom witness was acquainted to sell witness a rooming house, on which subject witness had an interview with him in the house that was robbed, and that on the succeeding day defendant sent witness a message asking her to meet such real estate agent at 1 o'clock p. m. for the purpose of looking at another house, and while she was away on such errand defendant and two of the other conspirators entered prosecutrix's house and assaulted and robbed her. Held, that such evidence of the transactions on March 1st and 2d were admissible as showing a plan to rob prosecutrix's house, and to get the inmates other than prosecutrix away.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 764, 765.]

2. WITNESSES—CORROBORATION.

In a prosecution for robbery, it was proper to permit the physician who attended the victim for the injuries received at the hands of the robbers to fully describe such injuries, as corroborative of her evidence that force was used to consummate the crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1287.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Bernard Whitelaw was convicted of robbery, and he appeals. Affirmed.

Wm. S. Barnes, for appellant. Webb, Atty. Gen., for the People.

HALL, J. Defendant, Bernard Whitelaw, was jointly charged with Michael Nolan, John Davis, and Docia Nolan with the crime of robbery committed upon one Emma Mathews. Upon the trial of the defendant, Whitelaw, he was convicted of the crime as charged, and this appeal is from the judgment and the order denying his motion for a new trial.

The only points relied on for a reversal concern certain rulings of the court in admitting certain evidence over the objections and exceptions of defendant, and are utterly without merit. The salient facts of the case, as disclosed by the evidence, are as follows: In the month of March, 1903, Mrs. Emma Mathews resided at 543 Haight street in the city and county of San Francisco, with her son aged 13 years, her daughter, Mrs. Ida Tuttle, and her daughter's daughter aged 12 years. A witness for the people, Ruby Grills, testified that she heard defendant Docia Nolan say to the other three defendants in front of a restaurant on the evening of March 1, 1903: "I know an old woman out here who has \$2,000 or \$3,000 and some diamonds. Her husband died a short time ago, and it would be easy to get, and the best time would be when the children are at school." The same witness also saw the three defendants, Whitelaw, Davis, and Michael Nolan, together leave the premises, 413 O'Farrell street, where she and some at least of the defendants resided, on the forenoon of March 2, 1903. Mrs. Ida Tuttle testified: That on March 1, 1903, she resided with her mother, Mrs. Emma Mathews, her mother's little boy, and her own little girl, at 543 Haight street. That on the 2d day of March, 1903, she came down town about 11 o'clock to see Mr. Johnson, a real estate dealer, whose office was at Turk and Market streets, looked at a house in the Mission and visited other places, and started home between half past 12 and 1 o'clock, taking the Haight street car on Market street. While going out Market street she saw the defendant Whitelaw looking at her. He was standing on the rear platform of the car. She got off the car at Haight and Fillmore streets, passing said defendant on the platform in doing so, and went to her home. She had just taken off her hat when the door bell rang. She opened the door and found appellant at the door. He asked if Mrs. Tuttle was in, and she answered: "I am Mrs. Tuttle." He then informed her that he had a lodging house to sell, gave the location, price, number of rooms, etc., and informed her that he had been sent by Mr. Johnson. During this interview Mrs. Mathews also came into the room and saw appellant. Mrs. Mathews said to Mrs. Tuttle: "You don't want that house. You want a larger house." And Mrs. Tuttle told appellant to go back to Mr. Johnson and have him sell the house. Whereupon he left. In the forenoon of March 4, 1903, appellant sent to Mrs. Ida Tuttle by a messenger boy a message written by him as follows: "San Francisco, March 4th, 1903. Mrs. Tuttle, please be at house on N. E. corner Polk and Larkin street at one p. m., or as near that time as possible, to get first chance. Johnson." Shortly after receiving the message Mrs. Tuttle left the house at about 12:30 o'clock, and went to Mr. Johnson's office, thus

leaving Mrs. Mathews alone, the little boy and girl having also left the house. In about five minutes after Mrs. Tuttle left the house appellant, Davis, and Michael Nolan appeared at the residence of Mrs. Mathews, and, on the door being opened by Mrs. Mathews, stepped into the hallway, and informed her that they had been sent by "Johnson." They passed into the parlor, drew pistols, with which they threatened and struck her, demanded her money and diamonds, beat and maltreated her most brutally, and succeeded in getting away with \$60 in money and a watch. They escaped from the premises through the back door and yard.

The evidence connecting appellant with the crime is abundant, and the only points urged for a reversal, as we have before stated, concern the rulings of the court in admitting certain testimony. Appellant objected to the admission of the testimony given by Ruby Grills as to what she heard said by Docia Nolan to the other three defendants on the evening of March 1st, and also as to the fact that she saw the three male defendants together on the morning of March 2d. Appellant also objected to the admission of the testimony given by Mrs. Tuttle as to where she was on March 1st, and as to the happenings of March 2d. The objection to this testimony seems to be that it was no part of the *res gestæ*, and was too remote in point of time from the actual commission of the offense. But it is perfectly apparent that every word of it that was in any way prejudicial to appellant tended to connect him with the commission of a deliberate and carefully planned robbery. It shows that the crime that was finally committed on the 4th day of March was probably conceived by the appellant and his fellow defendants on March 1st, and more fully planned on March 2d by appellant. The testimony of Ruby Grills and Mrs. Tuttle as to what occurred on March 1st and 2d tended to support the manifest theory of the prosecution that the robbery was the consummation of a deliberate and previously concocted plan of defendant and his codefendants to entice Mrs. Tuttle away from her home, and then, while both she and the two children were away, to rob Mrs. Mathews and the house of such valuables as they could get. The admission of this testimony was clearly proper, and is fully supported by *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390. See, also, *People v. Kelly*, 146 Cal. 119, 79 Pac. 846; *People v. Linares*, 142 Cal. 18, 75 Pac. 308; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; and *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862.

It was likewise proper for the court to allow the physician who attended Mrs. Mathews for the injuries received at the hands of appellant and his codefendants, to fully describe such injuries. It was corroborative of the evidence of Mrs. Mathews that force was used.

No other reason being suggested why the judgment or order should be reversed, both are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 626

PEOPLE v. AH LEAN. (Cr. 121.)

(Court of Appeal, First District, California. March 3, 1908.)

1. RAPE—EVIDENCE—INCRIMINATING CIRCUMSTANCES.

In a prosecution for rape alleged to have been committed on October 8, 1905, it was error to permit a physician to testify as a witness for the prosecution that he examined prosecutrix on October 24th and found that she had venereal chancroids, which appeared to be about 12 days old, for the purpose of showing that the venereal disease was contracted by prosecutrix from defendant.

2. WITNESSES—CROSS-EXAMINATION.

On a prior trial of another for rape, alleged to have been committed on prosecutrix on September 26, 1905, a physician testified that he had examined the girl in October and found that she had venereal chancroids, and in the prosecution of defendant for alleged rape on the same girl occurring October 8th, the same physician testified that on October 24th the girl had chancroids of about 12 days' standing. *Held*, that it was error to refuse to allow defendant's counsel on cross-examination to ask prosecutrix whether or not she had chancroids or any sores inside her private parts on October 8, 1905.

3. CRIMINAL LAW—OTHER OFFENSES.

In a prosecution for rape it was error to permit the prosecution to prove by the prosecutrix that she had intercourse with defendant several times before the date stated in the indictment, and that the usual price he paid her was \$1.50, as showing other offenses than that charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822-824; vol. 42, Rape, § 64.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Ah Lean was convicted of rape, and he appeals. Reversed.

E. L. Rhodes, for appellant. Attorney General Webb (B. A. Herrington, of counsel), for the People.

COOPER, P. J. The defendant is charged in the indictment with the crime of rape, in having had sexual intercourse on the 8th day of October, 1905, with one Lillie Ida Davis, an unmarried female under the age of 16 years. A trial was had before a jury, and the jury returned a verdict of guilty, with a recommendation of the defendant to the mercy of the court, and judgment was thereupon entered, sentencing the defendant to a term of eight years in the state prison. This appeal is from the judgment and from an order denying the defendant's motion for a new trial. The facts and circumstances surrounding this case, and the character of the girl Lillie Ida Davis, are fully set forth in *People v. Fong Chung* (filed May 27, 1907; Cal. App.) 91 Pac. 105, a case in which the defendant there was charged with rape upon the same

girl on the 26th day of September, 1905, and such facts and circumstances need not be here repeated. In the record of this case at least some of the matters held to be error in the Fong Chung Case are repeated.

The prosecution called Dr. McMahon, who testified that he examined the girl on the 24th day of October, 1905, and found at that time that she had venereal chancroids, which appeared to be about 12 days old. As this referred to a time only 16 days after the alleged rape, it is apparent that the object, and the only object, of the testimony was to give the jury the impression that the venereal disease was contracted by the girl from the defendant. The testimony certainly did not tend to prove the age of the girl, nor the fact that the defendant had had sexual intercourse with her, unless it had been proven that on the 8th day of October, 1905, the defendant had a venereal disease.

Dr. Cothran testified in behalf of the defendant that the day before the trial he examined the defendant, and that he did not have any venereal disease, and that if he had had chancroids or venereal warts at any time within the prior three months he would have been able to detect signs of such disease, but that he found no signs of any venereal troubles of any kind.

The defendant's counsel, in cross-examination, asked the prosecuting witness whether or not she had chancroids or any sores inside her private parts on the 8th day of October, 1905. The prosecution objected to each question asked in regard to such matter on the ground that it was immaterial, irrelevant, and incompetent, and the court sustained the objection. The rulings were clearly erroneous, and it is only necessary to refer to the Fong Chung Case as to the reasons. In that case the rape upon the same girl was alleged to have taken place on the 26th day of September, 1905, and the same physician was called to show that early in October the girl had a venereal disease or chancroids. In this case the alleged rape occurred on the 8th of October, and the same physician was again called to prove that on October 24th the girl had a venereal disease or chancroids of about 12 days' standing. In other words, in the Fong Chung Case the act of sexual intercourse was proven to have occurred on the 26th day of September, 1905, and the physician was called to prove that a few days afterwards the girl had chancroids. In the present case the act of sexual intercourse is proven to have occurred with the same girl and this defendant on the 8th day of October, 1905, and the same physician was called to prove that the disease was contracted soon after the act of intercourse with this defendant. It would certainly be a remarkably quick cure if the girl contracted a disease from Fong Chung on the 26th day of September, 1905, and was suffering from it early in October, 1905, and yet was well and cured of it on October 8, 1905, when the intercourse

that defendant is claimed to have had took place, and not only this, but that she again contracted it from this defendant.

Other questions were asked of the girl by defendant in cross-examination as to whether or not she had had intercourse with other Chinamen, and as to how many Chinamen she had accused of having raped her. The court sustained objections made by the district attorney to each of such questions.

The girl was also asked by defendant in cross-examination when she first told any one of having had sexual intercourse with the defendant. The court sustained the objection of the district attorney to the question.

Under the defendant's objection the prosecution was permitted to prove by the girl that she had had intercourse with this defendant several times before; that the usual price he paid her was \$1.50. The defendant was charged with only one offense, and that one alleged to have occurred on the 8th day of October, 1905. We know of no rule in cases of this class that will permit evidence to be introduced to show other and independent rapes to have been committed by the same defendant upon the same party.

It is useless to discuss the rulings further. Upon the authority of the case of *People v. Fong Chung*, *supra*, the judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 613

PEOPLE v. BORREGO. (Cr. 78.)

(Court of Appeal, Second District, California.
Feb. 28, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS—ACCUSED'S CREDIBILITY.

Where one accused of murder was a material witness in his own behalf, an instruction directing attention to the manner in which he would be affected by the verdict, and informing the jury that they should consider that in determining the weight to be given his statements and the likelihood of his coloring his testimony, etc., was prejudicial error as invading the jury's province.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1786-1789.]

2. HOMICIDE—APPEAL—FAVORABLE ERROR.

One may not complain of a conviction of manslaughter because the evidence warranted a conviction of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 722.]

3. INDICTMENT — MURDER — CONVICTION OF MANSLAUGHTER.

One accused of murder may be convicted of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 593.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Rafael V. Borrego was convicted of manslaughter, and he appeals from a judgment on the verdict, and from an order denying a new trial. Reversed, and new trial granted.

A. R. Holston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was charged with murder, in the killing of one Juan Orosco, and upon trial found guilty of manslaughter. He appeals from the judgment on this verdict, and from an order denying his motion for a new trial.

Orosco, who was a deputy constable, gave a dance at a dance hall in Los Alamitos, in the county of Orange, on the night of August 25, 1907. Defendant, who had been drinking wine more or less all day, attended the dance, and while in the ballroom became involved in some trouble with one Arthur Murrietta, who was Orosco's helper or assistant. There was an exchange of opprobrious names and threats between defendant and Murrietta, and the latter grabbed defendant's hands to prevent him from pulling a weapon. Orosco came up, directed Murrietta to turn the defendant loose, and told the latter he was under arrest. Some of the witnesses for defendant testified that Orosco followed the direction to Murrietta with the further remark, "I will fix him"; and another witness testified that Orosco merely said to the defendant: "You are under arrest, and I will make it all right in the morning." Defendant thereupon went out of the room, Murrietta and Orosco remaining in the house. In about five minutes after defendant left the room he fired a pistol shot into the ground a short distance from the dance hall. Thereupon Orosco went out, followed by Murrietta. The former took a step or two from the platform in front of the door, and defendant shot him, death following immediately. Orosco half turned and fell into the arms of Murrietta, and then dropped upon the ground.

Orosco and defendant were friends, and had had no previous quarrels, and no motive for the shooting appears, except that derived from the statement by the defendant that Orosco was advancing toward him with a gun in his hand, and such motive as can be inferred from the foregoing facts. But one other witness testified that Orosco was advancing with a gun in his hand toward defendant when the shooting occurred, although there is evidence that a gun fell upon the ground where Orosco was shot and circumstances tending to corroborate this statement. Defendant was a witness in his own behalf, and one of but two witnesses who saw the gun in Orosco's hand, rendering his testimony of great moment to his defense. If the words "I will fix him" were spoken by Orosco, they were not heard by the defendant, and his justification of self-defense rests largely upon his own testimony as to Orosco's actions.

Under such circumstances the giving of the instruction (No. 30) calling the especial attention of the jury to the situation of the defendant and the manner in which he would be affected by the verdict, and informing

them that they should consider this in determining the weight to be given his statements, and the likelihood of his coloring his testimony, etc., was clearly prejudicial error. The criticism of this instruction by the Supreme Court in numerous cases, and its repeated cautioning against the giving of it having gone unheeded, it at last declared in *People v. Maughs*, 149 Cal. 263, 86 Pac. 187, that in all future cases its giving on behalf of the prosecution would be sufficient to justify a reversal of the judgment. The instruction is, in effect, an argument against the defendant upon a matter of fact delivered by the court. As said in *People v. Winters*, 125 Cal. 330, 57 Pac. 1067, the credit to be given to the testimony of the defendant, like that of any other witness, is a matter with which the court has nothing to do. To give such an instruction is to expressly disparage the defendant, "the very thing that a court has no authority to do, in view of our constitutional provision." *People v. Ryan* (Cal.) 92 Pac. 853.

In so far as they have been presented, we see no error in the refusal of the other instructions asked by the defendant and refused by the court.

No prejudicial error was committed by the trial court in its rulings as to the admission and rejection of testimony complained of, and the assignment of error based upon the misconduct of counsel is withdrawn by appellant in his reply brief.

It is true, as claimed by appellant, that the evidence in the case would have sustained a verdict of murder; but the appellant cannot be heard to complain of a verdict of manslaughter for this reason. Every charge of murder includes manslaughter, and the jury were properly instructed that they might render such a verdict. The doctrine is well settled that the defendant cannot complain because the verdict was more favorable to him than the evidence warranted. *People v. Muhlner*, 115 Cal. 305, 47 Pac. 128.

Judgment and order reversed, and new trial granted.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 609

HILL v. CLARK et al. (Civ. 413.)

(Court of Appeal, Second District, California.
Feb. 28, 1908.)

1. APPEAL—HARMLESS ERROR.

Where a nonsuit was erroneously denied, after which sufficient evidence was admitted to supply the omission in plaintiff's proof, the error was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4210.]

2. CONTRACTS—SUBSTANTIAL PERFORMANCE.

Where plaintiff contracted to do certain grading according to specifications, a substantial performance only was required to entitle plaintiff to recover compensation for the work done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1361.]

3. APPEAL—FINDINGS OF FACT—CONCLUSIVE-NESS.

Where, in a suit to foreclose a lien for certain grading work, the court's findings in favor of plaintiff were not challenged as unsupported by the evidence, they were conclusive on appeal in favor of plaintiff's good faith and substantial performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1290, 1321.]

4. DISMISSAL AND NONSUIT — FINDINGS OF FACT.

While findings of fact are not proper on a motion for a nonsuit, yet, where the motion is denied and uncontested findings are subsequently made, they may be looked to to determine whether any omission in plaintiff's proof prior to the motion for nonsuit was supplied by subsequent testimony.

5. CONTRACTS — CONSTRUCTION — EVIDENCE—CUSTOM.

Where a contract required plaintiff to grade certain land in accordance with a specified grade, evidence was inadmissible to show that the term "grade" as used in the contract had by custom of business no other construction than to require plaintiff to take off the earth from the high places, and with it fill in the low places to the extent of the material within the lines of the work.

6. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where, in a suit on a contract to grade certain land, the court found that there was sufficient dirt on the ground to bring the land to the precise grade fixed in the contract, defendant was not prejudiced by evidence that the term "grade" as so used only required plaintiff to take off the earth from the high places, and with it fill in the low places to the extent of the material within the lines of the work, and did not require him to haul dirt onto the property from outside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160, 4171-4177.]

7. SAME—DAMAGES.

Where, in an action on a grading contract providing a fixed sum as liquidated damages for delay, no issue was presented as to the amount of the liquidated damages or claim on account thereof, and the court found that the contract had been substantially performed, there was no room for an inquiry as to damages, and hence defendant was not prejudiced by the exclusion of a question as to the extent of his injuries by plaintiff's failure to complete the work.

8. MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEE.

An attorney's fee cannot be allowed in the foreclosure of a mechanic's lien though provided for by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 653.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by James A. Hill against Stephen A. D. Clark and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

M. W. Conkling and J. L. Fleming, for appellants. H. L. Dunnigan, Haas, Garrett & Dunnigan, and Borden & Carhart, for respondent.

ALLEN, P. J. This is an appeal from a judgment, the evidence taken at the trial being presented in a bill of exceptions. The action was one brought by plaintiff to foreclose a lien on account of certain work and labor performed in grading a tract of land

under a written contract with defendant, the owner. This contract specified the exact lines of grade to which the premises should be brought, and for which work the plaintiff was to receive \$1,000 upon completion. Upon the trial the plaintiff did not show that he had complied with the contract in any manner other than as required by his construction thereof, which was that, when he had taken off the earth from the high places, and with it filled in the low places to the extent of the material within the lines of the work, he had done all that was required of him by the contract; and the court permitted plaintiff, under objections, to introduce testimony tending to show that the word "grade," as used in the contract, had by the custom of business no other construction than that given it by plaintiff; that by the use of the word "grade" in the contract it was never intended to require that dirt should be hauled from the outside. At the conclusion of the plaintiff's testimony defendants moved for a nonsuit upon the ground that the plaintiff had failed to show that the contract set out in the complaint had been substantially fulfilled or completed, which motion was denied, with an exception. Thereupon defendants introduced testimony tending to show the extent to which the work had been done and the amount of labor and expense incident to its entire completion; and plaintiff was permitted to introduce testimony in rebuttal in connection with such question of completion and cost.

At the conclusion of the testimony, the court filed its findings of fact, wherein it found that plaintiff furnished and performed the labor agreed to be furnished and performed, and substantially performed said contract according to its terms; that in the performance of said contract plaintiff failed to grade the property exactly to conform to the lines specified in said contract; that plaintiff endeavored in good faith to perform said contract; that defendants would not permit plaintiff to cut certain high places to the specified grade, which, had he been permitted so to do, would have provided sufficient dirt on the property to bring the entire property to the grade specified in said contract; that plaintiff failed to bring in dirt to fill up the low places on said property; that the defect is one that can be remedied, and the damage caused by the failure of plaintiff to bring in dirt, including the cost of supplying the deficiency, amounts to the sum of \$150; that such sum would correct the work done by said contractor to make it conform to the contract aforesaid. And, as a conclusion of law, the court found that plaintiff was entitled to judgment for \$650, being the amount of the contract price less a payment of \$200 theretofore made and the \$150 necessary to an entire completion of the contract, together with \$2.45 paid for verifying and recording the claim of lien and \$50 for attorney's fees; and a decree for the sale of the property in

the ordinary way on default in the payment of such judgment. The findings are not attacked by any specifications of error relating to insufficiency of evidence for their support.

The principal contention of defendant upon this appeal is that the judgment should be reversed because of the action of the court in denying the motion for nonsuit. In a former opinion filed in this case this court reversed the judgment of the trial court upon the ground that such motion for nonsuit should have been granted. Upon a rehearing of the case, however, we are satisfied that we overlooked the effect which should be given the findings of fact. While it is true that the court would have been warranted in granting the motion for nonsuit when made, yet sufficient appears in the record to show that the omission of the requisite proof upon the part of plaintiff in the first instance was supplemented by subsequent evidence properly received upon the trial; and, under the well-established rule, such subsequent proof will have the effect to cure the error in denying the original motion. The rule is well established that in cases of this character the performance of a contract need not in all cases be literal and exact in order to entitle a plaintiff to compensation therefor; that a substantial performance is all that is required. *Harlan v. Stufflebeem*, 87 Cal. 512, 25 Pac. 636. "Whether the contract has been substantially performed is a question of fact which must be determined by the trial court in each instance from the facts and circumstances in that case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact." *Schindler v. Green*, 149 Cal. 755, 87 Pac. 627. The findings not being challenged as unsupported by the evidence, we must, therefore, accept the same as conclusive upon the question of good faith and substantial completion. While findings of fact are not proper on a motion for nonsuit, yet, under the circumstances of this case, in determining whether or not the subsequent proof has supplied any omission in the plaintiff's testimony, we may look into the findings to determine that fact, rather than into the evidence in the bill of exceptions to see whether or not those findings have support, other than to see whether or not there is some evidence tending in that direction. In the light of subsequent events, therefore, there was no prejudicial error in denying the motion for nonsuit.

It is further insisted by appellant that the court erred in admitting the testimony of witnesses as to the construction to be given the word "grade" in a contract where the same specifically states the exact grade to which the property should be brought. We quite agree with appellant in this regard. There was no room for construction. The contract was specific as to the lines to which the grade should be brought; but, looking again into the findings we see that the court

finds that there was sufficient dirt on the ground to bring the property to the precise grade fixed in the contract. Hence, the evidence offered as applicable to cases where there was an insufficiency of earth could not prejudice defendant in this case.

We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: "Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?" The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling.

The appeal from the judgment, however, presents the question involved in an allowance of attorney's fees. In *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, it is held that an attorney's fee cannot be allowed in the foreclosure of a mechanic's lien, even though provided by statute. The same reasons which impelled that decision are applicable here, and the court erred in awarding an attorney's fee.

The judgment of the superior court is therefore modified by striking therefrom the words "and for the further sum of \$50 hereby allowed said plaintiff for attorney's fees in this action"; and, as so modified, is ordered affirmed, appellant to recover costs on appeal.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 629

PEOPLE v. FOSSETTI. (Cr. 82.)

(Court of Appeal, First District, California.
March 3, 1908.)

1. HOMICIDE—TRIAL—QUESTIONS FOR JURY—PASSION.

In a prosecution for murder, the result of a quarrel, where the evidence showed that deceased had been drinking and had exhibited no weapon, and made no threat toward defendant, and that defendant deliberately left the room after saying that he would "fix" deceased, procured a pistol, returned, and without warning fired the fatal shot, the jury were the exclusive judges of the facts, and it was for them to say whether the killing was the result of malice or premeditation, or whether it occurred during a sudden quarrel or heat of passion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 565.]

2. SAME—MURDER—DELIBERATION AND PRE-MEDITATION.

Where the deceased and defendant were quarreling, and the deceased struck defendant, after which defendant left the room, procured a pistol, returned, and shot the deceased, no definite time was necessary after defendant was struck for his angry passion to cool so as to

make the killing a murder, and not manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 62-64.]

3. CRIMINAL LAW—APPEAL—REVIEW — QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE—DEGREE OF CRIME.

The question as to the sufficiency of the evidence and as to the degree of a crime, where an inference may be properly drawn from the facts, is peculiarly a question for the jury, with whose determination it is not the province of the appellate court to interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

4. SAME—OPINION EVIDENCE—FACTS OR CONCLUSIONS.

In a prosecution for murder, a physician was asked by the prosecution to state the course of the bullet from its entrance to where it struck a bone, where it was changed out of the course it had first taken. *Held*, that the court did not err in permitting the witness to answer the question; its purpose being to show the jury the position of the wound and the course taken by the bullet, and not to secure an opinion with regard to the relative position of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1034-1036, 1062, 1063.]

5. SAME—TRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS AS TO DUTIES OF JURY.

In a prosecution for murder, the court did not err in refusing to strike out the district attorney's argument to the effect that instructions were prepared by counsel, and often stated hypothetical circumstances and conditions which made it necessary for the jury to look at them carefully and critically.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1680.]

6. SAME—APPEAL—ASSIGNMENT OF ERRORS.

On appeal from a conviction of murder, defendant assigned as error that an examination of the instructions refused would show that there seemed to have been a steady pressure in the lower court to bar out any verdict of manslaughter or acquittal, and that, if any of such instructions were refused on the ground that they had already been given, that reason should have been stated by the court. *Held*, that the assignment was not sufficient to justify the appellate court in examining the instructions; it being due to the court that, when counsel rely upon error in the refusal to give an instruction, they should state the instruction, and point out the reason why they think the court erred in refusing to give it, which rule also obtains in regard to the giving of an instruction to which objection is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2954-2964.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Joseph C. Fossetti was convicted of murder in the second degree. From the judgment and the order denying a new trial, he appeals. Affirmed.

A. J. Hinds and Thos. D. Ingersoll, for appellant. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was found guilty of murder in the second degree by the verdict of the jury, and upon the verdict judgment was duly entered. His motion for a new trial having been denied, he prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

The main point urged by the defendant is

that the evidence shows that the crime was manslaughter, and not murder. It appears from the evidence in the case that the defendant (who is sometimes referred to as Chip Moran), was in charge of a roadside house near Fresno; that one Ollie Leighton was living at the place, and one Hattie Russell, at the invitation of Ollie Leighton, was visiting the roadside house referred to; that Moseley, the deceased, was a friend of Hattie Russell, and called upon her at the roadside house while she was stopping there, and that he with her had partaken of a meal at the house; that on the date of the homicide, about 6 o'clock p. m., defendant and other persons returned to the roadhouse, and soon thereafter defendant went into the kitchen. Deceased went into the room of Hattie Russell. He had been drinking. Defendant was called into the room of Hattie Russell where deceased was, and deceased then stated that defendant had accused Hattie Russell of having been out riding with deceased, and stated to defendant that defendant had told him so and had made said accusation. Angry words ensued, during which time defendant called Moseley a liar, and Moseley struck defendant on the cheek, and knocked him over on the bed. Defendant then went out and procured a revolver, and came back into the room and fired the fatal shot. The transaction is thus stated by the witness Hattie Russell: "There was just one blow struck. There was nothing more happened in the way of their scuffling, striking, kicking, or anything. When I got Barney (referring to Moseley) off, we were at the foot of the bed there. Chip Moran got up from the bed on the side next to the door and went out. I don't remember whether he got up on his feet or his knees, because as soon as I pulled Barney up he got right up and got out. Chip (the defendant) said that he would fix him just as he was going out the door. Nothing happened before he came back. I was just talking with Barney Moseley, trying to keep the peace with him. We were standing by the bureau, and Chip came in, and I heard him coming around, and I shut the door, and he slammed it back and shot. He was down the hall from the back way when I heard him coming. He didn't say a word when he came back to the door and shot. The bureau was where it was shown there [referring to a diagram], and Barney was leaning on it when the shot was fired. Chip was in the door when he fired the shot. From the time Chip Moran went out of the door and says 'I'll fix you' till the shot was fired was inside of a minute. When the shot was fired, Barney fell; just slipping down from the bureau into a cramping position." It is contended that the above testimony, although it does not show that the fatal shot was fired in self-defense, shows that it was fired during a sudden quarrel or heat of passion, and, at most, only constituted the crime of manslaughter. This contention cannot be maintained as a proposition of law. The de-

ceased had been drinking. He had exhibited no weapon, and made no threat toward the defendant. The defendant deliberately left the room, according to the testimony, after saying that he would "fix" deceased. He procured a pistol and returned, and, without warning, fired the shot that caused the death of Moseley. In such case the jury are the exclusive judges of the facts, and it is for the jury to say whether the killing was the result of malice and premeditation, or whether it occurred during a sudden quarrel or heat of passion. No definite time was necessary after defendant was struck for his angry passions to cool. The jury had the right to infer when he left the room to procure his pistol that he did so with the deliberate and willful intention of killing deceased.

The question as to the sufficiency of the evidence and as to the degree of a crime, where the jury have a right to draw an inference from the facts, is peculiarly a question for the jury. With the determination of the jury it is not the province of this court to interfere. *People v. Wright*, 4 Cal. App. 704, 89 Pac. 364; *People v. Fitzgerald*, 138 Cal. 41, 70 Pac. 1014; *People v. Buckley*, 143 Cal. 379, 77 Pac. 169. Dr. T. N. Sample was called as a witness on behalf of the people, and he testified to attending deceased as he was dying, and to the fact that he examined the body and the wound. He was asked by counsel for the prosecution to state the course of the bullet from the entrance to where it struck a bone where it was changed out of the course it had first taken. To this question the defendant objected, and now insists upon the objection. The witness was permitted to answer, and stated: "The bullet struck just on the anterior axillary line—that is, the straight up and down line from the point here—and passed inward and slightly backward and slightly downward, and struck the beginning of the lumbar vertebrae, and then was deflected slightly outward and downward. I got that bullet, and after handed it to the coroner at the coroner's inquest. In striking the arm the bullet made a hole underneath the skin, but not into the muscle. The wounds mentioned are the only ones I found on the body, and I found but one bullet." It was not error for the court to permit the witness to answer the question. The witness was not asked to give his opinion as to the position the person must have been standing in at the time he was shot with relation to the deceased, and therefore the question did not come within the ruling of *People v. Smith*, 93 Cal. 445, 29 Pac. 64. The object of the question was to show the position of the wound, the course taken by the bullet, and its place of entrance and exit; so as to show the jury the facts.

It is further claimed that it was error in the court to refuse to strike out some remarks made by the district attorney in his argument in regard to the instructions that would be handed to the jury in the case.

The argument of the district attorney upon this point was to the effect that instructions were prepared by counsel, and often stated hypothetical circumstances and conditions, which made it necessary for the jury to look at them carefully and critically. But the district attorney did not state that the jury must disregard the instructions, and we do not think that he went beyond the scope of his right to state, by way of argument and illustration, his views of the case and the manner of instructing the jury. The remarks do not come within the reason of the rule given in the various cases in which remarks of district attorneys have been held to be error.

Defendant finally claims that "an examination of the instructions asked for on behalf of the defendant and refused by the court will convince this court that there seems to be a steady pressure in the lower court to bar out any verdict of manslaughter or acquittal. If any of the instructions asked for by the defendant were refused on the ground that they had already been given, that reason should have been given by the court. The record shows no such compliance with the law by the court, and it is therefore error." This is not a sufficient assignment of error in the giving or refusing of an instruction or of instructions to justify us, under the well-settled rule, in examining the instructions given or refused. It is due to the court that, when counsel rely upon error in the refusal to give an instruction, they should state the instruction, and point out the reasons why they think that the court erred in refusing to give it; and the same rule obtains in regard to the giving of an instruction to which objection is made. *People v. Cebulla*, 137 Cal. 315, 70 Pac. 181; *People v. Monroe*, 138 Cal. 99, 70 Pac. 1072; *People v. Woon Tuck Wo*, 120 Cal. 298, 52 Pac. 833.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 616

PEOPLE v. THOMPSON. (Cr. 57.)

(Court of Appeal, Third District. California.
Feb. 28, 1908.)

1. INFORMATION — FORMAL REQUISITES — VENUE.

Pen. Code, § 951, provides that an information shall contain the title of the cause and of the court in which it is filed. The caption of an information was as follows: "In the Superior Court of the County of Tuolumne, State of California, ——" The charging part did not specifically mention the county, the only language indicating the county in which the offense was committed being that accused on a specified date, "at the said county of ——" and before the filing of this information, did then and there ——" etc. *Held* that, while the caption of the information is no part of the information, viewed solely as a pleading, yet, inasmuch as the statute requires it to be made part of the instrument which constitutes the information, it may be considered in determining the question of venue where the body of the plead-

ing contains no direct allegation thereof, and hence the averment that the crime was committed in "said county of —" should be construed to refer to the county mentioned in the caption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 239.]

2. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—FORMAL DEFECTS IN INDICTMENT.

Formal defects or imperfections in indictments or informations which have no tendency to prejudice accused or to deprive him of any substantial rights should be disregarded, Pen. Code, § 1404, expressly providing that neither a departure from the form nor mode prescribed in respect to any pleading, nor an error nor mistake therein, shall render it invalid unless it has actually prejudiced accused, or tended to his prejudice in respect to a substantial right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3101-3105.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Ross S. Thompson was prosecuted for assault with intent to commit rape, and from a conviction of assault he appeals. Affirmed.

J. B. Curtin, and R. J. White, for appellant. U. S. Webb, Atty. Gen., and Geo. Beebe, Deputy Atty. Gen., for the People.

HART, J. The appellant was accused by information of the crime of assault with intent to commit rape, and upon his trial in the superior court of Tuolumne county was convicted of an assault. This appeal is taken from the judgment upon the judgment roll alone. The only point made by the appellant is that the averments of the information fail to bring the case within the jurisdiction of the superior court of Tuolumne county, in that it is not specifically alleged in the charging part thereof that said alleged crime was committed in said county. In other words, the claim is that the information does not affirmatively show the venue, for which reason it is contended, the court did not acquire or have jurisdiction to try the appellant for the offense charged in the information.

The information, including the caption, which states the title of the court and cause, reads as follows: "In the Superior Court of the County of Tuolumne, State of California. The People, Plaintiff, vs. Ross S. Thompson, Defendant. Information for Assault with Intent to Commit Rape. Ross S. Thompson, accused by the district attorney of the said county by this information of the crime of assault with intent to commit rape, committed as follows: The said Ross S. Thompson, on the 10th day of July, one thousand nine hundred and seven, at the said county of — and before the filing of this information did then and there willfully, unlawfully and feloniously in and upon one E. W., a female over the age of sixteen years, and not the wife of said Ross S. Thompson, make an assault with intent then and there to ravish, carnally know and to commit rape upon the said E. W. by force and violence and against her will and against her resistance, contra-

ry," etc. Section 951 of the Penal Code provides that the indictment or information shall contain, among other things, the title of the cause and of the court in which the indictment or information is filed. The charging part of the information here does not, it is to be seen, specifically mention "Tuolumne County," where the cause was tried, and the only language in that part of said information indicating the county in which the offense was committed is to be found in the words "said county of —" and the words "then and there."

It is evident that the failure to insert in the information the name of the county in the blank space immediately following the words "said county of" involves purely a clerical misprision, and, while it is true, as contended by counsel for appellant, that the caption of an information or indictment is no part of the same, viewed solely as a pleading, it is nevertheless required by the statute to be made part of the document or instrument which constitutes such information or indictment; and, we think that, for the purpose of determining the question of venue, as to which the body of the pleading is silent so far as a direct allegation is concerned, the averment in the information or indictment that the crime was committed in "said county of —" should and may reasonably be construed to refer to the county mentioned in the caption as the name or title of the court, and, so construing it, the venue is sufficiently established in the accusatory pleading to invest the court with jurisdiction of the offense and of the person of the accused. Such has been the construction given indictments and informations similarly phrased by the appellate courts of many other states, and in none of the California cases cited by appellant have we been able to find language expressing an opinion in conflict with this conclusion.

In *People v. O'Neil*, 48 Cal. 259, the charging part of the indictment does not contain the words "said county" or "county aforesaid" or words of similar import. The same is likewise true of the case of *People v. Craig*, 59 Cal. 370. There it was charged that the defendant "did willfully and unlawfully resist, delay and obstruct" a certain public officer, to wit, "a duly elected, qualified and acting constable of Pajaro township, of the county of Monterey, of the state of California," in the discharge of his duty as such officer. While the name of the county—assuming that Monterey county was where the offense was committed—is mentioned in the information as a part only of the description of the officer's official character and authority, there is no direct averment that the crime was committed in that county, nor are there elsewhere in the information any words or language which could be so construed as to fix the venue. In fact, there does not appear to be any attempt to allege the venue in the

information. The case of *People v. Wong Wang*, 92 Cal. 281, 28 Pac. 270, contains nothing at variance with the views expressed here. The facts of that case are different from those here. It is said among other things, in that case, that "it is a familiar and well-settled principle of law that the indictment must allege that the offense was committed within the jurisdiction of the court." No one would have the hardihood to attempt to dispute that elementary principle of law. And its violation in the case at bar, as we have before said, is not attempted. The statute, as we have seen, authorizes and requires the title of the court to be stated or set forth in the caption, and, although, as we have said, such caption is no part of the pleading proper, it is nevertheless to be considered, if necessary, in arriving at the meaning of the words of reference, "said county," in the charging part of the information, for the purpose of determining the question of venue.

We have been referred to no case in this state which has decided the precise question here; but, as before suggested, many cases directly in point can be found in other jurisdictions, among which may be mentioned the following: *State v. Hunn*, 34 Ark. 321; *U. S. v. Schneider*, 21 D. C. 381; *Rivers v. State*, 144 Ind. 16, 42 N. E. 1021; *State v. Muntz*, 3 Kan. 383; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *Wright v. Commonwealth*, 82 Va. 183; *State v. Bell*, 25 N. C. 506; *State v. Shull*, 40 Tenn. 42; *Commonwealth v. Edwards*, 70 Mass. (4 Gray) 1. In the case of *State v. S. A. L.*, 77 Wis. 467, 46 N. W. 498, the name of the county in which it was claimed the offense was committed appeared in the information only as indicating the county of which the district attorney was the prosecuting officer, as follows (after the caption): "I, J. L. E., district attorney for Dane county, hereby inform the court," etc. The charging part of the information did not after the language quoted contain the words, "said county" or "aforesaid county," but did allege that the defendant "then and there" committed the crime charged. The Wisconsin Supreme Court held that the words "then and there" had reference to the county named in the caption, and also mentioned in the first part of the information for the purpose of indicating the county of which the accusing officer was district attorney, and that, therefore, the venue was sufficiently laid in the information. We quote from the opinion in that case: " * * * But in the second place, where the words are used that 'M. C. did then and there have carnal knowledge of her body,' they must necessarily refer to Dane county, which is previously mentioned or described. This is the plain, natural meaning and sense of the language used. The words 'then and there,' as used in the indictment, are words of reference, and when time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words; and they have the

same effect as if the time and place were actually repeated"—citing *Whar. Crim. Law*, 74. Of course, if adding the caption to the information or indictment were the mere work of the clerk of the court, without any authorization or requirement of the statute to do so, a different question might be presented; but, as observed, section 951 of the Penal Code prescribes the form of an indictment and of an information by setting out such form, and among the requisites as to form thus set out is the caption setting forth the title of the court and cause. We are not to be understood as holding that an information or indictment, otherwise sufficient, would be fatally defective if the caption were omitted. All we hold is that the caption containing the title of the court and cause, being expressly authorized by the Code when referred to by appropriate words in the charging part of the indictment or information, has the effect, where the charging part thereof fails or omits to specifically allege the county, or fails to allege in some direct manner the venue, of sufficiently laying the venue to give the court jurisdiction to try the accused. "The name of the county being fully set forth in the caption thus returned as attached to the indictment," says the Massachusetts Supreme Court, 4 Gray, 1, "a reference thereto in the indictment, as 'in said county,' may properly be had, to find the county where the offense is alleged to have been committed; and, being thus made certain, the place of the commission of the offense is sufficiently charged."

We can conceive no reason upon principle why the rule as laid down in all the authorities cited herein is not sound and should not be sustained. Defects or imperfections in form in informations or indictments having no tendency to prejudice the accused, or to deprive him of any of his substantial rights, ought to be disregarded, and it seems to be the trend of modern decisions to disregard them. Form is now and for many years has been subordinated to substance in pleadings and practice in civil cases, and the same practice ought to be and can be, with equal reason, made applicable to indictments and informations and other proceedings in criminal cases, without impinging in the least upon the important and material rights of an accused. The Legislature of California has wisely recognized the justice of relaxing to some extent the strictness with which the rules as to form with reference to indictments and informations were formerly administered and enforced, by the enactment of section 1404 of the Penal Code, which reads: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Of course, the offense should be alleged with reasonable certainty, as

should also the fact or facts essential to give the court jurisdiction to try the accused under the information or indictment filed or found against him.

We may, however, with propriety, suggest to district attorneys that it is well to bear in mind that it is far the better and safer practice to allege the venue with unquestionable certainty and directness. The venue, it seems to us, ought to be the least of the difficulties in the way of a proper preparation of an indictment or information.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 642

ROBINSON v. MUTUAL SAVINGS BANK
OF SAN FRANCISCO et al. (Civ. 411.)

(Court of Appeal, First District, California.
March 5, 1908. Rehearing Denied
April 2, 1908.)

1. BANKS AND BANKING — DEPOSITS—OWNER-
SHIP—EVIDENCE.

Evidence *held* to show that plaintiff who deposited money in a bank to the joint account

of herself and decedent deposited it as the agent of decedent for decedent's use.

2. GIFTS—GIFTS INTER VIVOS—TIME OF TAKING EFFECT.

A valid gift goes into immediate effect and has no reference to the future; it divests the donor of its title, and requires a renunciation on his part of all claim and interest in the subject of the gift, and hence where a woman placed money of her own in a bank to the joint account of herself and another so that either could draw therefrom, and retained the bank book herself, there was no gift of the account to the other person.

3. JOINT TENANCY—JOINT ACCOUNT IN BANK.

The deposit of money to the joint account of depositor and his agent did not constitute a joint tenancy or ownership with right of survivorship.

4. GIFTS—ASSERTION AFTER DEATH OF DONOR—EVIDENCE.

Where the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 95–100.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Lizzie C. Robinson against the Mutual Savings Bank of San Francisco to recover a deposit in which Joseph Leggett and Charles H. Robinson, as executors of Amanda M. Scales, interpleaded, claiming the money, and upon the deposit of the amount in court by the bank the interpleaders were substituted as defendants. From a judgment for plaintiff and an order denying a new trial, the substituted defendants appeal. Reversed.

Jas. G. Maguire and Devoto & Richardson, for appellants. A. Ruef and F. T. Finch, for respondent.

HALL, J. Plaintiff brought suit against the Mutual Savings Bank of San Francisco to recover the sum of \$4,370.49 as the balance of money alleged to have been deposited by plaintiff with said bank. Upon a showing by the defendant bank that Joseph Leggett and Charles H. Robinson, as executors of the last will of Amanda M. Scales, deceased, made claim to the same money, said defendant bank was allowed to deposit with the court said sum of \$4,370, and was thereupon dismissed from the action, and said Leggett and Robinson, as such executors, were substituted as defendants. Leggett and Robinson, as such executors, answered plaintiff's complaint, and set up a claim to said money as part of the estate of Amanda M. Scales, deceased. The findings and judgment were in favor of plaintiff and against the substituted defendants, who have appealed from the judgment and the order denying their motion for a new trial. Appellants attack the findings as not being supported by the evidence.

It is alleged in the complaint that prior to the commencement of the action plaintiff

deposited with defendant the Mutual Savings Bank of San Francisco, and the said defendant received of and from plaintiff, for the use and benefit of plaintiff, the sum of \$5,729.69, which said amount said defendant promised to repay to plaintiff, and that said defendant has repaid to plaintiff the sum of \$1,359.20 and no more, thus leaving a balance of \$4,370.49.

The substituted defendants, in their answer, deny the allegations of the complaint above set forth, and further allege that prior to the 7th day of July, 1904, Amanda M. Scales deposited said sum of \$5,729.69 with said defendant, the Mutual Savings Bank of San Francisco, and caused said deposit to be made payable by said defendant to "Amanda M. Scales or Lizzie C. Robinson." "That said Amanda M. Scales so directed and made said deposit payable to 'Amanda M. Scales or Lizzie C. Robinson' for the sole purpose of enabling said Lizzie C. Robinson, as the agent of said Amanda M. Scales, to withdraw moneys from said deposit for the use and benefit of said 'Amanda M. Scales' and as the same might be required by said Amanda M. Scales, or to be paid out by her through said Lizzie C. Robinson (the plaintiff herein) as the agent of said Amanda M. Scales." That prior to the 7th day of July, 1904, said Amanda M. Scales withdrew from said deposit the sum of \$1,359.20, and no more, leaving a balance on deposit with said defendant bank of \$4,370.49. Amanda M. Scales died on the 7th day of July, 1904.

The court found all the allegations of the complaint to be true, and also found "That it is not true that prior to the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant Mutual Savings Bank of San Francisco the sum of \$5,729.69, or any sum." "That it is not true that prior to the 7th day of July, 1904, or at any other time, said Amanda M. Scales withdrew from said deposit the sum of \$1,359.20, or any sum whatever." From the foregoing statement of the contents of the pleadings and of the findings, it is apparent that the plaintiff's complaint was framed upon the theory that all the money deposited was deposited by plaintiff for her own use and from her own money, and that Mrs. Scales deposited none of it, and had no interest therein, and that the court in its findings fully adopted such theory of the facts. No such theory can be sustained upon the facts disclosed by the record before us.

Mrs. Scales, at the opening of the account in question, was upwards of 80 years of age and totally blind. The plaintiff had been in the habit of attending to business for her for several years before the opening of this account. The account was opened on March 10, 1902, by the deposit of a check for \$1,149.05 belonging to Mrs. Scales, and was opened

in the name of "Amanda M. Scales or Lizzie C. Robinson." Every item of deposit belonged to Mrs. Scales at the time of its deposit, as is admitted by plaintiff on the witness stand, save, possibly one, which confessedly also did originally belong to Mrs. Scale. This item will be referred to later. Concerning the opening of the account the plaintiff testified in substance that she obtained a check for Mrs. Scales, payable to her, from Bovee, Toy & Sontagg for \$1,149.05; that Mrs. Scales indorsed the check and plaintiff deposited it in the bank. In answer to the question "For what purpose did Mrs. Scales tell you at that time that she gave you that check?" the plaintiff said, "She wanted to establish a claim there that I could draw against—an account there that I could draw against, and pay bills for her, because she was constantly demanding such services of me, and she said, at the time, she said, 'I want to open this little account, it will be a joint account; whatever is left after I am gone shall be yours.'" She further said that all the other deposits in the account were from Mrs. Scales, and came from rentals of her property and different sources. Upon cross-examination she testified: "When this first deposit was made on the 10th day of March, 1902, Mrs. Scales told me that she wanted me to pay her bills out of the account, and to open that account for the purpose of enabling me conveniently to do that, and whatever remained after she died was to be mine; or that I could draw against it while she lived if I chose to. I never drew against it for any account, except her own, while she lived."

The evidence shows without conflict that plaintiff, acting for Mrs. Scales, for her use and to pay her bills, drew from the account the sum of \$1,359.20. Plaintiff also testified that Mrs. Scales also told her that she might draw from the account for her personal use, but she never did so. The evidence above set forth does not support the finding that the sum of \$5,729.69 was deposited with the bank by plaintiff for her use and benefit in the sense and meaning of the finding. In a legal sense the deposits were made by Mrs. Scales for her use and benefit. The plaintiff was acting simply as the agent of Mrs. Scales, and was depositing the money of Mrs. Scales for her use. For the same reason the evidence does not support the finding of the court: "That it is not true that prior to the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant, Mutual Savings Bank of San Francisco, the sum of \$5,729.69, or any other sum." The money was deposited by Mrs. Scales through her agent, the plaintiff, and likewise, in legal effect, whatever was withdrawn was withdrawn by her through her agent the plaintiff.

The evidence does not show a gift by Mrs. Scales to plaintiff of all the moneys deposit-

ed in the account or of the account itself. Although the deposit was in the names of either, and either could draw therefrom as between themselves and the bank, this does not show a gift to plaintiff, nor constitute a joint tenancy or ownership with a right of survivorship. Mrs. Scales at all times retained the right herself to draw the money. She retained dominion over it. She never delivered the bank book to plaintiff. It at all times remained in the possession of the bank at the convenience of both Mrs. Scales and plaintiff. "A valid gift goes into immediate effect, and has no reference to the future. It divests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift." *Denigan v. Hibernia, etc., Soc.*, 127 Cal. 137, 59 Pac. 389; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35. In both of the above-cited cases money, the separate property of a wife, was deposited in the names of the husband and wife, "and payable to the order of either of them." It was held that the form of the deposit did not indicate any gift to the husband or any joint interest of both parties with a right of survivorship. In the latter case it was held that the rule that joint interests or estates are such as are created by a single will or transfer in equal shares, when expressly declared in the will or transfer to be a joint tenancy, applies to personality as well as to realty. The doctrine of the *Denigan Cases* is supported by the following cases, all of which are reviewed in the second *Denigan Case*: *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Gorman v. Gorman*, 87 Md. 338, 39 Atl. 1038; *Schick v. Grote*, 42 N. J. Eq. 352, 7 Atl. 852; *Noyes v. Newburyport Sav. Inst.*, 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484.

The evidence does not bring this case within the doctrine of *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370, where money was deposited in such a way as to constitute the bank a trustee for plaintiffs, nor within *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645, where the wife, on the order of her husband, actually drew certain money and deposited it in her own name. In no aspect of the case can it be said that the findings attacked are sustained by the evidence, and for this reason the judgment and order must be reversed.

We have not overlooked the testimony given by plaintiff that one item of the deposit was given to her outright by Mrs. Scales for her own use, before the same was deposited. There was a sharp conflict in the evidence on this point, Mr. Leggett testifying to a statement made to him quite inconsistent with the claim that the item in question had been given to plaintiff. In this connection it is well to revert to what was said in *Denigan v. Hibernia, etc., Soc.*, supra: "When the claim of a gift is not asserted

until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."

But whatever the fact may be concerning the claim that this particular item was given to plaintiff, and by her afterwards deposited in the account sued on, the amount of the same is less than the balance sued for and for which judgment was given. If this particular sum of money was therefore the money of plaintiff, and deposited by her for her use in the account, this fact does not sustain the findings as made, nor the judgment rendered.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Delfine Albitre was convicted of murder, and appeals. Affirmed.

R. C. Coleman, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree, and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial. No brief having been filed in support of the appeal, the matter was submitted by the Attorney General upon the transcript, without oral argument, there being no appearance for defendant. The failure of defendant to file a brief or to appear on oral argument constitutes under our law sufficient reason for affirming the judgment and order. Pen. Code, § 1253. We have, however, carefully examined the record. The evidence contained therein amply warranted the verdict, and there is nothing to indicate that any substantial error was committed in the proceedings in the trial court.

The judgment and order are affirmed.

153 Cal. 359

In re MOFFITT'S ESTATE. (S. F. 4,896.)
(Supreme Court of California. April 20, 1908.
Rehearing Denied May 20, 1908.)

1. TAXATION—INHERITANCE TAXES—PROPERTY
LIABLE—WIFE'S SHARE OF COMMUNITY
PROPERTY.

The surviving wife's share of the community property is subject to the inheritance tax imposed by Act March 20, 1905 (St. 1905, p. 341, c. 314), declaring that all property which shall pass by will or by the intestate laws shall be subject to the tax therein prescribed, since the wife takes as heir and not as survivor.

2. STATUTES—CONSTRUCTION—PRESUMPTION
OF KNOWLEDGE OF JUDICIAL DECISIONS.

A statute is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 294.]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

In the matter of the estate of James Moffitt, deceased. From an order and decree of the superior court in probate directing the executors to pay a certain amount as inheritance tax on the widow's interests in the community property, the widow and executors appeal. Affirmed.

Warren Olney, Olney & Olney, for appellants. Snook & Church, for respondent.

153 Cal. 367

PEOPLE v. ALBITRE. (Cr. 1,411.)
(Supreme Court of California. April 20, 1908.)

CRIMINAL LAW—APPEAL—FAILURE TO FILE
BRIEF—EFFECT—AFFIRMANCE.

In a criminal prosecution, the failure of appellant on appeal to file a brief or appear on oral argument constitutes sufficient reason for affirming a judgment and order denying a new trial, under Pen. Code, § 1253.

HENSHAW, J. This is an appeal by the widow and the executors of the will of the deceased from an order and decree made by the superior court of Alameda county in probate, directing the executors to pay to the county treasurer of Alameda county the sum of \$26,684.50 as the inheritance tax upon the interest of the widow in the community property of herself and her deceased husband.

The inheritance tax law of this state, approved March 20, 1905 (St. 1905, p. 341, c. 314), prescribes that "all property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same * * * shall be and is subject to a tax hereinafter provided for." The single question presented by this appeal is whether the surviving wife's share of the community property is subject to this inheritance tax.

It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of *In re Burdick*, 112 Cal. 387, 44 Pac. 734, *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and *Sharp v. Loupe*, 120 Cal. 89, 52 Pac. 134, 586. But it is earnestly contended that this court should overrule these cases to the extent of holding that as to the community property the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife during the existence of the marriage status has always enjoyed an ownership in one-half of the community property; and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it with which the law during his lifetime and during the existence of the marriage status has clothed him. Reference is made to the language of the Civil Code (section 682), which declares that ownership of property by several persons is either (1) of joint interest; (2) of partnership interest; (3) of interests in common; (4) community interest of husband and wife. We are referred also to expressions in some of the earlier decisions of this court, such as the language of *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125, where it is said: "The husband and wife during coverture are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death." All of these Code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *De Godey v. De Godey*, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy,' * * * it is at the same time * * * so vested in her that the hus-

band cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it." After painstaking investigation and review, and after the fullest deliberation, this court in *Re Burdick* determined and held, as it declared in *Spreckels v. Spreckels*, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into, and what a complete disposition was made of them.

It is finally urged that as laws imposing inheritance taxes are subject to strict construction, and that as it could not have been in the legislative mind that by this act they were imposing a tax upon the widow's share of the community property, therefore a construction should be sought which will avoid this harsh result. But a familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. Thus the Legislature is presumed to have enacted it with full knowledge that this court in bank, not once, but repeatedly, had declared that the wife did take her share of the community property upon the death of her husband by succession as his heir. The next and necessary presumption that follows is that the Legislature enacted the inheritance tax law in the light of these decisions and to the end that the widow's share of the community property should bear this tax quite as much as would the portion of the husband's separate estate which might come to her by will or by the laws of succession. In other words, since the Legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject to this tax, it would have made provision that it should be excepted from the operation of the law. If, however, the truth be as counsel urge, that it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts, must find the remedy.

The order and decree appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

153 Cal. 365

In re SIMS' ESTATE. (S. F. 4,883.)

(Supreme Court of California. April 20, 1908.)

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

In the matter of the estate of John Fletcher Sims, deceased. From an order and decree of the superior court in probate directing the executors to pay a certain amount as inheritance tax on the widow's interest in the community property, the widow and executors appeal. Affirmed.

H. M. Wright and Titus, Wright & Creed, for appellants. Snook & Church and U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. This case presents the same question as that in Estate of James Moffitt (this day decided), 95 Pac. 653; namely, whether a surviving wife's share of the community property is subject to the inheritance tax. The decision of the trial court was to the same effect in both cases.

For the reasons given in Estate of Moffitt, the order and decree appealed from are affirmed.

153 Cal. 368

JOHNSON et al. v. WILLIAMS, County Auditor. (Sac. 1,617.)

(Supreme Court of California. April 24, 1908.)

1. COUNTIES—APPLICATION OF GENERAL FUND—HIGHWAYS.

The Legislature has power to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all property of the county, for work on its public roads lying outside of the limits of municipalities within the county, and there is no double taxation of the owners of property within a municipality caused by such an expenditure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 219.]

2. SAME—POWER TO ISSUE BONDS—CONSTRUCTION OF BRIDGES AND HIGHWAYS.

Political Code, § 4088, provides that any county may incur a bonded indebtedness for any purpose for which the board of supervisors are authorized to expend the county funds, or for building or constructing roads, bridges, or highways. *Held*, that a county may issue bonds payable out of taxes to be levied on all property in the county including that in incorporated cities to construct bridges and highways in the county outside the municipalities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 265.]

3. SAME.

Political Code, § 4088, provides that any county may incur a bonded indebtedness for any purpose for which the board of supervisors are herein authorized to expend the county funds, etc. Section 2712 provides that, whenever it appears to the supervisors that any road district is unreasonably burdened by the expense of constructing or by the maintenance and repair of any bridge, they may cause a portion of the cost to be paid out of the general road fund of the county, or by a two-thirds vote of the board of supervisors they may order a portion of the cost to be paid out of the county general fund. *Held* that, where proceedings for the issuance of county bonds for the purpose, among others, of repairing bridges, were ordered and instituted by the unanimous vote of the board, the bonds

could be issued under section 4088, payable by general taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 265.]

4. SAME—CONSTITUTIONAL REQUIREMENT OF SINKING FUND—SUBSTANTIAL COMPLIANCE.

Const. art. 11, § 18, provides that no county indebtedness exceeding the income provided for the year shall be incurred unless provision shall be first made for the collection of an annual tax to pay the interest, and also provision for a sinking fund for the payment of the principal. Political Code, § 4088, contains a like provision, and provides that the supervisors before or at the time of issuing bonds shall provide for the levy of an annual tax sufficient to effect the objects of the provision. A board of supervisors, when making the order prescribing the form of county bonds on October 7, 1907, provided by ordinance for the levying of an annual tax commencing with the general tax levy to be made in September, 1908. The ordinance, which was adopted subsequent to the general tax levy for the year 1907, which by law is required to be made in September of each year, fully complied with the constitutional and statutory requirements as to the principal and all interest falling due after the first half of the year 1908; but the proposed bonds were to bear date December 10, 1907, with interest payable semi-annually, and the first interest coupon on each bond would by its terms be due on June 10, 1908, if the bond had been sold and delivered prior to that date. Consequently the tax to be levied to pay interest would not be available when the first installment of interest became due. *Held*, that the object of the provision was simply to insure provision annually at the time of the general tax levy for the necessary funds to pay interest and principal falling due before the time of the next general levy, and it did not contemplate a levy at any other time, and the procedure of the board was in substantial compliance with the Constitution, though the first payment of interest might be deferred for a short time pending proceedings for the collection of the tax.

McFarland, J., dissenting.

In Bank. Mandamus by Howard K. Johnson and others to compel L. P. Williams, as county auditor of Sacramento county, to attest and sign county bonds. Writ granted.

E. S. Wachhorst, Dist. Atty., W. H. Devlin, and J. B. Devine, for petitioners. H. C. Ross, for respondent.

ANGELLOTTI, J. This is a proceeding instituted in this court to obtain a peremptory writ of mandate requiring the defendant to attest and sign, as auditor of Sacramento county, certain proposed bonds of said county which have been ordered issued by the board of supervisors, after such issuance had been authorized by the electors of the county at a special election held in the manner provided by the Constitution and statutes. The auditor's refusal to perform this official action is based on his claims that the bonds cannot be legally issued, and the matter was submitted for decision upon a demurrer to the petition.

The proposed bonds are of three different kinds: First, bonds to the extent of \$660,000 for the purpose of erecting and constructing a new county courthouse, and in connection therewith a new county jail in the said county of Sacramento; second, bonds to the ex-

tent of \$600,000 for the purpose of building certain specified roads and highways in said county; third, bonds to the extent of \$225,000 for the purpose of building and constructing certain specified bridges in said county, the itemized statement in this behalf describing the work as to some of the bridges to be "repairs."

The city of Sacramento is a municipal corporation existing under a freeholders' charter, and having its corporate boundaries within the boundaries of the county of Sacramento. Under the existing laws applicable to all municipalities it is required to construct and maintain its own streets and bridges without aid from any county fund, and is exempt from certain road taxes by reason of the following provision of section 2 of the highway act of February 28, 1883, viz.: "Provided further, that nothing herein contained shall be deemed to authorize the levy or collection of a road poll tax, or property road tax, within municipalities existing under the laws of this state, wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality. Nor shall any such incorporated city or town be by the supervisors of the county included or embraced in any road district by them established under this act." St. 1883, p. 20, c. 10. The roads and bridges to be constructed and repaired are all outside of the corporate limits of the city of Sacramento. The proposed bonds of the county and the interest thereon are necessarily to be paid from taxes levied by the county on all the property in the county, including that within the corporate limits of said city.

The principal contention of defendant is that the law does not authorize the issuance of county bonds payable from taxes to be levied on all the property of the county, including that situated in incorporated cities and towns, for the purpose of constructing roads, bridges, and highways, or repairing bridges. It is apparent that no constitutional question is presented by this contention. It is undoubtedly within the power of the legislative department to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county, and our statutes show several instances of the exercise of this power, the validity of which has never been challenged. Section 2712, Pol. Code, authorizes a portion of the cost of constructing or maintaining or repairing any bridge or the cost of purchasing a toll road, to be paid under certain circumstances by the supervisors from the county general fund. Subdivision 10 of section 2643 authorizes the cost of waterworks, oil tanks, etc., for the sprinkling of roads and the cost of sprinkling to be charged to such fund. The same subdivision authorizes the expense of a road three miles in

length, the cost of which is too great to be paid out of the road fund to be paid from the general county fund. Section 2647, Pol. Code, contains a similar provision as to one-half of the cost of fences constructed on certain public highways. There is no double taxation caused by such an expenditure to the owners of property within a municipality. What they are thereby caused to pay for the expense of public highways lying outside of the municipality is nothing more than their proportion of such expense as the legislative power deems should be borne by the whole county. The whole matter is purely one of statutory legislation.

Has the Legislature authorized the issuance of county bonds for the purposes under discussion? The proceedings for the issuance of the bonds in question were had under the provisions of section 4088, Pol. Code, enacted March 18, 1907, St. 1907, p. 382, c. 282. That section provides that "any county may incur * * * a bonded indebtedness for any purpose for which the board of supervisors are herein authorized to expend the funds of said county, *or for the purpose of building or constructing roads, bridges, or highways.*" The portion of this provision which we have italicized is new to our law; the corresponding section of the former county government act (section 13, County Government Act 1897; St. 1897, p. 460, c. 277) providing simply that such a bonded indebtedness might be incurred "for any purpose for which the board of supervisors are herein authorized to expend the funds of said county." Under the law last referred to the cases of *Devine v. Board of Supervisors*, 121 Cal. 670, 54 Pac. 262, and *Wright v. Sacramento County* (not officially reported) 54 Pac. 1130, were decided, and it was held therein that the statute did not authorize the issuance of county bonds for the construction of a county highway; the reason given being that the board of supervisors of Sacramento county were not authorized to expend the general fund of the county collected from all parts of the county including municipalities for such purposes. After these decisions the Legislature amended the law on the question by adding the words we have italicized above. It is manifest to us that these words were added for the express purpose of changing the statutes as they had been construed in the *Devine* and *Wright* Cases to the end that county bonds payable by means of a tax levied on all the property of the county, including that within municipalities, might be issued by any county for the purpose of "building or constructing roads, bridges, or highways." This is the plain meaning of the words used without regard to prior decisions on the subject; but, when the legislative action is viewed in the light of those decisions, there is no possible escape from the conclusion that we have stated. It is unimportant that there has been no modification or repeal of section 2 of the act of February 28, 1883, hereinbefore quoted.

That section simply prohibits the inclusion of a municipality within a road district of the county, or the collection therein of the county road poll tax or the property tax for county highway purposes levied annually by the board of supervisors (Pol. Code, §§ 2651-2655), and its provisions are in no way affected by the later enactment. We are satisfied that section 4088 of the Political Code authorizes the issuance of the bonds of Sacramento county for the purpose of building or constructing roads, bridges, and highways therein.

The amendment of 1907 does not in terms authorize the issuance of county bonds for the purpose of "repairing" bridges already constructed. As we have seen, a portion of the \$225,000 issue for bridge purposes was for such repairs, and it is claimed that the rule of the Devine and Wright Cases is applicable thereto. We may assume, without deciding, that the issuance of bonds for "repairs" of bridges is not authorized by the provision for such issuance for the purpose of "building or constructing" bridges. But the section also authorizes such issuance "for any purposes for which the board of supervisors are herein authorized to expend the funds of said county." Section 2712, Pol. Code, provides: "Whenever it appears to the board of supervisors that any road district is or would be unreasonably burdened by the expense of constructing, or by the maintenance and repair of any bridge, * * * they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general road fund of the county, or by vote of two-thirds of the board of supervisors, said board may, in their discretion, order a portion of the cost of construction and repairs of bridges * * * to be paid out of the county general fund as well as the general road fund." By this section the board of supervisors of Sacramento county are authorized to expend money in the general fund of the county, collected from all parts of the county, including municipalities, for repairing bridges, under the circumstances and in the manner provided by the section. The proceedings for the issuance of these bonds were ordered and instituted by the unanimous vote of such board, and this must be taken as a determination by the whole board of the facts authorizing resort to such general fund for the purpose indicated. Under these circumstances the issuance of bonds for repairing bridges was permitted by that part of section 4088 which authorizes the issuance of bonds for any purpose for which the board are authorized to expend the funds of the county.

The only remaining objection is one made to all the bonds, based on the provisions of section 18, art. 11, of the Constitution. This section provides that no indebtedness or liability exceeding the income or revenue provided for the year shall be incurred, "unless before or at the time of incurring such indebtedness provision shall be made for the collec-

tion of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal," etc. The section of the Political Code under which these proceedings were had (section 4088) provides, following the constitutional provision, for the levy of a tax by the board of supervisors "at the time of making the next general tax levy after incurring the indebtedness," and annually thereafter, for the purposes of paying the bonds and interest, "which must not be less than sufficient to pay the interest on said bonds, and such portion of the principal, if any, as is to become due before the time for making the next general tax levy." It further provides: "And the board of supervisors, before or at the time of issuing said bonds by ordinance, shall provide for the levy of an annual tax sufficient to effect the objects of this provision." The petition in this proceeding shows that the board of supervisors did, at the time of making the order prescribing the form of bonds and coupons, etc., October 7, 1907, adopt an ordinance providing for the levying of an annual tax commencing with the general tax levy to be made in September, 1908, sufficient for the purposes stated, as well as for the purpose of paying all interest accruing on such bonds. This ordinance was adopted subsequent to the general tax levy for the year, 1907, which by law is required to be made in the month of September of each year, and the provisions therein for an annual tax fully complied with the requirements of the Constitution and the statute as to the principal, and as to all interest falling due after the first half of the year 1908. But the proposed bonds were to bear date December 10, 1907, with interest payable semiannually, and the first interest coupon on each bond would, by its terms, be due and payable on June 10, 1908, if such bond had been sold and delivered prior to that date. The result would be that the tax to be levied for the purpose of paying interest would not be available at the time the first installment of interest became due. It is upon this fact alone, as we understand it, that the claim of the defendant that the constitutional requirement has not been complied with rests. We are of the opinion, however, that there was a substantial compliance with the requirement of the constitutional provision. The provision was adopted in the light of the rule which has always existed in this state for an annual general tax levy. No levy at any other time than that of the general tax levy was contemplated. The object was simply to insure provision annually, at the time of such general tax levy, for such money as would be necessary to pay interest and principal falling due before the time of the next general tax levy, and to place in the sinking fund for the payment of the principal the amount required by law. That the payment of interest might be deferred for a short time pending proceedings for the collection of

a tax for that purpose already levied, or that the payment of the first installment of the interest on the bonds might be deferred until a general tax levy and collection thereunder, because it fell due prior to the first general tax levy after the incurring of the indebtedness, were not matters being guarded against by the framers of the Constitution. The important thing was that a tax sufficient to pay the interest and principal falling due, and to make up the necessary sinking fund, should be levied and collected annually, and this we are satisfied was all that was intended by the provision under discussion. Under this construction of such provision, the proceedings for the incurring of the indebtedness were in compliance with the constitutional requirement.

This disposes of all the objections made by the defendant to the proposed bonds. It follows that the plaintiff is entitled to the relief sought.

Let the peremptory writ of mandate issue in accord with the prayer of the petition, requiring the defendant forthwith to attest and sign, as auditor of Sacramento county, the bonds and interest coupons therein described, and to do and perform such other acts in the premises as are required of him as such auditor.

We concur: BEATTY, C. J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

I dissent: McFARLAND, J.

153 Cal. 365

QUIST v. MICHAEL et al. (S. F. 4,821.)
(Supreme Court of California. April 20, 1908.)

1. APPEAL—PRACTICE—DISMISSAL.

Where the determination of the question whether a party not served with notice of appeal is an adverse party who should have been served, and whether or not as between the parties actually served a judgment could be rendered without affecting the rights of the party not served, necessitates an examination of the record, such examination will not be made in advance of the hearing on the merits, and a motion to dismiss the appeal for failure to serve the notice will be continued to such hearing.

2. SAME.

Though a case was tried on an agreed statement of facts, with a stipulation waiving findings, the trial court had jurisdiction to entertain a motion for a new trial, and on appeal from its order denying the motion the appellate court acquired jurisdiction to review the trial court's action, and a motion to dismiss the appeal would not lie.

3. SAME—FRIVOLOUS APPEAL.

Where an appeal is properly taken, and the appellate court has acquired jurisdiction, it will not, on a motion to dismiss the appeal, examine the record to determine whether or not the appeal was frivolous and taken merely for vexation and delay, though, if such proves to be the case, respondent's rights will be protected by the imposition of a penalty.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Charles Quist against David B. Michael and others wherein certain of de-

fendants filed cross-complaints. From the judgment and from an order denying their motion for new trial, defendants H. H. Hill and another appeal. Respondents' motion to dismiss the appeal from the judgment ordered to stand over, to be renewed, heard, and decided when the case is presented on its merits, and their motion to dismiss the appeal from the order denied.

McNab & Hirsch, for appellants. Thomas, Pemberton & Thomas, for respondents. Robert Duncan, for cross-complainants.

HENSHAW, J. The appeals in the above entitled case are from the judgment and from the order denying appellants' motion for a new trial. Respondents move to dismiss the appeals, the first upon the ground that Sandman, a defaulting defendant, was not served with notice of the appeal, and is an adverse party, whose rights will be injuriously affected by a reversal or modification of the judgment; the second upon the ground that the case was tried upon an agreed statement of facts, with a stipulation waiving findings, and that, as a motion for a new trial is a request to the court to re-examine an issue of fact, since here the facts are stipulated, an appeal from the court's order refusing to do so is a vain and useless thing.

As to the appeal from the judgment, it is sufficient to say that the determination of the question whether or not defendant Sandman is an adverse party who should have been served, and whether or not, as between the appellants and the respondents actually served, a judgment could be rendered without affecting the rights of Sandman, necessitates an examination of the record. In accordance with the practice of this court in such cases that examination will not be made in advance of the hearing upon the merits, but may be urged at the time of such hearing. *Hibernia S. and L. Soc. v. Behnke*, 118 Cal. 498, 50 Pac. 666; *Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40. It is ordered, therefore, that the motion to dismiss the appeal from the judgment stand over, to be renewed, heard, and decided when the case is presented upon its merits.

As to the motion to dismiss the appeal from the order of the court refusing to grant a new trial, it is manifest that the trial court had jurisdiction to entertain the motion for a new trial, and by appeal from its order this court has acquired jurisdiction to review the action of the trial court. Under these circumstances a motion to dismiss does not lie. If it shall prove, as respondents argue, that the appeal is a vain and useless thing, the result will be an affirmance of the order of the trial court. The appeal having been properly taken, and jurisdiction by this court having been acquired, we will not look into the record to determine the merits of respondents' contention. If it shall appear that the appeal was frivolous and taken merely

for vexation and delay, a respondent's right in such a case will always be adequately protected by the imposition of a penalty.

The motion to dismiss the appeal from the order refusing to grant a new trial is therefore denied.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

7 Cal. App. 634

CHAMBERLAIN v. CHAMBERLAIN et al.
(Civ. 439.)

(Court of Appeal, Third District, California.
March 4, 1908.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—CONVEYANCE OF LAND—"ACTUAL FRAUD."

A person prevailed upon plaintiff to deed his land to her without consideration, falsely pretending that suits were about to be brought which would result in plaintiff's liability for certain indebtedness as a stockholder in a company, and that his land might be taken for the debt, and that she would upon demand reconvey the land which she subsequently refused to do. *Held*, that she was guilty of actual fraud within Civ. Code, § 1572, subds. 1, 4, 5, providing that actual fraud within the meaning of the chapter relating to contracts consists of the suggestion as a fact of that which is not true by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract or a promise made by such a person without any intention to perform it, or any other act fitted to deceive, and under section 2224, providing that one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it, she became an involuntary trustee for plaintiff, in the absence of an affirmative showing that his purpose in conveying the land was unlawful or immoral.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 144-147.

For other definitions, see Words and Phrases, vol. 1, pp. 157, 158.]

2. FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION BETWEEN PARTIES.

Even if plaintiff in making the conveyance was induced by a desire to preserve his property from sequestration by the creditors of his corporation, the grantee could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, and thereby deprive him of any redress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 524-529.]

3. TRUSTS—EVIDENCE TO ESTABLISH.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, evidence *held* sufficient to sustain a finding that plaintiff had requested the reconveyance of the premises.

4. SAME.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, evidence *held* sufficient to sustain a finding that the husband of the transferee had knowledge that she took and held the title in trust.

5. SAME—NOTICE OF TERMS OF TRUST.

Where a wife is a transferee of property held in trust without consideration under an agreement to reconvey on demand, it is not of decisive significance as affecting the right to a

reconveyance that her husband did not have full knowledge of her agreement to reconvey, where he was not a purchaser for value, and the principle of estoppel has no application as in the case of a purchaser or incumbrancer for value in good faith without notice.

6. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a proceeding to have land which had been conveyed without consideration on an agreement to reconvey on demand adjudged to be held in trust, the admission of evidence of defendant's declaration in reference to a former conveyance of the property to him to the effect that if he had the place over again he would not deed it back was of little importance, and not prejudicial.

7. TRUSTS—ACTION TO ESTABLISH—LACHES.

Where defendant was in possession of land which had been conveyed to his wife by plaintiff without consideration, and upon an agreement to reconvey upon demand which had been refused, and defendant had lost nothing by the delay, but had on the contrary benefited by plaintiff's forbearance, the doctrine of laches had no application to the bringing of a suit to enforce a reconveyance.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joel Chamberlain against William M. Chamberlain and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

E. S. Van Meter, H. K. Harris, and D. E. Perkins, for appellant. F. H. Short and A. M. Drew, for respondent.

BURNETT, J. The action was brought to have certain land in Fresno county consisting of 80 acres adjudged to be held in trust for the use and benefit of plaintiff, and to have it conveyed to him in accordance with the terms of the said trust. In 1895 plaintiff conveyed this land to E. J. Chamberlain, the wife of the defendant, William M. Chamberlain, by deed of grant, bargain, and sale, naming \$3,000 as the consideration, though it is admitted that there was in fact no consideration; appellant, however, claiming in his answer that there was a gift of the property to the said E. J. Chamberlain. The parties named, at the time mentioned, for some time prior thereto, and for several years thereafter, resided together on the land in question. Their relations were of a friendly and confidential character. At the same time plaintiff was the owner of certain shares of stock in a corporation known as the Mill Race Ditch Company. This company had become involved in controversies with certain landowners, and suits were pending against the company. Under these circumstances, according to the allegation of the complaint, "on or about the 13th day of April, 1895, the said E. J. Chamberlain, with intent to deceive and defraud this plaintiff, and for the purpose of procuring the legal title to the said premises, did represent, assert, and say to the said plaintiff that certain parties whose true names are to plaintiff unknown were about to commence a suit against the Mill Race Ditch Company for certain indebt-

edness due from the said corporation to the said parties; that the said E. J. Chamberlain did then and there advise the said plaintiff to convey the said premises to her, and did agree then and there that if the said plaintiff would so convey the said premises that she would upon demand reconvey the said premises to the said plaintiff; * * * that each and all of said statements and representations made by the said E. J. Chamberlain to the plaintiff were false and fraudulent, and made with the intent to deceive and defraud the plaintiff."

This averment of the complaint really presents the vital point in the case. It is contended by appellant that plaintiff relied upon such representations at his peril, and that a conveyance in accordance with the said agreement with E. J. Chamberlain would not create a trust enforceable in a court of equity. It is said that: "Unless there was such fraud practiced by E. J. Chamberlain, or such undue influence exercised by her upon the plaintiff in inducing him to convey the land to her as would make her an involuntary trustee, the relation of trustee could not and would not exist. Her verbal promise to hold it in trust would not make her a trustee"—citing section 852 of the Civil Code; *Russ v. Mebius*, 16 Cal. 357; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294.

We understand that respondent agrees with appellant that the case must fail unless the allegations of the complaint and the evidence disclose such fraud or undue influence as to create a constructive trust or one by operation of law, and no fault is found with the authorities cited by appellant, but only with the application of them attempted to be made to the particular facts of this case. The claim is made by respondent in other words that we have here the trust contemplated by subdivision 3 of said section 852 and recognized in said cases cited by appellant. For instance, in the *Russ Case*, supra, it is held that, "where a son conveys real estate to his father, the only consideration being a verbal agreement by the father to make a will and devise to the son certain property and the father dies without having complied with the agreement, the agreement is void, the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property"; and the doctrine is asserted which must be accepted as well settled that, "unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance." The decision in the *Feeney Case* is based upon the ground that there was no actual or constructive fraud. The court says: "For all that appears to the contrary,

Michael Feeney's deed may have been given and received in entire good faith." In the *Hasshagen Case* it is held that, "in order to entitle respondent to recover, it was necessary for her to prove that the trust attempted to be established was created or declared in writing or by operation of law," and that nothing was shown to take the case out of the statute; and, besides, that the original intent and purpose of the grantor conveying the property was to hinder and defraud his creditors, and hence there was the strongest reason for the application of the statute of frauds.

But here the allegation is that certain representations were made by the grantee, that they were false, and made with intent to deceive plaintiff, and that he relied upon the representations and promises and therefore executed the conveyance. The case is thus brought within the terms of section 1572 of the Civil Code providing that: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract. (1) The suggestion, as a fact, of that which is not true by one who does not believe it to be true; * * * (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive." And as to the relation thereafter sustained to the property by the one obtaining such an advantage section 2224 of the Civil Code provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." The only possible objection, then, to the scheme of the complaint lies in the suggestion that it gives rise to the inference that plaintiff's purpose in conveying the property was unlawful or immoral, and hence that he does not come into court with clean hands, and cannot justly invoke the interposition of equity. We think it is sufficient to say that it does not affirmatively appear from the complaint that plaintiff's purpose was to defraud any creditor. The indebtedness of the corporation, it is true, in which he was a stockholder, is alleged as one of the inducements for the conveyance; but we must indulge the presumption that his intention was consistent with a prudential regard for his own interest as well as with the utmost good faith toward his creditors. Especially should this position be taken in view of the importunities of the grantee and the fact that there is no evidence that any creditor was actually defrauded.

Turning to the proceedings of the trial, we find in the testimony of the plaintiff sufficient support for said allegation and the corresponding finding of the court. The plaintiff testified: "She said: 'You better make the ranch over in my name, for the ditch com-

pany was in debt, and they would be liable to come on to it and take the whole ranch, and if I didn't look out I would lose my ranch, and she would make the deed back to me after the indebtedness was settled.' I deeded it to her so that I could have, if the company ever come on to me, that I could have longer time to pay up the indebtedness, but then I never deeded it to put the company out anything." The subsequent conduct of the grantee justifies the inference that she made the statement and promise to the plaintiff with the intent to deceive and mislead him. Hence a case of actual fraud was made out. Again, the age of the plaintiff and the confidence he reposed in the grantee are sufficient in connection with other evidence to justify the charge of constructive fraud. The fact that she was his daughter-in-law is not of itself sufficient to prove the fiduciary relation, but this is an important circumstance, and there is substantial support in the record for the conclusion that she became the involuntary trustee of plaintiff, as she certainly assumed "a relation of personal confidence" with him.

Even conceding that in making the conveyance plaintiff was influenced somewhat by a desire to preserve his property from sequestration by the creditors of the corporation, still giving full credit, as we must, to the evidence favorable to the judgment of the court below, we cannot find in that circumstance alone sufficient reason to disturb the findings. We are bound to accept as true that E. J. Chamberlain importuned plaintiff to convey the property to her upon the assurance that she would reconvey it on demand, that she made the promise with the intent to deceive him, and that he had confidence in her representations and therefore executed the deed. It follows, we think, upon the clearest principles of equity, that she could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, thereby depriving him of any redress for her gross misconduct. The law is more indulgent to human infirmity, and less tolerant of deliberate and obtrusive depravity. A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. For further illustration of the principles herein involved we refer to the following cases: *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Adams v. Lombard*, 80 Cal. 426, 22 Pac. 180; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Hayne v. Hermann*, 97

Cal. 259, 32 Pac. 171; *Crosby v. Clark*, 132 Cal. 1, 63 Pac. 1022; *More v. More*, 133 Cal. 489, 65 Pac. 1044; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Nobles v. Hutton* (Cal. App.) 93 Pac. 289. The views we have thus expressed render it unnecessary to discuss at length the other points made by appellant.

It is claimed that the evidence fails to support that part of finding No. 3 to the effect that plaintiff requested E. J. Chamberlain to reconvey said premises. He so testified substantially when he said: "I wanted my daughter-in-law to make the ranch back to me, and she wouldn't. She turned it off and went away. I think some two or three times I had a talk with her about making it back to me, and she rather put me off, and she wouldn't do it—put me off." The foregoing is obviously sufficient, although the finding itself is immaterial. It would not aid appellant if plaintiff made no demand upon E. J. Chamberlain for a reconveyance.

Again, it is contended that there is insufficient support for the finding that "William Chamberlain had full knowledge of all the facts of the verbal agreement between plaintiff and the said E. J. Chamberlain, and that he knew she took and held the title in trust." William Chamberlain, however, did testify that he knew the circumstances why the deed was made, though denying that he heard anything said about the place being deeded back. But the court was not bound to accept the latter statement. Giving full credit to the testimony of the plaintiff as to the circumstances surrounding the transaction, it would be justified in concluding that the defendant knew that his wife agreed to reconvey. But, again, assuming that the issue is raised by the denial in the answer "that said defendant and William M. Chamberlain on or about the 13th day of April, 1895, or at any other time, had full knowledge of said alleged verbal agreement between plaintiff and said E. J. Chamberlain," it would seem to be without decisive significance in view of the fact that appellant was not a purchaser for value. There is no apparent reason why a voluntary transferee, whether with or without knowledge of the circumstances under which his grantor was clothed with the legal title, should not receive the property charged with the original trust. The principle of estoppel has no application as in case of a purchaser or incumbrancer for value in good faith without notice.

Complaint is made also of the finding that "all the allegations of defendant's answer are untrue." Appellant is right in his contention that the evidence shows an indebtedness of the corporation at the time plaintiff deeded the property to E. J. Chamberlain, but there is testimony that the corporation was perfectly solvent, and there is no showing that any creditor was defrauded. Under the circumstances, if the finding had been that this allegation of the answer is true, the result would not be changed. Even conced-

ing that plaintiff desired to protect his property against seizure by creditors of the corporation, appellant should not be permitted to set this up as a defense, as we have seen, in view of the evidence and finding as to the actual fraud of said E. J. Chamberlain.

Again, it is contended that the court committed error in overruling an objection to the testimony of a witness as to a declaration of appellant in reference to a former conveyance of the property to the effect that if he had the place over again he wouldn't deed it back. This might be some evidence of animus towards the plaintiff, and was probably admissible for that purpose as affecting the credibility of appellant; but if erroneously received it could hardly have been prejudicial, as it is a circumstance of little importance.

Again, it is contended that plaintiff should not have prevailed on account of his long delay in bringing suit, as equity abhors a stale claim, and it is incumbent upon the plaintiff to show facts excusing his delay in asserting the fraud. *Truett v. Onderdonk*, 120 Cal. 581, 53 Pac. 26; *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476; 2 *Pomeroy's Eq. Jur.*, § 817. In the *Truett* Case it is doubtful whether there were any fraudulent acts shown. There was an unexplained delay of 14 years, and it was held that the court below properly exercised its discretion in denying the relief claimed. *Harrington v. Paterson* presents the case of rescission of a contract of purchase, and in accordance with the provisions of the statute it is held that the party who claims to have been defrauded must act promptly after the discovery of the fraud. *Pomeroy* states the conditions under which acquiescence may prevent the right of equitable relief as follows: "The acquiescence must be with knowledge of the wrongful acts themselves and of their injurious consequences. It must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in," and he adds that "it follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances." But there is no reason here for the application of the doctrine of laches. The appellant has lost nothing by plaintiff's delay in bringing the action. It is not a case of rescission, but of forbearance to press a right to demand performance of an agreement, which indulgence has inured to the benefit of appellant, who, longer than he had a right to expect, has enjoyed the bounty of plaintiff.

Upon an examination of the whole record, we find no prejudicial error, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 667

RAISCH v. M. K. & T. OIL CO. et al.
(Civ. 413.)

(Court of Appeal, First District, California.
March 11, 1908.)

1. CORPORATIONS—ASSESSMENTS ON CAPITAL STOCK.

An assessment upon the capital stock of a corporation can be levied by the board of directors only at a regular meeting or at a special meeting regularly called, and the right to levy such an assessment can be legally exercised only in the manner provided by law or by the charter of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 654–656.]

2. SAME—FORFEITURE OF SHARES.

The proceedings by which the stock of a shareholder of a corporation is declared forfeited must be strictly pursued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 396–402.]

3. SAME—DIRECTORS—NOTICE OF MEETINGS.

The law contemplates that the directors of a corporation shall all have notice of each and every meeting. If a meeting is a regular one, the by-laws fix the time and place. If it is an adjourned meeting, they are each in law presumed to know what they have done at a regular meeting, and, if it is a special meeting, notice of the time and place of holding it must be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1292–1300.]

4. SAME—QUORUM—ADJOURNMENT.

Civ. Code, § 308, provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors, that a majority of the directors is a sufficient number to form a board for the transaction of business, and that every decision of a majority of the directors made when duly assembled is valid as a corporate act. Section 305 provides that, unless a quorum is present and acting, no business performed or "act done" is valid as against the corporation. *Held*, that a minority of the board of directors have no power to adjourn the time of holding a regular meeting, and an assessment levied on the capital stock at the adjourned meeting without previous notice to all the directors is void.

5. SAME—ACTIONS BY STOCKHOLDER AGAINST CORPORATION—PLEADING.

In an action by a stockholder and director against the corporation to have an illegal sale of his stock set aside and the stock reissued to him, and to be restored to his rights as a stockholder, it is not necessary for him to allege the value of the stock, or that he has been injured, since it will be assumed that the stock has some value, especially as it entitled the holder to the office of director.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Harry J. Raisch against the M. K. & T. Oil Company and others. Judgment for defendants on demurrer to complaint, and plaintiff appeals. Reversed.

Wal. J. Tuska, for appellant. Wm. R. Davis, for respondents.

COOPER, P. J. The court sustained a demurrer to the plaintiff's second amended complaint, and, upon the plaintiff declining further to amend, judgment was entered for defendant. This appeal is prosecuted from the judgment, and the plaintiff claims that the complaint states facts sufficient to constitute

a cause of action, and that the court erred in sustaining the demurrer thereto.

The facts necessary to an understanding of the question to be decided may be briefly stated as follows: The defendant is a corporation duly organized and having a board of five directors, which, during the times the acts complained of were committed, was composed of this plaintiff, David M. De Long, George D. Metcalf, George Schmidt, and R. A. Jackson. Plaintiff was the owner of 46,900 shares of stock. The by-laws of the corporation provided that the regular meetings of the board of directors should be held on the last Saturday of each month, and that each director should receive a notice, personal or otherwise, of all meetings called for any other time than the regular meeting. On Saturday, April 30, 1904, which was the day of the regular meeting of the directors pursuant to the by-laws, only Metcalf and Jackson were present, and an entry was caused to be made in the minutes as follows: "No quorum. Adjourned to May 7, 1904, at 2 p. m. Attest, R. A. Jackson, Secretary." On said May 7th, at the hour named, Metcalf, Jackson, and Schmidt met in the office of defendant without previous notice, personal or otherwise, of such meeting to plaintiff, or to any other director than the three who were present, and without plaintiff's knowledge or assent levied the assessment of five cents per share on each and every share of the capital stock of the corporation; this being the assessment claimed to be void in this case. Under the said assessment as so made, and not otherwise, the defendant sold the said 46,900 shares of stock belonging to plaintiff, becoming the purchaser itself, and after such sale it refused, and ever since has refused, to recognize the plaintiff as a stockholder or director of the corporation.

The question in the case is as to whether or not the assessment was valid; and this depends upon whether or not the meeting at which the levy was made was a regular meeting. It is not claimed that any special meeting had been called, or that any notice had been given of a special meeting in any manner. An assessment upon the capital stock of a corporation can be levied by a board of directors only at a regular meeting, or at a special meeting regularly called. *Thompson v. Williams*, 76 Cal. 155, 18 Pac. 153, 9 Am. St. Rep. 187; *Harding v. Vandewater*, 40 Cal. 78. The proceedings by which the stock of a stockholder of a corporation is declared forfeited must be strictly pursued. The right to levy an assessment can only be legally exercised in the manner provided by law or by the charter of the corporation. *Ruck v. Caledonia Silver Mining Co.* (Cal. App. filed Sept. 4, 1907) 92 Pac. 194; *H. Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. If a minority of a board of directors can adjourn a regular meeting where no quorum is present to a time and place named, and thus make such adjourned meeting a regular

meeting, then the assessment in question was valid; otherwise not. If Metcalf and Jackson could adjourn the regular meeting of April 30, 1904, to May 7th, and procure Schmidt to be present at that time, thus making a quorum, without notice to the other directors, and then pass a valid order of assessment, every other director could have done the same thing; that is, either one of them could have adjourned the meeting. Of course, if a quorum had been present on April 30, 1904, the regular meeting could have been adjourned to any day and hour, and such adjourned meeting would have been a regular meeting, and not a special one; but no quorum was present, and hence the regular meeting could not be adjourned because there was no regular meeting. The time had arrived for the regular meeting, but only a minority of the directors were present. Such minority could not adjourn the meeting for the simple reason that they had nothing before them but the by-laws fixing the time and place for the regular meeting, and the fact that at such time and place there was no meeting and only two directors being present. The law contemplates that the directors shall all have notice of each and every meeting. If it is the regular meeting the by-laws fix the time and place; if it is an adjourned meeting the directors are each in law presumed to know what they have done at a regular meeting; and, if it is a special meeting, the notice of time and place of holding such meeting must be given. If such were not the rule, and if the meeting could be adjourned (as in this case) without notice, serious injury might result. Some unforeseen reason might prevent a quorum of directors from attending. Two of the directors, with improper motives, might adjourn the meeting for one day, and procure one other director, who might be either not well informed or easily influenced, and with the aid of such third director, and with no notice to the other directors, pass upon matters of grave importance to each and every stockholder.

The Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors; that a majority of the directors is a sufficient number to form a board for the transaction of business; and that every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act. Civ. Code, § 308. It is provided that, "unless a quorum is present and acting, no business performed or act done is valid as against the corporation." Civ. Code, § 305. The adjournment was an act done, and hence, under the express provisions of the Code, it was not a valid act. It is significant in this connection that there is no provision of the Code to which our attention has been called authorizing a meeting of the directors of a corporation to be adjourned by a minority. In the very chapter in which it is provided

that unless a quorum is present and acting no act done is valid as against the corporation we find a provision that, if at a stockholders' meeting there is not present a majority of the subscribed stock or of the members, the meeting may be adjourned from day to day or from time to time, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors. Civ. Code, § 312. Counsel have been unable to cite us to any authority, either in this state or elsewhere, directly in point. We have examined the cases cited, but find nothing to aid us in the solution of the question involved here. We therefore conclude there was no power in the minority of the board of directors to adjourn the time of holding the regular meeting, and that the assessment was levied without authority, and is therefore void.

It was not necessary in this case for the complaint to allege the value of the stock, or that the plaintiff had been injured. We will presume that 46,900 shares of the capital stock of the defendant had some value; at least, it entitled the plaintiff to hold the office of director of the corporation to which he had been elected, and to participate in the meetings of the stockholders. Defendant corporation will not be allowed to acquire the title to plaintiff's entire corporate stock through an illegal sale under a void assessment, and then hold it for the alleged reason that it does not appear to have any value. It is not analogous to a case in which a stockholder is suing for damages for an illegal conversion of his stock. Here the plaintiff is asking to have the illegal sale set aside, 46,900 shares reissued to him; and that he be restored to his rights as a stockholder.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 661

HUBBELL v. HUBBELL. (Civ. 402.)

(Court of Appeal, First District, California.
March 11, 1908. Rehearing Denied by
Supreme Court, May 10, 1908.)

1. DIVORCE — GROUNDS — COMPLAINT — "ESPIONAGE."

Under Code Civ. Proc. § 426, providing that a complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, a complaint in a suit for divorce on the ground of extreme cruelty, which alleges that defendant, since the marriage, has inflicted on plaintiff grievous bodily injury and mental suffering, that continuously during five years preceding the commencement of the suit defendant has maintained over plaintiff an unreasonable espionage, and has manifested unnecessary jealousy of plaintiff, and has repeatedly made to plaintiff false accusations of infidelity, and has taken possession of letters addressed to him by patients, opened the same, and has refused to surrender them, and that defendant instigated a third person to make a violent personal assault on plaintiff, as a result of which plaintiff sustained serious personal injuries, is good as against a general demurrer,

though the objection that the complaint does not show how plaintiff sustained any serious injury from the assault is well taken; "espionage" being defined as the practice of spying or secretly watching for the purpose of detecting wrongdoing, excessive or offensive surveillance.

2. SAME — APPEAL — REVIEW — FINDINGS OF TRIAL COURT.

Whether the evidence in a suit for divorce on the ground of extreme cruelty was sufficient to prove the ultimate facts alleged in the complaint, and whether or not the various acts of defendant caused plaintiff grievous mental suffering, were matters for the trial court.

3. SAME — PLEADING — COMPLAINT.

In a suit for divorce, either on the ground of habitual intemperance or on the ground of extreme cruelty, both being defined by the Code, the complaint must allege the ultimate facts, but need not allege the evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 293.]

4. PLEADING — CONCLUSIONS.

In a suit for divorce on the ground of extreme cruelty, the acts and conduct relied on must be stated, and not conclusions of law.

5. APPEAL — HARMLESS ERROR — ERRONEOUS ADMISSIONS OF EVIDENCE.

Where, in a suit for divorce tried by the court, the uncontradicted evidence showed that a third person had assaulted plaintiff, who sought to show that the assault had been instigated by defendant, error in permitting a physician to testify to a statement made to him by plaintiff, to the effect that plaintiff had been attacked by the third person, and that plaintiff had received injuries, was not prejudicial to defendant.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action for divorce by G. R. Hubbell against Harriet H. Hubbell. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. Martin Stevens, for respondent.

COOPER, P. J. This action was brought to procure a divorce on the ground of extreme cruelty. After a trial lasting three days, the court filed its findings and conclusions of law, upon which judgment was entered for plaintiff as prayed. This appeal is from the judgment and the order denying defendant's motion for a new trial. No question is raised as to the sufficiency of the evidence to justify the findings, nor is there any question to the property rights or the custody of children.

The principal point relied upon by appellant is the contention that the complaint does not state facts sufficient to constitute a cause of action. It is claimed that the complaint does not state with sufficient particularity and certainty the facts relied upon as constituting extreme cruelty. The complaint alleges as follows: "That since their intermarriage defendant has inflicted upon plaintiff grievous bodily injury and grievous mental suffering, and more particularly as follows: That continuously during the five years last past, and immediately next preceding the commencement of this action, defendant has exercised and maintained over plaintiff and his affairs

an unreasonable espionage, and has manifested an improper, unreasonable, and unnecessary jealousy of and concerning plaintiff, and has repeatedly made to plaintiff false accusations of infidelity, well knowing her charges to be false, and has spied upon him in an offensive manner, and pried into his private affairs, and has taken possession of letters addressed to him by patients, opened the same, read them, and refused to surrender them to plaintiff, who was during all of said times and now is a physician and surgeon engaged in the practice of his profession in the city and county of San Francisco. That on the 14th day of July, 1904, at the residence of plaintiff and defendant in the city and county of San Francisco, defendant instigated one Hinckley, her son-in-law, to make a violent personal assault upon plaintiff, as a result of which plaintiff sustained serious personal injury." The defendant demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, and upon the special ground that it is uncertain, in this: "That it does not appear therefrom how the plaintiff sustained any serious personal injury from an assault." The demurrer also alleged that the complaint is ambiguous for the reason last stated, and, further, that it is unintelligible for the same reason.

It will thus be seen that the demurrer is general except as to that part of the complaint relating to the assault. As to such part, the objection is that it is not made clear how the plaintiff could have sustained "serious personal injury from an assault." It may be admitted that the complaint does not show how the violent assault could have resulted in serious personal injury, but, if the personal injury portion be eliminated, we still have the clear statement that at the time and place named the defendant instigated Hinckley to make a violent person assault upon the plaintiff. If such an assault did not or could not have caused serious personal injury, still it could have been one of the factors in causing the plaintiff grievous mental suffering, and the complaint states that the defendant has inflicted upon plaintiff grievous mental suffering by all the means stated in the complaint. As to the portion of the complaint to which the general demurrer was pointed, while it is not a model of pleading, we conclude that it is sufficient, at least when tested by general demurrer. It is alleged that defendant has for the five years last past exercised over plaintiff and his affairs an unreasonable espionage. Espionage is defined as "the practice of spying or secretly watching for the purpose of detecting wrongdoing; excessive or offensive surveillance." Standard Dictionary. It may be reasonably inferred that, if a wife has continuously and unreasonably for five years spied upon and secretly watched her husband, it would probably cause him grievous mental suffering, and it is alleged in the com-

plaint that it did cause him such mental suffering. It is further alleged that during all such times defendant has manifested an improper, unnecessary, and unreasonable jealousy of and concerning plaintiff. This language is such that a person of ordinary understanding would know what is intended, and the same may be said as to the "false accusations of infidelity." These accusations are alleged to have been made to plaintiff, and we will not presume that for a wife to falsely accuse her husband of infidelity, and this repeatedly and without cause, would not cause him grievous mental suffering. It is further alleged "that defendant has taken possession of letters addressed to him by patients, opened the same, and refused to surrender them to plaintiff." We do not think it was necessary to state the date of the letters, whom they were written by, or their contents; and, while a pleading should state facts, it is not required that it should state evidence. The ultimate facts must be stated in such manner as to apprise the opposite party of what is relied upon. As to whether the evidence was sufficient to prove the ultimate facts, and as to whether or not the various acts and conduct of defendant caused plaintiff grievous mental suffering, were matters for the trial court. Under our system the complaint is only required to state the facts constituting the cause of action in ordinary and concise language. Code Civ. Proc. § 426. In *Smith v. Smith*, 124 Cal. 651, 57 Pac. 573, it is said: "Grievous bodily injury, or grievous mental suffering, is the ultimate fact, and should be alleged. There is no attempt whatever to allege bodily injury, and the probative facts alleged in no degree establish grievous mental suffering." In *Forney v. Forney*, 80 Cal. 528, 22 Pac. 294, the action was brought on the ground of habitual intemperance. The complaint alleged "that for four years and eight months last past said defendant has been and still is guilty of habitual intemperance from the use of intoxicating drinks, to that degree that the intemperance of defendant reasonably inflicts a course of great mental anguish upon said plaintiff." It was claimed that the complaint was insufficient, in that it did not state facts, but conclusions of law. The court, however, held the complaint sufficient, and that it was not necessary to state how often the defendant was intoxicated, to what extent, and upon what occasions, or what he said or did when so intoxicated to cause mental anguish. In *Reading v. Reading*, 96 Cal. 4, 30 Pac. 803, it was held that it was not necessary to set out the particular acts of intemperance in an action for divorce upon such ground. As the Code makes habitual intemperance a ground for divorce, so it makes "extreme cruelty." It defines habitual intemperance, and so it defines extreme cruelty. In neither case is it necessary to set forth all the evidence, but the ultimate facts must be alleged. Of course, in an action for divorce on the ground

of extreme cruelty, the acts or conduct relied upon must be stated, and not conclusions of law. Appellant calls our attention to *Franklin v. Franklin*, 140 Cal. 607, 74 Pac. 155. That case was reversed on account of the insufficiency of the findings. The allegations of cruelty were "that shortly after their marriage, and for a period of nearly 10 years, defendant was abusive to plaintiff, neglected her, failed to provide for her, and compelled her to perform hard and unaccustomed labor to support herself and her minor children, while he spent his time in idleness and dissipation." The question as to the sufficiency of the facts stated in the pleading was not discussed.

It is claimed that it was error to allow the witness Dr. Hirschfelder to testify as to a statement made to him by plaintiff, to the effect that he had been attacked by Hinckley, the son-in-law of defendant, and in a personal encounter with said Hinckley that he had received an injury upon his knee. The statement made by plaintiff was purely hearsay, and should not have been admitted, but we do not think the ruling of sufficient importance to justify a reversal of the case. The fight with Hinckley was given in detail by the plaintiff as a witness in his own behalf, and by Hinckley, a witness for defendant, and also by defendant as a witness in her own behalf. There was no conflict as to the fact that an encounter of a violent nature had occurred between plaintiff and Hinckley, and that plaintiff was injured in the fight. The case was tried before the court, and we are of the opinion that the ruling did not injure the defendant. The same may be said as to the refusal of the court to strike out the statement of the plaintiff, as a witness in his own behalf, as to Mrs. Baum denying to him that she had made a remark that defendant had told plaintiff had been made. Whether or not Mrs. Baum made the remark was immaterial.

We have examined the many exceptions to rulings on the admission of evidence grouped under one heading in appellant's brief, but find nothing that would in our opinion justify a reversal of the case. The evidence admitted related to some transactions not set forth in the complaint; but, as we have before stated, the plaintiff was not required to plead minutely each and every detail of the evidence. The evidence was conflicting, but in our opinion amply sufficient to sustain the findings of the court. In fact, the defendant, by her own testimony, shows many little acts tending to establish jealousy on her part, and other acts of improper interference with the plaintiff and his business. She admitted that she opened plaintiff's letters, and she exhibited some of them in evidence. She admits that she upbraided plaintiff at times, and that at least upon one occasion she called him a coward, and that upon another occasion she threw down and broke a stein that belonged to plaintiff and had been painted

for him by some one, but that he did not tell her who had given it to him. It is evident that the trial court, after hearing the evidence, and seeing the witnesses, concluded that defendant was at fault, and that the parties could not longer safely live together as husband and wife.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 656

PEOPLE v. CAULFIELD. (Cr. 112.)

(Court of Appeal, First District, California.
March 11, 1908. Rehearing Denied by
Supreme Court May 10, 1908.)

1. RAPE—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to support a conviction of rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 71-77.]

2. CRIMINAL LAW—APPEAL—REVIEW—QUESTIONS OF FACT.

Where there is evidence to support a conviction, a question of law cannot arise as to the propriety of the conviction on the evidence within the jurisdiction of an appellate court, as declared by Const. art. 6, § 4, providing that jurisdiction in criminal cases shall extend to questions of law alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

John F. Caulfield was convicted of rape, and from the judgment and an order denying a new trial he appeals. Affirmed.

Frank McGowan and Elmer Westlake, for appellant. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was convicted of the crime of rape, and sentenced to the penitentiary for 10 years. He appeals from the judgment and from an order denying his motion for a new trial.

The chief point relied upon by appellant, and the only one that merits serious consideration, is the claim that the evidence is insufficient to justify or sustain the verdict. In this behalf our attention is directed to a line of cases in this state which hold that in cases of this character the testimony of the complainant alone, if inherently improbable and uncorroborated, will not support a conviction. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371. In those cases the evidence was so improbable as to warrant the conclusion that the verdicts were the result of passion or prejudice. In our judgment, however, the facts of this case do not bring it within the rule laid down in those cases. Here the testimony of the prosecutrix is neither improbable nor uncorroborated. Much of the evidence is of such a character that we cannot with propriety repeat it in this opinion, but that part of it tending to

support the verdict of the jury is as follows: The prosecutrix testified that on September 20, 1906, between 5 and 6 o'clock in the evening, the defendant, accompanied by four other men, entered her room in a lodging house at 3377 Mission street, San Francisco; that on entering the room defendant grabbed her by her arms and threw her upon the bed; that she screamed, whereupon defendant choked her, saying, "If you holler again I'll choke your wind off, you damn bitch;" that the men took all her clothes off with the exception of a small undershirt, and that while she was being held each of the five men, including the defendant, had sexual intercourse with her. Her testimony further shows that while Scobie, one of the men who accompanied defendant to the room, was engaged in an act of sexual intercourse with her, she again screamed and called for help, that some one slipped his hand over her mouth, and that she could not cry out again. She further testified that as the result of her resistance her throat was bruised and showed finger marks; that the same was true of her wrist; that her left eye was discolored; that her legs were scratched and bruised.

Her testimony was corroborated by two police officers as to her physical appearance and condition, and as to the fact that defendant and others were there. The latter fact defendant admitted, but claimed that he had been there but a short time when the officers arrived. When the officers entered her room, which was at about half past 1 o'clock in the morning, she exclaimed, "Thank God, you have come to my aid," and complained, "These men have ravished me, outraged me brutally." The defendant and his associates made no reply to this charge. When the officers entered the room the defendant was on the bed, clad only in his pants and shirt, and others of the men present had on even less.

The testimony of the prosecuting witness was thus not corroborated; and while, when read as a whole, it has its contradictions, inconsistencies, and statements hard to credit, it cannot be said to be inherently improbable. As it was corroborated and not incredible, it follows that the case does not fall within the rule laid down in the cases cited by appellant and to which reference has already been made. In short, there is evidence to support the verdict of the jury, and we cannot therefore say, as a matter of law, that the verdict should be set aside. By the Constitution appellate jurisdiction is conferred upon this court in criminal cases in questions of law alone. Consequently, when there is evidence to sustain the verdict a question of law cannot arise. *People v. Kuches*, 120 Cal. 569, 52 Pac. 1002; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018; *People v. White* (Cal. App.) 90 Pac. 471.

In the case of *People v. Kuches*, supra, the court said: "This court has appellate juris-

diction on questions of law alone (Const. art. 6, § 4), and the propriety of a conviction on the evidence before the jury becomes a question of law within the competence of this court only when there is a clear failure of proof. *People v. Smallman*, 55 Cal. 185."

On the same subject it is said in *People v. Logan*, supra: "It is claimed that the evidence is too weak to support the verdict of the jury. If the evidence of the prosecuting witness be true, the verdict has full support therein, and its truth or falsity was a matter essentially for the jury's consideration. In criminal cases this court's appellate jurisdiction is limited to matters of law alone, and the truth or falsity of a witness' statement is essentially a matter of fact. It is possible that evidence might come before this court so incredible, so inherently improbable, so stamped with falsehood upon its face, that the court would deal with it as presenting a matter of law; but such a case would be a most exceptional one, and it is not presented by the record, although it may be said that the circumstances and conditions enveloping and forming the *res gestæ* of this particular offense are unusual and not entirely convincing."

We perceive no other matter requiring consideration, and for the reasons stated above the judgment and order are affirmed.

We concur: COOPER, P. J., HALL, J.

7 Cal. App. 659

PEOPLE v. SCOBIE. (Cr. 113.)

(Court of Appeal, First District, California. March 11, 1908. Rehearing Denied April 8, 1908; Denied by Supreme Court May 10, 1908.)

CRIMINAL LAW — APPEAL — REVIEW — CONSIDERATION OF MATTERS OUTSIDE OF RECORD.

On a claim that the evidence is insufficient to support a conviction, evidence taken on the hearing of a motion to place defendant on probation, and not a part of the evidence in the case, cannot be considered by the Court of Appeal.

Appeal from Superior Court, of City and County of San Francisco; Carroll Cook, Judge.

Gustave Henry Scobie was convicted of rape, and from the judgment and an order denying a new trial, he appeals. Affirmed.

H. C. and Oliver Dibble, for appellant. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of rape, and was sentenced to a term of five years at San Quentin. He appeals from the judgment and from the order denying his motion for a new trial. The sole question presented is the sufficiency of the evidence to support the verdict.

This is a companion case to that of *People v. Caulfield* (Cr. 112, this day decided) 95 Pac. 666. The charges in both cases sprang out of the same transaction, and in the two

cases the evidence is substantially the same, except that here there was direct proof that the prosecutrix was a woman of loose character, and also stronger evidence that she was addicted to drink. For a statement of this case reference is made to *People v. Caulfield*, supra. The evidence in this case makes a little stronger defense than was presented by the evidence in the *Caulfield Case*, but after all the record in both cases presented a question of fact for the jury.

Counsel for the appellant, in their brief and in the oral argument, referred to testimony which shows that the prosecutrix died of alcoholism, and that before she died she made statements contradictory of her testimony as to the time appellant with his companions came to her room, and as to the rape itself. Appellant and one Mary McCarthy and one Nettie Richardson all state that she said that Scobie did not rape her. This evidence, however, was taken on the hearing of a motion to place appellant on probation, and is not part of the evidence in the case, and therefore cannot be considered by this court. It may not be out of place, however, to state that the trial court acted upon this showing, and placed appellant on probation; but a few days thereafter, on appellant being brought before the court for a violation of the terms of such probation, he was sentenced to a term of five years in the penitentiary.

For the reasons stated in the case of *People v. Caulfield*, supra, and upon the authorities there cited, the judgment and order in this case are affirmed.

We concur: COOPER, P. J.; HALL, J.

(7 Cal. App. 649)

BLACKBURN v. BUCKSPORT & E. R. R. CO. et al. (Civ. 434.)

(Court of Appeal, Third District, California. March 5, 1908.)

1. APPEARANCE—EFFECT.

Under Code Civ. Proc. § 416, providing that the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him, where, in an action against certain named defendants and unknown claimants to quiet title, a claimant voluntarily appears and moves to set aside a default against him as an unknown defendant, which motion was by consent of counsel sustained, and a cross-complaint was filed, the voluntary appearance obviated the necessity of serving the summons, and the jurisdiction of the court on that ground cannot afterwards be questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 103–153.]

2. QUIETING TITLE—NOTICE OF LIS PENDENS—STATUTORY PROVISIONS—NECESSITY TO JURISDICTION.

The filing of a notice of the pendency of an action to quiet title with the county recorder is not necessary to invest the court with jurisdiction of the subject-matter of the suit, notwithstanding Code Civ. Proc. § 749, requiring the plaintiff in such action to file in the office of the county recorder of the county where the property is situated, the complaint, within 10 days after filing a notice of the pendency of the ac-

tion, containing the names of the parties, with the object of the action, and the description of the property, etc., and where a claimant appears as defendant, and has the default against him as an unknown claimant set aside, and files a cross-complaint, he is not prejudiced by failure to file a lis pendens, the only effect of which omission could be to release innocent third parties from the operation of a judgment affecting the title or right of possession of the land in dispute.

3. SAME—PARTIES—COMPLAINT—SUFFICIENCY—STATUTORY PROVISIONS.

Code Civ. Proc. § 749, providing that, in actions to quiet title, the complaint may include as defendants, in addition to such persons as appear of record, all other persons who are known to plaintiff to have some adverse claim or cloud on the land described, or other persons unknown, claiming any right, etc., does not require a plaintiff to examine the public records and name as defendants all persons having an interest in the land in controversy, in derogation of plaintiff's title, and failure to include such persons as defendants does not render the complaint insufficient to state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 64–66.]

4. PARTIES—UNKNOWN PARTIES—PLEADING—FICTITIOUS DESIGNATION OF DEFENDANT—STATUTORY PROVISIONS—NECESSITY FOR AMENDMENT—EFFECT OF CROSS-COMPLAINT.

Code Civ. Proc. § 474, provides that, when plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and, when his true name is discovered, the pleading or proceeding must be amended accordingly. *Held* that, where a defendant sued by a fictitious name in an action to quiet title appears, answers the complaint, and files a cross-complaint seeking affirmative relief, failure to substitute the true name of the defendant will not authorize reversal; for, even if substitution is necessary at all under such circumstances, the court on appeal may direct the amendment of the complaint by the substitution of the name of the real parties as of a date prior to the judgment; the object of the requirement as to substitution of the true name of the party to bind him by the judgment.

5. ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY.

In an action to quiet title, evidence held sufficient to sustain a finding of adverse possession.

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Mary Blackburn, also known as Mary T. Blackburn, against the Bucksport & Elk River Railroad Company, a corporation, and others, in which C. W. Hill appears as the defendant, and files a cross-complaint. From a judgment for plaintiff, C. W. Hill appeals. Affirmed, with directions as to amendment of complaint.

H. L. Ford and J. S. Burnell, for appellant. Coonan & Kehoe and G. D. Murry, for respondent.

HART, J. This is a suit to quiet title to certain real property situated in Humboldt county, and was brought against the Bucksport & Elk River Railroad Company and certain fictitiously designated defendants, and "all other persons unknown, claiming any right, title, estate, lien or interest in

the" said real property adverse to plaintiff's title thereto. The suit was instituted under the provisions of sections 749, 750, and 751 of the Code of Civil Procedure. Summons was duly served upon the corporation, and as to the other defendants the summons was published, under an order of the court, in a newspaper printed and published daily in the city of Eureka, in said Humboldt county. The railroad company appeared and answered the complaint, and, there being no appearance by or on behalf of the fictitious defendants or of any "unknown persons" claiming any interest in the property adversely to plaintiff, a default was entered against them. Subsequently the appellant appeared and moved the court to set aside the default as to him, so that he might be permitted to answer the complaint. By consent of counsel the default against the appellant was set aside, and he thereupon answered the complaint and also filed a cross-complaint, to which answers were interposed by the plaintiff and the railroad company, respectively. Upon the issues of fact thus made up the cause was tried and the plaintiff obtained judgment, from which, upon a bill of exceptions, this appeal is taken.

The only point presented and discussed in the briefs of counsel and upon which the appellant insists upon a reversal of the judgment involves the question of whether the court acquired jurisdiction of the action and of the person of the appellant. The claim is that the summons does not contain all the matters required by the Code provisions to be set forth therein; that the affidavit upon which the court ordered the publication of the summons is insufficient; that the affidavit of the publication of the summons, being made by one Smith, who designated himself as the "Manager" of the newspaper in which the summons was published, is not made by the person required by the law to make such affidavit; that there is nothing in the record showing that a *lis pendens* was filed in the office of the county recorder, as required by sections 409 and 749 of the Code of Civil Procedure. There is, in fact, no objection which could be urged against the sufficiency of the steps essential, under the statute, to give the court jurisdiction of the action which has been overlooked by counsel for the appellant. But we think appellant has no conceivable reason to complain here that the court was without jurisdiction to try the action and determine the issues involved therein as to him, even if we assume that his contention as to the alleged defectiveness of the summons and the service thereof be well founded. The record, as we have seen, shows that the appellant, after default had been entered against him as one of the "unknown defendants" and the same had been, on his motion and by consent of counsel for respondent, vacated, answered the complaint and filed a cross-complaint. The trial was proceeded with without objection upon his

part that the court was without jurisdiction either of the action or of his person. It is immaterial so far as he is concerned whether the summons was regularly issued or defective, in that there were omitted therefrom certain matters required by the statute to be embraced therein, or was not, for any reason, properly served and returned. And it is equally as immaterial, so far as he may be affected thereby, whether or not a *lis pendens* was recorded. He voluntarily made an appearance in the action, and under the law of this state "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." Code Civ. Proc. § 416; *Hibernia Sav. & Loan Soc. v. Cochran*, 141 Cal. 654, 75 Pac. 315; *Hibernia S. & L. Soc. v. Lewis*, 117 Cal. 581, 47 Pac. 602, 49 Pac. 714. In the last-named case the court says: "When defendant William F. Lewis appeared, demurred to the complaint, and filed an answer thereto, the court acquired jurisdiction of his person itself, and whether there was or was not a valid summons in the case was of no moment." The fact that the appellant here appeared and moved to set aside the default, so far as it affected him, against the "unknown defendants," of whom he was one, and the further fact that, the default having been set aside, he not only answered the complaint, but also sought affirmative relief through a cross-complaint, indubitably bear witness to the fact that in some way or by some means he received notice of the institution of the suit, and that he has had "his day in court," and most assuredly it is immaterial now how he obtained such notice. If he were the only defendant, and had, before summons was issued or served upon him, having received actual notice of the filing of the action, appeared by way of answer or otherwise, he certainly could not complain, after judgment against him, because the summons had not been issued and served upon him, or, if issued, because it did not contain all the matters that the statute requires shall be set out therein to make it a valid summons. His voluntary appearance manifestly obviated the necessity of serving the summons, the sole purpose of which is to notify the defendant of the institution of the action, and in general terms, of the nature thereof.

And the question of whether or not a *lis pendens* was filed for recordation with the county recorder is, as to the appellant, of no significance. The record does not show that such notice was so filed, although the respondent's brief declares that a *lis pendens* was recorded. But, as we have suggested, even if there was a failure to file a *lis pendens*, the appellant could not be prejudiced thereby, for the only effect of an omission to so record such notice would be to relieve innocent third parties (purchasers or incumbrancers) from the operation of a judgment affecting the "title or right of possession" of the land in dispute. We know of nothing

which would have prevented the appellant himself, after filing his cross-complaint asking for affirmative relief, from filing a lis pendens, or notice of the pendency of the action. Section 409, Code Civ. Proc. But, as we have before stated, it is unimportant whether a lis pendens was or was not recorded, so far as this appellant is concerned. He voluntarily submitted himself to the jurisdiction of the court in the case, and we do not think, as we have already indicated, that the mere omission to file for record the notice of the pendency of the action affects the question of the court's jurisdiction of the subject-matter of the litigation. In other words, we do not think, as counsel's argument upon this point necessarily assumes, that the filing of the notice of the pendency of the action with the county recorder is an essential prerequisite to investing the court with jurisdiction of the subject-matter of a suit in which the recordation of such a notice is required. A lis pendens, or the filing for record with the recorder a notice of the pendency of a suit involving the title to or right of possession of real property, is the mode substituted by the Legislature for the constructive notice to all the world of the pendency of such an action which formerly arose ipso facto upon the institution of the suit. Thus "a purchaser or incumbrancer of property, instead of being required to examine all the suits pending in the courts to ascertain whether any of them relate to or affect the real estate he is negotiating about, has now only to examine the notices of lis pendens filed in the recorder's office of the county where the real estate is situated." Sampson v. Ohleyer, 22 Cal. 211. The purpose of the Legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action and thereby warning them against attempting to acquire a legal or equitable interest in the property concerning which the suit was brought and to bind such persons as might acquire any interest in the property in controversy after the recording of the notice by any judgment which might be secured affecting said property. This is all that the Legislature intended by the present mode of giving constructive notice of the pendency of such actions, and the legislation does not, as we before observed, nor was it intended that it should, affect in the slightest degree the question of the court's jurisdiction of the subject-matter of the suit or of the persons of the parties thereto.

The appellant makes the further point that the complaint does not state a cause of action because it omits to include as defendants "all persons as appear of record to have * * * some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership." Section 749 of the Code of Civil Procedure provides that the complaint may include as defendants such persons, and the appellant seems to think that it was

therefore the duty of the plaintiff to have examined the public records and named as defendants all persons having an interest in the land in controversy in derogation of plaintiff's title. We think the claim is destitute of merit. *Irving v. Carpentier*, 70 Cal. 23, 11 Pac. 391. Under our law, it is true, when the defendant is ignorant of the name of a defendant, he must state that fact in the complaint (the complaint here contains such allegation), and such defendant may be designated in any pleading or proceeding by any name, and, when his true name is discovered the pleading or proceeding must be amended accordingly. Section 474, Code Civ. Proc. But it has been held that in a case where parties are so sued by fictitious names, and appear and answer by their true names, and there is an omission to amend the complaint by substituting the true for the fictitious names, the cause will not be reversed, but the judgment on appeal will direct the lower court to amend the complaint as of date prior to the judgment, in order to support the judgment. *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766; *Baldwin v. Bornheimer*, 48 Cal. 434; *McKinlay v. Tuttle*, 42 Cal. 572. We are not prepared to say that in a case like this, where one of the parties sued by a fictitious name appears, and not only answers the complaint, but also files a cross-complaint in which he seeks affirmative relief, it is absolutely necessary to substitute the true name of the party in the complaint in support of the judgment. The object of the requirement of the statute that the complaint must be amended by inserting therein the true name of a party who has been fictitiously designated as one of the defendants, when such true name has been discovered, is to bind such person by the judgment. In other words, "it is requisite that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleading of the party in whose favor it was rendered." *McKinlay v. Tuttle*, supra. The cross-complaint contains the name of the plaintiff as an adversary party, and alleges that "the above-named plaintiff and defendants claim to have some right, title, estate," etc., in the real property described in the cross-complaint (and likewise in the complaint) adverse to the title and ownership of the cross-complainant. The answer of plaintiff to the cross-complaint denies that the cross-complainant is the owner of the property in question, and prays that "she be dismissed therefrom with her costs and such other and further relief as to this court may seem meet and equitable in the premises." Thus it seems reasonable, even if the complaint be disregarded, that the cross-complaint and answer of respondent thereto present a direct issue between the parties to this appeal as to the ownership of the land affected by the judgment, and that such judg-

ment is "warranted by the allegations of the pleading (answer to cross-complaint) of the party in whose favor it was rendered." However, we see no harm in directing, and perhaps it may be the better practice under the circumstances to so order, the court below to cause the complaint to be amended in the respect here referred to.

Among the assignments of error in the record is the claim that the court's findings upon the material points in the case are not sufficiently supported by the evidence. No special reference is, however, made to this point in the briefs of counsel. But there is no substantial ground upon which to found the claim. The plaintiff sets up title by adverse possession. There is evidence showing that she had been in possession of the land in dispute for over 30 consecutive years prior to the commencement of the action; that during nearly, if not quite all of said period, she had the property inclosed by a fence, had paid all the taxes assessed thereon for all those years, and had otherwise exercised acts of ownership thereof. The defendant established a record title; but the court's finding of title by adverse possession in the plaintiff is well supported by the proofs, and cannot be disturbed by this court.

The judgment is affirmed, with directions to the court below to amend the complaint or cause the same to be amended, as of date prior to the judgment entered the 19th day of August, 1905, in said court, by the insertion of the name of C. W. Hill as a party defendant.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 679

BERRYMAN v. GIBSON. (Civ. 426.)

(Court of Appeal, First District, California.
March 12, 1908. Rehearing Denied by
Supreme Court May 11, 1908.)

1. APPEAL—SCOPE OF REVIEW—APPEAL ON JUDGMENT ROLL ALONE.

Where an appeal is prosecuted from a judgment on the judgment roll alone, neither the sufficiency of evidence to support the findings, nor the rulings of the court in the admission or exclusion of evidence, can be considered.

2. LANDLORD AND TENANT — NOTICE OF CHANGE OF RENT—SUFFICIENCY.

A notice of increase in the amount of rent on a monthly tenancy is not insufficient merely because it announces that the rent after a certain date will be \$150 per month, instead of the sum of \$40, "as heretofore paid," even if the rent under a prior oral lease was \$35 per month; for, as the tenant knew the amount of rent theretofore paid, an error in the statement did not tend to mislead or injure him, and he was informed that the terms of his lease were to be changed so that the rent would be \$150 per month, which was the object of the notice.

3. APPEAL—REVIEW—PRESUMPTIONS — REGULARITY OF JUDGMENT.

Where there was nothing in the record to show that the rent of premises alleged to have been unlawfully detained by the tenant had not been \$40 per month prior to an increase thereof, instead of \$35, as stated in the complaint, it will

be presumed in favor of the regularity of the judgment that the complaint erroneously stated the amount, and that it was shown or stipulated on the trial that it was \$40 per month.

4. LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—SUFFICIENCY.

Under Code Civ. Proc. § 1161, providing that a tenant is guilty of unlawful detainer when he continues in possession after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, it is not necessary to notify the tenant that he has three days' time in which to pay the rent, for the statute fixes the period, and must be read in connection with the notice; and, while an action of unlawful detainer cannot be maintained until three days after the notice is given, the notice need not be in any particular form, and if it states the thing required by the section in plain language, so that a person of ordinary understanding would know what is intended, it is sufficient.

5. SAME—COMPLAINT—SUFFICIENCY—RIGHT OF PLAINTIFF—LEASE FROM OWNER.

In an action of unlawful detainer brought by one holding a lease from the owner of the premises, it is not necessary to set forth the contents of such lease in the complaint, and, while it is incumbent upon plaintiff to show that he is the successor in interest of the owner, it is sufficient if he states that the owner has executed and delivered to him a written lease of the premises for a term covering the period in question.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by F. M. Berryman against A. Gibson. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrew Thorne, for appellant. H. Jones, for appellee.

COOPER, P. J. This is an action of unlawful detainer. The case was tried before the court, and findings were filed, in which judgment was directed to be entered for plaintiff. The defendant prosecutes this appeal from the judgment on the judgment roll alone.

In such case we cannot examine the sufficiency of the evidence to support the findings, nor the rulings of the court in the admission or exclusion of evidence. It is contended, however, that the complaint does not state facts sufficient to constitute a cause of action, and that the defendant's demurrer to the complaint should have been sustained. In appellant's brief the reasons are pointed out why the complaint is claimed to be insufficient.

It is first claimed that the notice served August 10, 1906, changing the terms of the lease so as to make the rent on and after September 1, 1906, \$150 per month instead of the sum of \$40, "as heretofore paid by you," was not sufficiently certain, because the complaint alleges that the rent under the prior verbal lease was \$35 per month. There is no merit in the contention. If the verbal lease was at \$35 per month, the defendant

knew it, and the error in the statement did not tend to mislead or injure him in any way or in any manner. He was informed by the notice that the terms of his lease were to be changed so that his rent from the time named in the notice would be \$150 per month. The object of the notice was to change the amount of monthly rental which defendant had been paying, and the defendant was informed by the notice of such change. Not only this, but there is nothing in this record to show that the prior rent was not \$40 per month. The complaint may have erroneously stated that it was \$35 per month, and the evidence may have shown, or the parties may have stipulated, on the trial, that it was \$40 per month. We must presume that such was the case in favor of the judgment, as all presumptions are in favor of the regularity of the judgment. On September 4, 1906, the plaintiff served a demand in writing upon defendant, demanding payment of the rent for the month of September, stating the amount due, and demanding that defendant pay the same or deliver up possession of the premises; and in October, 1906, a like demand was made for both the September and October rent. It is argued that the above notices were defective for the reason that they did not notify the defendant that he had three days' time in which to pay the rent. The Code provides (Code Civ. Proc. § 1161) that a tenant is guilty of unlawful detainer when he continues in possession "after default in the payment of rent pursuant to the lease or agreement under which the property is held and three days' notice in writing requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him." This action was not commenced until October 15, 1906; and it is alleged that the defendant neglected and refused for the space of three days after each of said demands to either surrender possession of the said premises, or to pay the rent due. It is not necessary that the notice or demand specify the three days. Demand in writing must be made, the amount of rent due must be stated, and the payment thereof required. Then after such demand, if the tenant, without the permission of his landlord, remains in possession without paying his rent for three days, he has had three days' notice in writing. The statute fixes the period of three days, and it must be read in connection with the notice; and when the period of three days has expired the tenant has had notice for three days, which is in substance three days' notice in writing. While the statutory requirements must be observed, and no one thing required dispensed with, yet the law regards the substance and not the shadow. The notice required by the statute need not be in any particular form. It may be deficient in spelling or in grammatical construction; but, if it states the thing required by the section in plain language so that a

person of ordinary understanding would know what is intended, it is sufficient. The case cited by counsel (*Martin v. Splivalo*, 56 Cal. 128) does not hold that the notice shall state anything about the three days, and we are aware of no case that does so hold.

It was not necessary for the contents of the lease of the premises from the owner to the plaintiff to be set forth in the complaint. The complaint sufficiently states that the owner had made, executed, and delivered to plaintiff a written lease of the premises for the term of two years from the 1st day of August, 1906. This was a conveyance for the purposes set forth in the instrument for the term of two years. It was incumbent upon plaintiff to show that he was the successor in interest of the owner. This he did by alleging that he procured a written lease from the owner for the period of two years. He had the right to change the terms of defendant's monthly tenancy, or to terminate it. He served notice upon defendant 20 days before the expiration of the month. Defendant of his own volition remained in possession, and he must suffer the penalty.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

1 Cal. App. 683

DENT et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 494.)

(Court of Appeal, Second District, California. March 12, 1908.)

1. PLEADING—AMENDMENT—JURISDICTION.

Though, after judgment on an order sustaining a demurrer and the denial of a new trial, the court has no jurisdiction to permit amendments to a demurrer, such jurisdiction continues after an order sustaining a demurrer, so long as no judgment is entered thereon.

2. SAME—"ORDERS"—REVOCATION.

A decision overruling a demurrer to an amended complaint, with leave to defendants to answer, was not a judgment of itself, but an order which was subject to vacation for cause under Code Civ. Proc. § 473, providing that the court may relieve a party from a mistake in an order made during the progress of the proceedings during the term in the furtherance of justice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5020, 5023.]

3. SAME—"MISTAKES" OF LAW.

Mistakes of law are mistakes within Code Civ. Proc. § 473, authorizing the court, in the furtherance of justice, to allow an amendment correcting mistakes in proceedings had during the progress of a trial in the furtherance of justice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4539, 4542; vol. 8, p. 7722.]

4. PLEADING — DEMURRER — AMENDMENT — ABUSE OF DISCRETION.

Where a complaint was demurred to both generally and for misjoinder of causes of action, and an order was entered overruling the demurrer with leave to answer, and before answer defendants moved to compel plaintiff to separately state and number the several causes of action alleged in the complaint, which relief could only be obtained by demurrer, it was with-

in the jurisdiction of the court, and was not an abuse of discretion, to permit defendants to file an amended demurrer setting up as an additional ground that plaintiff's different causes of action were not separately stated and numbered, the effect of which was to revoke the former order overruling the demurrer.

5. APPEAL—REVIEW—FINAL JUDGMENT.

Any irregularity or error connected with an order permitting an amendment of a demurrer after the same had been overruled was proper matter for determination on an appeal after final judgment.

6. CERTIORARI—PROCEEDINGS REVIEWABLE—FINALITY OF DETERMINATION.

Parties may not through writs of review or other proceedings of like character correct errors pending the proceedings, even where errors are made to appear.

Petition for writ of review by Henry G. Dent and others against the superior court of Los Angeles county. Application denied.

A. K. Hancock and T. R. Archer, for petitioners.

ALLEN, P. J. On August 12, 1907, petitioners, as plaintiffs, commenced an action in the superior court of Los Angeles county against certain defendants, who, in due time, filed a demurrer to an amended complaint filed in said action, which demurrer was general as well as upon the ground of a misjoinder of causes of action. This demurrer was overruled in December, 1907, with leave given defendants to answer. Thereafter, and before answer filed, a motion was interposed by defendants asking for an order requiring petitioners, as plaintiffs in said action, to separately state the several causes of action set out in the amended complaint. Plaintiffs objected to the hearing of this motion, for the reason that the matters contained in the motion were grounds of demurrer, and could not be taken advantage of by motion. This objection was sustained by the court, but upon the hearing the court granted defendants leave to file an amended demurrer, which was filed in due time, and which demurrer was identical with the original demurrer, except that it contained the additional ground that the several different causes of action claimed by plaintiffs in their amended complaint were and are not separately stated. This demurrer, upon hearing, was sustained, but no judgment thereon has been rendered.

Petitioners in this application contend that the court was without jurisdiction to grant the defendants leave to file the amended demurrer. We think this position not maintainable. While it is true that, after a judgment has been entered upon an order sustaining a demurrer and a new trial denied, the suit is ended and the court has no jurisdiction to permit amendments, but a different rule obtains where no judgment has been entered upon the order. The decision of the court upon the original demurrer was not a judgment of itself, but an order, as defined in *McGuire v. Drew*, 83 Cal. 232, 23 Pac. 312. Orders made and entered during the progress of proceedings have always been held sub-

ject to revocation by the court for good cause during term time, and in our practice, under section 473 of the Code of Civil Procedure, the court may allow any mistake corrected which is in the furtherance of justice. Mistakes of law are mistakes within this section. *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. The application for leave to amend the demurrer was made before any issue of fact was tendered. Nothing is shown suggesting an abuse of discretion in granting leave to amend, and, when so granted, the effect could only be a revocation of the former order overruling the original demurrer. In our opinion the court had jurisdiction to allow the filing of the amended pleading, the effect of which was to revoke the former order, and, even were there any irregularity or error connected therewith, it would be proper matter for determination upon an appeal after final judgment. Our practice does not permit parties through writs of review, or other proceedings of like character, to correct errors pending the proceedings, even where errors are made to appear. The fact that the additional grounds stated in the amended demurrer have only recently been recognized as grounds of demurrer explains the mistake upon the part of defendants' counsel in seeking relief through a motion, which practice prior to 1907 was the correct practice.

We think the court did not exceed its jurisdiction, and the application for a writ of review is denied.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 703

McCUE v. JACKMAN. (Civ. 446.)

(Court of Appeal, First District, California.

March 16, 1908.)

1. MECHANICS' LIENS—MATERIALMEN'S LIENS—ENFORCEMENT—STATUTES.

Under Code Civ. Proc. § 1200, providing that where a contractor abandons the work the portion of the contract price applicable to the liens of others than the contractor shall be fixed so that the balance remaining after deducting from payments due and paid the value of the work and materials done and furnished including materials actually delivered shall be the portion of the contract price applicable to such liens, a materialman, seeking to enforce a mechanic's lien for materials furnished to a contractor who abandoned the work, must allege and prove that the value of the work and materials done and furnished, including the materials delivered at the time of the abandonment, exceeded the amount due and paid to the contractor, for, unless there is such excess, there is no sum applicable to the claim.

2. SAME.

A materialman who has furnished materials to a contractor to be used by him in the construction of a building is only entitled to be paid by the owner when there is something owing and unpaid from the owner to the contractor.

Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by J. S. McCue against W. Jackman. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. McCue, in pro. per. (W. B. Crocker, of counsel), for appellant. Edgar C. Chapman, for respondent.

KERRIGAN, J. Appellant sought by his action to foreclose a mechanic's lien. The cause was tried, and judgment went for respondent, from which judgment appellant prosecutes this appeal.

The appellant, pursuant to a contract between him and F. J. Owens, the original contractor, furnished and delivered to said Owens, to be used in the construction of six certain houses of respondent, concrete amounting to the sum of \$124.40, to be paid for by said Owens on or before the completion of said buildings. In part the court found that the respondent and said Owens entered into the agreement alleged, and in accordance therewith concrete amounting to \$124.40 was delivered, for which material no payment has been made, and that the lands described in the complaint are the property of the respondent; but the court also found as follows: "That it is not a fact that the said buildings or any of them were completed under said contract between said F. J. Owens and said defendant Wm. Jackman, but in this behalf the court finds that during the month of July, 1904, said F. J. Owens abandoned the work of construction of said buildings, whereupon on the 10th day of August, 1904, the defendant, William Jackman, at the instance of Dodge & Oliver, who were the architects employed by him to superintend the work of drawing plans and specifications and to superintend the erection of said buildings, filed in the office of the county recorder of Marin county, state of California, a notice, wherein it was stated that for the period of more than 30 days next preceding the 8th day of August no work had been performed upon said buildings or any of them by said F. J. Owens, and that said F. J. Owens had abandoned the work of the construction of said buildings."

By this last finding it appears that the buildings were not finished by Owens, but that the contract was abandoned by him. This finding brings the case within the rule of section 1200 of the Code of Civil Procedure, which is as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure and abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hun-

dred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens."

Appellant, in order to recover, should have alleged and proved that the value of the work and materials done and furnished, including the materials delivered or on the ground, at the time of the abandonment, exceeded the amount due and paid to the original contractor. This he neglected to do. If there was no such balance, there was no sum applicable to plaintiff's claim. In no aspect of the case, however, does the complaint or the findings state a cause of action; for it is not shown in either of them that there was anything owing from the respondent to Owens, the original contractor, when appellant's claim of lien was filed. A materialman who has furnished materials to the original contractor of a building, to be used by him in its construction, is only entitled to be paid by the owner of the building when there is something owing and unpaid from the owner to the original contractor. *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

Cal. App. 672

MUGFORD v. ATLANTIC, G. & P. CO.
(Civ. 407.)

(Court of Appeal, First District, California.
March 12, 1908. Rehearing Denied by
Supreme Court, May 11, 1908.)

1. MASTER AND SERVANT—DUTY TO WARN
SERVANT OF DANGER.

In the case of a man 32 years old, an experienced carpenter, who, after working about a pile driver 3½ days, was sent aloft for the first time to point the pile and put a ring thereon, and who, after announcing that the ring was on, and after the signal was given by the foreman to the engineer to let the hammer fall shouted, "Hold on," and while the hammer was descending grabbed for the ring to prevent its falling off, the pile having moved slightly, there was no duty of the master to warn him, though when he went aloft the foreman said, "I will take care of you"; the danger to which he was exposed being obvious and apparent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 310.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

A man of mature years, an experienced ship carpenter, who, after working about a pile driver for 3½ days, was sent aloft for the first time to point a pile and put a ring on it, the foreman saying, "I will take care of you," was guilty of contributory negligence, where, after announcing that the ring was on, and after the signal was given by the foreman to the engineer to let the hammer fall, and while it was falling he shouted, "Hold on," and grabbed for the ring to prevent its falling off.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by William Mugford against the Atlantic, Gulf & Pacific Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Fitzgerald & Abbott and Campbell, Fitzgerald, Abbott & Fowler, for appellant. S. G. Hinds, for respondent.

KERRIGAN, J. This action was brought by an employé of the defendant corporation to recover damages for personal injuries received while working on a pile driver of defendant. At the trial below, at the close of plaintiff's case, the court granted a nonsuit. Plaintiff appeals from the judgment following the nonsuit and from an order denying a new trial.

The contention of the appellant is that the court erred in deciding that as a matter of law plaintiff was guilty of contributory negligence, and in taking the case away from the jury. From plaintiff's case, as presented by his bill of exceptions, the following undisputed and uncontradicted facts appear: William Mugford, at the time of the accident, was a thoroughly competent ship carpenter. He had worked at his trade seven or eight years in different places in the United States and elsewhere. He had worked on the pile driver $3\frac{1}{2}$ days, during which time he pulled ropes and poles around the pile driver. Sometimes he was on the deck of the scow on which the pile driver stood, and sometimes in a boat running lines by which to handle the scow. On the morning of the accident, May 22, 1903, plaintiff was sent aloft to act as loftsman by the foreman. The duties of loftsman are to point a pile in the mud, and put it in position upright between the "gins" of the pile driver, which are the straight edges or guides at each side of the hammer, and then to place a ring on the top of the pile. Before directing the plaintiff to act as loftsman the foreman asked him how he was as a loftsman, and plaintiff answered that he did not know what the duties were, but that he would act as such. The foreman replied: "Go ahead, and I'll tell you what to do and take care of you." The plaintiff went aloft, a pile was put in place, and the plaintiff was told to measure the head of the pile to ascertain what size ring would be required. He did so, and replied that a 14-inch ring was necessary. The ring was tied on a rope kept for that purpose. The plaintiff pulled it up and put it on the head of the pile. Then he holloed to the foreman below: "Ring's on." That is the general signal given by loftsman. Plaintiff testified that he did not know that the expression "Ring's on" was the signal to let go the hammer; that after he holloed "Ring's on" he listened for a response, but did not "hear the foreman say anything." The foreman, whose duty it was to give the signal "to let go," told the engineer to "hit the pile." In the meantime the pile moved slightly, and the ring fell off, whereupon the plaintiff holloed, "Hold on," and grabbed for the ring to keep it from falling. Just then the hammer came down and caught plaintiff's hand between the hammer and the head of the pile, and cut off all the fingers of that hand. The evidence showed further that plaintiff was ignorant of the duties of loftsman, and was given no instruction beyond being told to measure the head of the pile, and he was not told that he was going to work in

a dangerous place. The evidence also showed that plaintiff did not do his work that morning in the approved fashion.

As the negligence alleged is for the failure to warn and instruct plaintiff as to the dangers incident to his employment, it is proper to set forth the substance of the testimony showing the character of the apparatus on which plaintiff was working. Plaintiff, according to his own testimony, knew how the pile driver was operated. Charles Osberg, the engineer at the time of the accident, who was an experienced pile driver, and who had worked in every capacity in the business, testified that there was nothing about the pile driver as to the lowering or dropping of the hammer and the apparatus for that purpose that an ordinary man could not see. Ernest Downing, the foreman, testified: "There is nothing about the pile driver concealed that I know of. It is open and visible to everybody."

The trial court held that the evidence showed that the plaintiff was guilty of contributory negligence, and on that ground granted respondent's motion for nonsuit. In so ruling appellant claims that the court committed error, and in support of this claim cites the well-known rule that negligence is a question for the jury, even when there is no conflict in the evidence, if different conclusions on the subject can rationally be drawn from the evidence; or, as stated in other words, when the question of negligence is fairly debatable. *Fernandes v. Sacramento, etc., R. R. Co.*, 52 Cal. 45; *McKeever v. Market St. R. R. Co.*, 59 Cal. 294; *Chidester v. Consolidated, etc., Co.*, 59 Cal. 197; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 42 Pac. 980; *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; *Liverpool, etc., Co. v. So. Pac. Co.*, 125 Cal. 434, 58 Pac. 55; *Olsen v. Gray*, 147 Cal. 112, 81 Pac. 414.

Respondent, on the other hand, claims that the nonsuit was properly granted for the following reasons: (1) There was no evidence from which a reasonable man could find negligence causing the injury on the part of any person except the plaintiff. (2) If negligence other than that of plaintiff caused or contributed to the cause of plaintiff's injury, it was negligence of the foreman, a fellow servant of plaintiff, and such conclusively appears from plaintiff's evidence in the matter. (3) Granting negligence on the part of defendant, the plaintiff was guilty of contributory negligence, and his negligence was so established by his own evidence that reasonable minds could not differ as to its existence.

These reasons, except the second, are the grounds on which the motion for nonsuit was based in the trial court. The second reason just stated was not specified in the trial court as one of the grounds of the motion, and appellant, therefore, objects to the point being raised in this court. While we think, under

the circumstances of this case, that the objection has little if any merit, nevertheless, in view of the conclusion we have reached on the first and third reasons urged by respondent, no discussion of the one objected to will be necessary.

Appellant contends that respondent was guilty of negligence in not warning and instructing him of the dangers incident to his employment as loftsmen. Under the well-settled law in this state and elsewhere it is the duty of an employer to instruct his employes only when the dangers of their employment are concealed. No such duty is imposed on him where the dangers are obvious and apparent. 20 Am. & Eng. Ency. of Law, 94, and cases cited; 1 Labatt on Master and Servant, p. 522, and cases cited. The rule is stated by Labatt in the following words: "The failure to give instructions, therefore, is not culpable, when the servant might, by the exercise of ordinary care and attention, have known of the danger; or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered." The appellant was a man 32 years old, and an experienced ship carpenter. He had worked around this pile driver 3½ days. The work exacted of him as loftsmen required no great amount of skill. The danger to which he was exposed and which resulted in his injury was obvious and apparent; hence, under the circumstances of this case, no duty of warning devolved upon respondent. The statement of the foreman to appellant, "I will take care of you," did not impose on the respondent the duty of cautioning the appellant. The following cases hold that no assurance can take from an employe the duty of guarding against obvious danger: Section 452, Labatt, and cases cited; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; Phillips v. Michaels, 11 Ind. App. 672, 39 N. E. 669.

This brings us to the subject of appellant's contributory negligence. We think appellant was negligent in allowing his hand to be hit by the hammer, and that his negligence in this respect was so apparent that reasonable minds could not differ about it. The appellant of course was bound to use such care as an ordinarily prudent man would use under similar circumstances, or men of such intelligence and knowledge as he (the appellant) may be presumed to have had. As we have seen, he was a man of mature years, a thoroughly competent mechanic in his line—that of ship carpenter. He went to work on a pile driver, the operation of which was simple and open, and had worked on and about it for 3½ days when he was sent aloft to point or set a pile in the mud and to place a ring on the top of the pile in order to keep the pile from spreading or splitting. He placed the ring on the pile, knowing why it was placed there, and holloed, "Ring's on," and the foreman then gave the signal to the engineer.

In the meantime the ring fell off, and he holloed, "Hold on," and grabbed for the ring, and in doing so he put his hand on top of the pile, the hammer came down, struck his hand, and he was seriously injured. This certainly was not the act of a reasonably prudent man. Reasonable minds could not differ as to the character of such an act. The trial court, in granting the motion for nonsuit, in apt language expressed itself in part as follows: "* * * The evidence shows that before placing the ring on top of the pile he knew, or must have known, that it was put there in order that the pile might be hit with the hammer without splitting. He informed the foreman below by calling out, 'The ring is on,' and the foreman then gave the signal to the engineer, and the hammer came down. In the meantime, after saying, 'The ring is on,' he called out, 'Hold on,' which showed that he knew that the initiatory signal, as it may be called, had been given to let the hammer fall. He may not have known—he says he did not know—that that was the customary signal. But he knew it had some purpose. He announced that the ring was on for some purpose. Evidently to let the people below know, so far as he was concerned, the thing was ready, and when he had holloed out, 'Hold on,' it shows conclusively that he had given a signal before which would start the sequence of events which would result finally in the dropping of the hammer; yet he put his hand on the top of that pile, an act which a person of any intelligence whatever would have known was fraught with danger to himself."

The rule applicable to this case is stated by Labatt in the following words: "A servant is not in the exercise of ordinary care unless, at each stage of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger." Volume 1, § 332.

And, again, in the American and English Encyclopedia of Law the rule is given thus: "One who is working in a place where, or with machinery or appliances by which, he is exposed to danger, must exercise his faculties of sight and hearing for his own protection so far as proper attention to his duties will permit; and, if he fails to do so, and is injured in consequence thereof, he is guilty of such negligence as will preclude a recovery for such injury." See, also, volume 20, p. 144 (2d Ed), citing, among other cases, Kenna's Adm'r v. C. P. R. R. Co., 101 Cal. 26, 35 Pac. 332.

For the reasons stated, the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 705

GOLDSTEIN v. WEBSTER. (Civ. 432.)
(Court of Appeal, First District, California.
March 16, 1908.)

1. FRAUDS, STATUTE OF—MEMORANDUM—SIGNATURE—LEASE MADE BY AGENTS—NECESSITY OF WRITTEN AUTHORITY.

A lease for a term to commence in the future, made by agents having no written authority, is void.

2. LICENSES—LICENSES REVOCABLE.

A license by a landlord to a tenant to enter the leased building for the purpose of removing a partition therein prior to beginning the term is a revocable one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 117-120.]

3. FORCIBLE ENTRY AND DETAINER—NATURE AND ELEMENTS OF FORCIBLE OR OTHER UNLAWFUL DETAINER.

Where agents, having authority only to lease premises subject to the approval of the owner, made an unauthorized lease, giving the tenant the keys to the building and permission to remove a partition therein, the owner, who had other keys to the building, by peaceably taking possession of the premises during the absence of the tenant, and renting them to other parties, was not guilty of forcible entry or forcible detainer.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by J. A. Goldstein against James S. Webster. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel M. Samter, for appellant. Lindley & Eickhoff, for respondent.

HALL, J. This is an appeal from a judgment on nonsuit granted upon motion of defendant at the close of the evidence for plaintiff. The action is for forcible entry and detainer, and the complaint is so drawn as to state a cause of action under both sections 1159 and 1160 of the Code of Civil Procedure.

The only ruling presented for review, aside from the order granting the nonsuit, is the action of the court sustaining an objection of defendant to the offer of a receipt dated April 20, 1906, and shown to have been signed and delivered that day by "Baldwin & Howell, Agents." The instrument purported to be a receipt for \$25 as a deposit on account of rent of the premises sued for at \$60 per month, for the term of one year commencing on the 1st day of May, 1906. The objection was upon the ground, among others, that it was void as against defendant; no written authority to the agents being shown, and the lease being for a term to commence in the future. At the time of the offer no written authority had been shown. Subsequently plaintiff proved that no written authority had ever been given by the defendant to Baldwin & Howell. Treated as a lease, the instrument was void as against defendant. *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 158, 60 Pac. 764, 79 Am. St. Rep. 36. Furthermore, the entry complained of is alleged and claimed to have

occurred prior to April 24th, while the receipt did not purport to confer any right upon plaintiff until May 1st. It therefore did not tend to show either a right of possession by plaintiff, or any actual possession by plaintiff, at the time of the entry complained of. The court did not err in sustaining the objection.

Plaintiff in his testimony showed that his only claim of right to the possession of the premises, and his only possession, if any he ever had, of the premises, was as a tenant of defendant. The evidence in the case shows that on April 20, 1906, plaintiff applied to Baldwin & Howell to rent the premises in suit, being two stores, numbered 1109 and 1111 Fillmore street. It was shown that Baldwin & Howell had no written authority from the owner, the defendant, and was only orally authorized to lease the stores subject to the approval of defendant. Baldwin & Howell, as agents, did, however, on the 20th day of April, 1906, through Mr. Baldwin, rent to plaintiff the two stores at a rental of \$60 a month for the term of one year, commencing May 1, 1906, and accepted as a deposit on the rental \$25. Baldwin then went with plaintiff to the stores, and told plaintiff to get the keys from a billiard parlor, which he did. They went into the stores, and plaintiff tore down the "To Let" signs of Baldwin & Howell. Plaintiff picked up a piece of plaster that was lying on the floor, and wrote on it, "This store will be opened as a first-class clothing and furnishing goods store," and placed it in the window, where it could be seen by the public. He then said to Mr. Baldwin that the plaster would need fixing, and Baldwin replied that that would be done. Plaintiff then said that he would like to take out the partition between the two stores at his own expense, and Baldwin said the landlord will not object to that. They then left the premises. Plaintiff locked the doors and retained the keys, although there was a tag attached to each with the direction, "Lock the doors and return this key to billiard parlor." This was in the morning, and plaintiff again in the afternoon visited and entered each store. The keys remained in his possession, and, we think it may be fairly inferred from the evidence, with the knowledge and consent of Mr. Baldwin. The foregoing is all the evidence tending to show any possession or occupation of the premises by plaintiff. Plaintiff went to the country, where he had been living, and on his return several days later found the stores in the possession of others. He made a demand on defendant for the premises, and tendered to him the rent, but defendant refused to accept the rent and refused to give him possession of the premises. There is no evidence of how defendant entered the stores, or got the doors opened, except what may be inferred from the fact that he gave to the person, to whom he rented the premises on April 24th, keys to

the doors, and keys to padlocks which had been placed thereon.

The trial court granted the nonsuit upon the ground that the plaintiff was not in the possession of the premises when the entry complained of occurred. We think the court was correct in thus holding. The lease was by its terms to commence in the future (May 1, 1906), and, having been made by an agent without written authority, was void. *Wickson v. Monarch Cycle Co.*, 128 Cal. 158, 60 Pac. 764, 79 Am. St. Rep. 36. Furthermore, the evidence shows that the only authority of Baldwin & Howell from defendant was to lease the premises subject to the approval of defendant. Defendant never approved the lease, but, on the contrary, leased the premises to one Mr. Wolfe, and put him in possession on April 24, 1906. Plaintiff never in fact occupied the stores, either by himself or by any employé or agent. He never put any of his goods or possessions therein. He simply had possession of keys to the stores, and this was unauthorized by the owner of the stores. The owner of the premises (defendant) seems also to have had possession of keys to the stores, for he delivered to Mr. Wolfe keys to the doors of the stores on April 24th. Under the circumstances above set forth, the mere possession of keys to the stores did not give to plaintiff possession of the stores as against the owner thereof. The permission to remove the partition between the stores, even if it had been authorized, added nothing to the strength of plaintiff's possession. The most that can be claimed for it is that it gave a license to enter for the purpose of removing the partition prior to the beginning of the term, which was never acted upon. Such a license is revocable, even if it had been authorized by the owner. *Potter v. Mercer*, 53 Cal. 667.

Furthermore, even if it be conceded that plaintiff had a possession of the premises sufficient to warrant an action for forcible entry and detainer, the evidence wholly fails to show that the entry by the defendant was either forcible or unlawful. As before stated, the evidence shows that the lease under which plaintiff claims was void. The evidence also shows that the possession, if he had any, was without authority from the owner (defendant). Defendant therefore had a right of entry, and the possession of plaintiff, if any he had, was unlawful as against defendant. The owner, with a right of entry, of lands unlawfully in the possession of another, may, during the absence of such occupant, peaceably and without force or violence, take possession thereof, and his subsequent refusal to deliver possession to such occupant does not make him guilty of either a forcible entry or forcible detainer. *Potter v. Mercer*, 53 Cal. 667; *Powell v. Lane*, 45 Cal. 677. In *Powell v. Lane*, supra, the action was brought under the forcible entry and detainer act of 1866 (St. 1865-66, p.

768, c. 550), which was substantially identical with sections 1159 and 1160 of the Code of Civil Procedure. Like the case at bar, the complaint was so framed as to state a cause of action under each section of the act. Defendant was the owner of the premises in suit (a dwelling house), but plaintiff had been in possession thereof with her family for over a year. During the absence of plaintiff, defendant went into the house and took possession, removing plaintiff's furniture, without violence, to the other side of the road. On plaintiff's return, she was refused admission, and the next day she made a written demand for possession, so as to bring herself within section 3 of the act (corresponding to subdivision 2 of section 1160 of the Code of Civil Procedure), and, being refused, brought her action. It was held that plaintiff could not recover. To the same effect is *Potter v. Mercer*, supra, which was brought under sections 1159 and 1160 of the Code of Civil Procedure, and in its essential features is much like the case at bar. The plaintiff, pending negotiations with the owners of a certain store for a lease thereof, obtained permission to fit up the store with shelves, etc., and thereupon obtained the key to the store, and immediately employed a carpenter, who, on the same day, took lumber into the building and commenced work. The negotiations for the lease were not consummated, and the license to enter was revoked on the same day. It was held that the owners, after revoking the license to enter, had a right to re-enter if they could do so peaceably and without violence, and, having entered and obtained possession peaceably, they were not guilty of forcible entry or detainer for refusing to permit the plaintiff to enter.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 724

COOPER-POWER v. HANLON. (Civ. 457.)

(Court of Appeal, First District, California.

March 17, 1908. Rehearing Denied by
Supreme Court, May 14, 1908.)

JUDGMENT—VACATING JUDGMENT—EXCUSABLE NEGLECT—AFFIDAVIT OF MERITS—SUFFICIENCY.

On a motion to set aside a default on the ground of excusable neglect, where the affidavit of merits merely stated that affiant had fully and fairly stated the facts constituting her defense to the action to her counsel, etc., and does not state that affiant had stated all the facts of the case to her counsel, it was insufficient as an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 314-316.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Rose L. Cooper-Power against Elizabeth R. Hanlon, executrix of John D. Hanlon. From an order granting a motion to

set aside a default by defendant, plaintiff appeals. Order reversed.

Arthur H. Barendt, for appellant. Coffey & Coffey (Edward C. Harrison, of counsel), for respondent.

HALL, J. This is an appeal by plaintiff from an order granting the motion of defendant to vacate and set aside a default that had been duly entered against her for failure to appear and answer to plaintiff's complaint. The notice of motion was given a few days before the expiration of six months from the entry of the default, and stated that the motion would be made upon the grounds that said default had been taken against defendant through her inadvertence, mistake, and excusable neglect. No answer or proposed answer was served with the notice, but an affidavit of merits sworn to by defendant was served.

This affidavit of merits fails to state that defendant has or had stated all the facts of the case to her counsel, but in that regard simply states "that affiant has fully and fairly stated the facts constituting her defense to the cause of action set out in the complaint in said action, to her counsel," etc. Such an affidavit has repeatedly been held insufficient as an affidavit of merits. *Palmer & Rey v. Barclay*, 92 Cal. 199, 28 Pac. 226; *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Nickerson v. California Raisin Co.*, 61 Cal. 268.

The order must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

2. EVIDENCE—JUDICIAL NOTICE—DEATH—ACTION UNDER LAWS OF OTHER JURISDICTION.

At common law there was no right of action for an injury causing death, and, as the courts do not take judicial notice of the laws of foreign jurisdictions, plaintiff, in an action for an injury occurring in the territory of Alaska and resulting in death, must plead and prove the law of that territory to show that in that forum there existed the right of action sued upon, and that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right is vested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 51.]

3. APPEAL — REVIEW — HARMLESS ERROR — PLEADING—AMENDMENT.

In an action for a death resulting from an injury occurring in Alaska, though the court may have erred in sustaining a demurrer to the complaint without leave to amend, on the ground that the complaint was silent as to the laws of Alaska relating to the right of action, in the absence of proof that the laws of that territory were different than those of California, yet where plaintiff did not ask leave to amend, and does not contend on appeal that an amendment would have obviated the difficulty, the error was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4089-4109.]

4. SAME—DISCRETION OF COURT.

The action of the trial court in granting or denying leave to amend a complaint after the sustaining of a demurrer thereto will not be interfered with on appeal unless an abuse of discretion is shown by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Death action by Mary J. Ryan against the North Alaska Salmon Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

Frank Schilling, for appellant. C. H. Wilson, for respondent.

McFARLAND, J. The complaint charged that Orion F. Ryan met his death in the territory of Alaska through the negligence of the defendant company by which he was employed. Plaintiff sues to recover damages for the death so occasioned, not as the personal representative, but as his mother and sole surviving heir. Code Civ. Proc. § 377. The complaint was silent as to the laws of the territory of Alaska, and defendant's general demurrer for lack of facts was sustained by the court without leave to amend, and the action was accordingly dismissed.

The demurrer was properly sustained. Where the action as here is transitory in its nature, a right or liability imposed by the statute of another state or of the United States, may in proper cases be asserted and enforced in this state. Such may be taken to be the settled rule since the case of *Dennick v. Railway*, 103 U. S. 11, 26 L. Ed. 439. But the courts of this state will only entertain such an action for the purpose and upon the terms permitted by the *lex loci*. In other words, the right to prosecute this action in California is permissible only if permissible under

153 Cal. 438

RYAN v. NORTH ALASKA SALMON CO.
(S. F. 4568.)

(Supreme Court of California. April 28, 1908.)

1. COURTS—ACTIONS—TRANSITORY ACTIONS—WHAT LAW GOVERNS.

Where an action is transitory in its nature, a right or liability imposed by the statute of another state or of the United States may in proper cases be asserted and enforced in California, but such an action will be entertained only for the purpose and upon the terms permitted by the *lex loci*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 14.]

the laws of Alaska, and only upon such terms as the laws of Alaska prescribe. And as at common law there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff to plead and prove such law. Thus it is said in *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118, quoting from *Liverpool Co. v. Phenix Ins. Co.*, 129 U. S. 445, 9 Sup. Ct. 469, 32 L. Ed. 788: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved." "There being no right of action at common law for an injury causing death, the plaintiff in such an action must specifically aver and prove that the laws of the state where the injury occurred permit such an action." 8 Am. & Eng. Ency. of Law, 880; 13 Cyc. 345.

But it is equally well settled that, not only must the law of the foreign state be pleaded to show that in that forum there existed the right of action sued upon, but also it must be pleaded to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested, and this because, as is said in *Dennick v. Railway*, supra, where this subject is considered, the court which renders the judgment can only do so by virtue of the foreign statute. Generally that power is given to the personal representative of the deceased. The laws of this state are broader in this respect, and confer the same right upon the heirs or next of kin of the deceased. But the right conferred by our statute can be exercised only where the cause of action has arisen within the jurisdiction of this state, and not in cases such as this, where the measure of the right and the form of procedure are those dictated by a foreign statute. It would follow, therefore, that if the right to prosecute an action such as this is limited by the laws of the territory of Alaska to the personal representative of the deceased alone, such personal representative only could prosecute the action in this state. In the briefs of counsel for respondent the laws of the territory of Alaska are set forth, and it is made to appear that it is the personal representative only who may maintain such an action, and the existence of this law is urged upon this court as a reason in justification of the trial court's ruling dismissing the action. But neither the trial court nor this court takes judicial notice of those laws, and the presentation of them in the brief of counsel cannot be considered the equivalent of a presentation of them in evidence. So far, then, as this court can judicially know, it may be that the laws of the territory of Alaska will permit the prosecution of an action in the form here adopted and countenanced by the Code of this state.

In this view it may be said that technically the trial court fell into error in ordering the action dismissed. But, upon the other hand, plaintiff and appellant did not ask leave to amend, probably for the reason that, in the situation of the law, she could not successfully amend. And upon this appeal her counsel does not contend that by any amendment he could have obviated the difficulty. The most that can be said, then, as to appellant's rights, is that the irregularity was one without injury, and that an appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. *Stewart v. Douglass*, 148 Cal. 512, 83 Pac. 699.

The judgment appealed from is therefore affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

153 Cal. 387

PEOPLE v. SIEMSEN. (Cr. 1,417.)

(Supreme Court of California. April 27, 1908.)

1. INDICTMENT AND INFORMATION—PRELIMINARY PROCEEDINGS—COMMITMENT—ORDER—NECESSITY.

Under Pen. Code, § 809, requiring the filing of an information within 30 days after a defendant has been examined and committed, as provided in section 872, and section 872 providing that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe defendant guilty, the magistrate must make or indorse on the complaint an order signed by him holding defendant to answer the charge, the making of such order, signed by the magistrate, is a prerequisite to the valid filing of an information.

2. CRIMINAL LAW—APPEAL—REVIEW—QUESTIONS OF FACT.

On motion to set aside an information, because filed before the order had been signed by the magistrate holding defendant to answer the charge, whether the order was signed before or after the filing of the information is a question of fact to be determined by the trial court, and, if there is a substantial conflict of evidence on the point, the conclusion of that court must stand on appeal.

3. EVIDENCE—PRESUMPTIONS.

The presumptions raised by Code Civ. Proc. § 1963, subd. 15, that an official duty has been regularly performed, and by subdivision 23 that a writing is truly dated, while disputable, are in themselves evidence, and will support a finding made in accordance with them, though there be evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 105, 109.]

4. CRIMINAL LAW—CONFESSIONS—VOLUNTARY CHARACTER.

A confession, to be admissible, must be free and voluntary; that is, it must not be obtained by any sort of threats or violence, nor by any direct or implied promises, however slight, nor by the exertion of any improper influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1175-1184.]

5. SAME—DETERMINATION OF QUESTION OF ADMISSIBILITY.

Whether a confession is free and voluntary is a preliminary question addressed to the trial

court, and a considerable measure of discretion must be allowed that court in determining it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1219-1221.]

6. SAME.

Defendant, on being brought before the police captain, was asked if he had heard of the confession of his alleged accomplice, to which he replied that he had, and the police captain read the same to him. Defendant stated that parts of it were not true, and specified an entirely unimportant detail. The police captain then brought in the accomplice, and reread the confession in the presence of both. Defendant stated that he preferred to consult a lawyer before making any statement. To this the police officers made no reply, and did not send for an attorney. The police captain turned to the accomplice and said, "Is this true?" to which he replied, "Yes," and, looking at defendant, said, "You know it is true." Defendant hesitated, but finally admitted that it was true, and at the police captain's suggestion signed his name to a statement that the confession was true. While defendant had, up to that time, been kept in close confinement, he had been placed alone at his own request, and had not been subjected to any indignity or unkind treatment. He had been allowed to communicate with his wife, and would, if he had desired, have been allowed to see counsel. *Held*, that the confession was properly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1163-1174, 1203-1206.]

7. SAME—CORROBORATION—ADMISSIBILITY OF EVIDENCE.

On a trial for murder, evidence to show that shortly after the murder defendant and his accomplice had purchased various articles was admissible, where all the items proved corresponded more or less closely with the amounts which, according to the confession of defendant's accomplice, assented to by him, had been paid by them out of the money taken by them, as tending to corroborate the confession in that particular, irrespective of whether, before evidence of the possession of money can be admitted, a foundation must be made by showing that prior to the offense defendant was without funds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1138, 1222-1226.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

John Siemsen was convicted of murder in the first degree, and, from the judgment of death pronounced on the verdict and an order denying a new trial, he appeals. Affirmed.

A. P. Wheelan and J. J. Greeley, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and William H. Langdon, Dist. Atty., for the People.

SLOSS, J. John Siemsen and Louis Dabner were, by information filed in the superior court of the city and county of San Francisco, charged with the murder of M. Munkata. Upon a separate trial, Siemsen was found guilty of murder in the first degree, and he appeals from the judgment of death pronounced pursuant to the verdict, and from an order denying his motion for a new trial.

1. Upon being arraigned, the defendant moved to set aside the information. His motion was denied, and this ruling is now assigned as error. The ground of motion was

that before the filing of the information the defendant had not been legally committed by a magistrate, or, more specifically stated, that the information was filed "before any commitment, deposition, or other record showing that said defendant had a preliminary examination had been returned or filed, and that no order of commitment was indorsed upon an alleged paper purporting to be a complaint." Section 809 of the Penal Code provides for the filing of an information within 30 days after a defendant "has been examined and committed, as provided in section 872 of this Code." Section 872 directs that "if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the complaint an order, signed by him," holding the accused to answer the charge. It seems to be settled by the decisions of this court that the making of such order, signed by the magistrate, is a prerequisite to the valid filing of an information. *Ex parte Branigan*, 19 Cal. 133; *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061. In so far as the section "provides that the order shall be indorsed upon the deposition, the statute may be regarded as directory; but it is essential that it should be reduced to writing, and entered either upon the official docket of the magistrate or upon the complaint or depositions." *People v. Wilson*, *supra*. See, also, *People v. Wallace*, 94 Cal. 497, 29 Pac. 950. It appears that the information was filed on the 3d day of December, 1906. The complaint which formed the basis of the preliminary examination was produced at the hearing of the motion to set aside the information. Indorsed upon this complaint was a written order, signed by the magistrate, holding the defendants to answer. This order was, on its face, in full compliance with section 872, and bore date of the 1st day of December, 1906, two days prior to the filing of the information. To overthrow the apparent regularity of the proceedings, the defendant called as a witness his counsel, J. J. Greeley, who testified that the information had been filed in the superior court at about five minutes before 10 o'clock, on the morning of December 3d, and that at that time the "commitment," or order holding the defendant to answer, had not been signed; that he had seen the complaint in the police court at about 10:30 o'clock on the same morning; and that the signature of the magistrate had not then been affixed to it. E. P. Shortall, a police judge, who had presided over the preliminary examination, testified that he had no independent recollection of the time when he signed the order, but thought he had signed it on the afternoon of December 1st. "The only thing that calls it to my memory is the date on it." Whether the order holding defendant to answer was signed before or after the filing of the information was a question of fact to be determined by the trial court; and,

if there was a substantial conflict of evidence on the point, the conclusion of that court must stand here. We think there was such a conflict. It is true that the testimony of Mr. Greeley was positive, while Judge Shortall expressed only a belief that he had signed the paper on December 1st, and based this belief on the fact that it bore that date. But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that "official duty has been regularly performed"; another that "a writing is truly dated." Code Civ. Proc. § 1963, subds. 15, 23. These presumptions, while disputable, are in themselves evidence (Code Civ. Proc. § 2061, subd. 2; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Moore v. Gould* [Cal.] 91 Pac. 616), and will support a finding made in accordance with them, even though there be evidence to the contrary. It was for the trial judge to determine whether Mr. Greeley's testimony was sufficiently convincing to overcome the presumptions (a) that the district attorney had properly performed his duty by withholding the filing of an information until after an order was signed by the magistrate; and (b) that the order dated the 1st day of December had been signed on that day.

2. The prosecution offered evidence tending to show the following state of facts: M. Munekata was the manager and A. Sasaki the cashier of the Kimmon Ginko Bank, located at 1588 O'Farrell street, in the city of San Francisco. The banking premises contained a private room, separated from the main business office of the bank by a partition of wood and glass. On October 2, 1906, Siemsen entered the bank, made some inquiries of the cashier in the main office, and visited the manager Munekata in the private office. At a few minutes before noon on the 3d of October all of the employés and officers of the bank, with the exception of Munekata and Sasaki, went out for lunch, leaving Munekata in the private office, and Sasaki in the business office. About \$2,000 in gold and several hundred dollars in silver were piled in boxes on a table beside the bank counter. At about half-past 12 one of the clerks returned and found Munekata and Sasaki unconscious and covered with blood. All of the money, with the exception of a few cents, had disappeared. On the floor was a piece of gas pipe wrapped in paper. Siemsen and Dabner had been seen coming out of the bank at about 5 or 10 minutes past 12 o'clock. The injured men were removed to the emergency hospital, where Munekata died within two hours. He had sustained an extensive fracture of the skull, which, with the resultant hemorrhage of the brain, was the cause of his death. Sasaki's skull was also fractured, but he finally recovered, and was a witness at the trial. The injuries were such as might have

been caused by the piece of pipe found on the floor. They could not have been self-inflicted. Siemsen was arrested on November 3d, and taken to the O'Farrell street police station, where his name was placed on the "detinue book," so-called. He was placed in a cell, but no charge was made against him. On the following day he was taken to the Bush street police station, and placed in a cell with a guard outside to watch him. At his own request, he was confined alone. The public was not permitted to visit him, and the police captain in charge of the station testified that, if an effort had been made, he would not have allowed anyone to communicate with him. "At no time," says this witness, "did he make a request for an attorney to be sent for. If he had asked for a lawyer, I certainly would have complied with his request." He was not threatened or abused in any way, in fact, as stated by the same witness, he was shown more consideration than "an ordinary prisoner." He was allowed to communicate with his wife by telephone.

On the day of the alleged confession Police Captain Duke sent for Siemsen. The chief of police and a detective were present. Capt. Duke said: "Siemsen, I suppose you have heard the boys outside calling out, 'Extra papers! All about the confession of Dabner'"; and he said: "Yes; I have heard it." Prior to that time Siemsen had refused to make any statement unless he received a promise that he would not be hanged, and the police officers had refused to make any promise whatever. The alleged confession of Dabner had been reduced to writing and Duke read it to Siemsen. Siemsen stated that parts of it were not true, and, on being asked what parts were not correct, specified an entirely unimportant detail. Duke then brought the codefendant Dabner and his father into the room and reread the confession in the presence of both defendants. Siemsen stated that he preferred to consult a lawyer before making any statement. The police officers made no reply to this, and did not send for an attorney. Duke turned to Dabner and said, "Dabner, is this true?" and Dabner said, "Yes; it is true"; and, looking at Siemsen, he said: "Jack, you know it is true." Siemsen hesitated for a few seconds, and finally said, "Well, that is the goods, that is true," or words to that effect, and shook hands with the chief of police and with Duke, and thereupon, at Duke's suggestion, signed his name "John Siemsen" to the statement under the words, "This statement is correct throughout," which Duke had first written. Capt. Duke testified that he did not hold out any inducement to Siemsen with reference to what he might state and made no promise of leniency, and made no threats, used no force, and did not put him in any fear. Chief of Police Dinan gave substantially the same testimony as Capt. Duke. He also testified that, after the signing of the confession, newspaper men were admitted, and that in their pres-

ence Siemsen stated that the confession was true, and that it was free and voluntary. Upon this showing, the confession was admitted in evidence over defendant's objection. It was in substance as follows: That on the morning of October 3d Siemsen and Dabner left their home together, having planned on the preceding day to rob the Japanese bank. They waited around the bank until they saw the clerks go away, and then went in. Siemsen stopped at the main or front office, and told the Japanese there (Sasaki) that he wanted to see the manager. Siemsen and Dabner went back to the manager's office, and Siemsen struck the manager over the head with a gas pipe which Dabner had wrapped up in a piece of paper. Then Dabner, following out the plan theretofore agreed on by Siemsen and himself, called the other Japanese back to the rear office. When he came back Siemsen struck him over the head several times, and he fell. He then started to get up and Dabner struck him on the head with the pipe and he fell again. The defendants went through the till and got about \$2,200, partly in silver and partly in gold, which they put in a hand satchel. They then went to a place where they had left a horse and buggy in waiting and drove to the stable where they kept the horse and buggy. The satchel containing the money was concealed in a sack of oats. In the evening Dabner took it to the room occupied by Siemsen and himself, and counted it. They subsequently spent various sums of this money for clothing and jewelry; the expenditures being stated by Dabner in detail. The objection to the admission of this confession, and of the statements of Siemsen regarding it, was put upon the ground that the prosecution had failed to establish that the confession was free and voluntary on Siemsen's part, and that, on the contrary, the preliminary proof showed that it was made under duress. The objection was overruled and appellant excepted.

Upon the preliminary showing, which we have set forth with some fullness, it cannot be said as matter of law that the trial court erred in admitting in evidence the confession of Dabner, together with the statements of Siemsen regarding it. Undoubtedly the rule is elementary, even in the absence of constitutional provisions protecting persons accused of crime, that "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 3 Russell on Crimes (6th Ed.) 478. As was said by this court in *People v. Miller*, 135 Cal. 69, 67 Pac. 13: "Before any confession of a defendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat." The slightest pressure, whether by

confession is withheld, is sufficient to require the exclusion of the confession. Thus the confession is not admissible, if made in response to a statement by one in authority to the prisoner that "it will be better for him" to make a full disclosure (*People v. Barrie*, 49 Cal. 343), or to tell all he knows (*People v. Thompson*, 84 Cal. 598, 24 Pac. 384), or if called forth by a statement of the sheriff that he would do all he could for the prisoner (*People v. Gonzales*, 136 Cal. 666, 69 Pac. 487). But whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (*People v. Miller*, supra), and a considerable measure of discretion must be allowed that court in determining it. "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion." *Hopt v. Utah*, 110 U. S. 574, 583, 4 Sup. Ct. 202, 207, 28 L. Ed. 262.

The testimony above recited shows on the part of the officers no express utterance amounting to either a threat or an inducement. The claim is that Siemsen was placed in circumstances which necessarily operated to take from his actions the free and voluntary character which is required by the rule under consideration. Those circumstances are that he was in custody, charged, or to be charged, with a serious crime, and that he was made aware that his co-suspect had made a confession implicating him. It is established law that the mere fact that the confession was made to a police officer, while the accused was under arrest, does not necessarily render the confession involuntary. *Hopt v. Utah*, supra; *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; *People v. Devine*, 46 Cal. 46; *People v. Miller*, supra; *People v. Walker*, 140 Cal. 156, 73 Pac. 831. Nor do we think the mere fact that the accused was informed, in the presence of his alleged accomplice, that the latter had confessed, requires the holding that the ensuing confession of this defendant was involuntary. It does not appear that he was, in any way, made to believe that his situation would be better if he confessed, or that it would be worse if he declined to speak. It may well be that a suspect, informed that a co-suspect has confessed, may feel impelled to speak for fear that silence on his part would give rise to inferences against him. Such fear might well be enough to take away from his resulting confession the voluntary character requisite to its admissibility. But it is also possible that he may fully understand that he is not called upon to say anything and that his silence could not be used against him. Here,

as was stated by the police officers, the defendant, apparently knowing his rights, declined to say anything without first consulting counsel. Subsequently, without any pressure or suasion, other than a second reading of Dabner's confession, having been brought to bear on him, he decided to admit the truth of Dabner's statement. It cannot be said that the trial court was not justified in finding that this decision on Siemsen's part was voluntary, uninfluenced by either fear or hope induced by word or act of any of the officers. While the defendant had, up to that time, been kept in close confinement, he had been placed alone at his own request, and had not been subjected to any indignity or unkind treatment. He had been allowed to communicate with his wife, and would, if he had desired, have been allowed to see counsel. In this respect the case differs essentially from the Sweat Box Case, 80 Miss. 592, 32 South. 9, 92 Am. St. Rep. 607, and *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, relied on by appellant. In each of these cases it was held that a confession induced by means of keeping the prisoner in a dark cell, or "sweat box," under circumstances leading him to believe that he would be kept there until he did confess, could not be used against him. The fact that Siemsen was confronted with Dabner and made to listen in Dabner's presence to the latter's confession is not of itself sufficient to establish the involuntary character of the appellant's admission of the truth of that confession. In *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, the Supreme Court of the United States exhaustively reviewed the authorities on the general subject of the admissibility of extrajudicial confessions by persons accused of crime. In the opinion in that case there are some expressions indicating that a confession made by a prisoner immediately upon a statement by a police officer to the effect that an alleged witness had seen him commit the crime is not voluntary. But the facts of that case were very different from those here presented. It appeared that the police officer had stripped the accused of his clothing, and had said to him: "If you had an accomplice, say so. Do not have the blame of the crime on your own shoulders." That these circumstances were inconsistent with the exercise by the prisoner of a free will, uninfluenced by threat or promise, may well be. The situation is not the same, however, where the prisoner is treated with all the consideration shown to any prisoner, where no word is said to urge him to confess, where by his own declaration he indicates clearly his appreciation of the fact that he is not required to speak, where he has knowledge of his codefendant's confession before he is told of it by the police officers, and where he has, in effect, adopted that confession and admitted its truth in all material respects before being confronted with the codefendant, and before making any request to be allowed to see counsel. The fact

that Siemsen said he preferred to consult a lawyer before making a statement, and that the police officers continued the interview without giving him an opportunity to obtain legal advice, would, if there had been no confession up to this point, undoubtedly be a circumstance entitled to considerable weight in determining whether or not the police officers were withholding such advice from him as a means of inducing him, through fear, to assent to Dabner's confession. On the showing here made, however, there was clearly ample ground for the court to conclude that Siemsen's confession was the "spontaneous suggestion of the defendant's own mind, unmoved and uninfluenced by any inducement, promise, threat, or menace by the officer to obtain it." *People v. Ramirez*, 56 Cal. 536, 38 Am. Rep. 73.

3. After the introduction in evidence of Dabner's confession, assented to by Siemsen, the people offered the testimony of several witnesses to the effect that shortly after the alleged robbery and murder Siemsen and Dabner had purchased various articles of jewelry and clothing, and had paid cash for the same. The sums so shown to have been expended amounted to more than \$1,000. In several instances this testimony was objected to on the ground that it had not been shown that the defendant was, prior to the alleged robbery, without means to make these purchases. That the sudden possession of money, immediately after the commission of a larceny, by one who had before that been impecunious, is admissible as a circumstance in the case (*People v. Kelly*, 132 Cal. 430, 64 Pac. 563), is not disputed. Nor is it questioned that the same rule is applicable here, where, although the charge does not embrace larceny, the proof tends to show that, in the course of committing the crime under investigation, money was taken by the person or persons guilty of the main crime charged. It is urged, however, that before evidence of the possession of money by the defendant can be admitted a foundation must be laid by showing that such defendant was impecunious before the commission of the alleged crime. It may be questioned whether this objection goes to the admissibility, or merely to the weight, of the evidence. This need not be decided here, however, since the evidence was clearly admissible upon another ground. All of the items of expenditure proven over defendant's objection corresponded, more or less closely, with the amounts which, according to the confession, had been paid by the defendants out of money taken by them from the bank. The evidence in question was relevant and proper for the purpose of corroborating the confession in this particular.

4. It is urged that the district attorney was guilty of misconduct, in that, in the course of his opening statement to the jury, he referred to the confession of Dabner and stated its purport. In view of our conclusion, above expressed, that the confession itself was proper-

ly admitted as against the appellant, it was, of course, not improper for the prosecuting officer to state that he would prove it.

No other point is made, and we see no reason for disturbing the verdict.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 405

ZIHN v. ZIHN et al. (S. F. 4,624.)

(Supreme Court of California. April 27, 1908.)

1. DEEDS — EVIDENCE — PRESUMPTIONS — DELIVERY.

Where a deed is in possession of the grantee, the presumption is that it was delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 577.]

2. SAME—BURDEN OF PROOF.

In an action to annul a deed of gift to land, the burden is on plaintiff to rebut a presumption that the deed was delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 574, 575.]

3. APPEAL — REVIEW — FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

In an action to annul a deed of gift, the question of delivery is one of fact for the trial court, and, where the evidence is conflicting, the finding of the trial court is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

4. DEEDS — VALIDITY — CONFIDENTIAL RELATIONS OF PARTIES—PRESUMPTION OF FRAUD.

The presumption of fraud arising from confidential relations between the parties to a deed of gift goes no further than to throw upon the grantee the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer.

5. APPEAL—REVIEW—HARMLESS ERROR.

The erroneous admission of evidence is harmless, where the subject-matter of the evidence has been fully covered by other testimony in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Andreas Zihn against Clara G. Zihn and others. Judgment for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Charles G. Nagle, for appellant. Edwin L. Forster and William H. Cobb, for respondents.

ANGELLOTTI, J. This is an action to obtain a decree adjudging that the plaintiff is the owner of a lot of land, 43 by about 150 feet, on Twelfth street, in the city and county of San Francisco, and annulling a deed of gift of the same, purporting to have been executed by plaintiff to his three unmarried daughters, defendants herein. Judgment went for defendants, decreeing them to be the owners in fee of said property, subject to a

life estate in plaintiff therein, and plaintiff appeals from an order denying his motion for a new trial.

The complaint proceeds upon the theory that the deed of gift was never delivered by plaintiff to the daughters as a conveyance to them of the property described therein, but was simply given by him into their possession to be kept for him among his other papers, and not recorded, until such time as he was ready to deliver it to them, they promising to so dispose of and keep it, and he, by reason of his trust and confidence in them, relying on their promise to do so. It contains allegations of the confidential relations existing between plaintiff and his unmarried daughters, and the reasons why he was induced to sign and acknowledge the deed and give it to them for safe-keeping; but these allegations all apparently go to the ultimate fact alleged that there was no valid delivery of the deed, and not to the proposition that there was an executed conveyance induced by fraud or undue influence.

The trial court found that on the 4th day of January, 1902, the plaintiff "made, executed, and delivered to the defendants Clara G. Zihn, Emma A. Zihn, and Elizabeth D. Zihn, as grantees, his certain deed of conveyance" of the property, "and that at the same time it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life," and further that "plaintiff unconditionally delivered said deed to said defendants, and it was not merely delivered to be placed among his papers for safe-keeping and not to be recorded, and it was not agreed that it should be returned to him upon demand." These findings completely negative the allegations of the complaint as to want of delivery of the instrument, and plaintiff is forced to contend that they do not find sufficient support in the evidence given on the trial. There is no warrant in the record for any such claim. The deed was in the possession of the grantees, and therefore presumably had been delivered. *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; *McDougall v. McDougall*, 135 Cal. 319, 67 Pac. 778. The burden was on plaintiff to rebut this presumption. This the trial court was fully justified in holding he had not done. Plaintiff was residing with his three unmarried daughters on this property, which had been for a long time the family home. His wife had died a short time before, and the only other heir was a married daughter, who is also a defendant herein, she having been granted an undivided interest in the property by the unmarried daughters. He was 68 or 69 years of age, possessed of other property, and, so far as appears, fully capable of understanding the nature of a transaction of the character under discussion. Great

affection had always existed between him and his unmarried daughters, and he was apparently desirous of so arranging the title to this property that they would not be disturbed in their enjoyment thereof after his death. While the daughters suggested and requested that he make them a gift of the home, there is nothing in the record to indicate any undue influence or fraud, or anything inconsistent with the theory that all that he did was done by him freely and voluntarily and for the purpose of giving them a valid claim to the property. He went alone to the office of a notary, and, as alleged in the complaint, "having concluded to arrange said real property," "caused to be written" the deed of gift in question (a deed of gift absolute in terms and without reservation), subscribed and acknowledged the same, carried it to his home, explained it to the grantees therein named, and gave it into their possession. There was some little conflict between the evidence of plaintiff and that of the daughters as to what was said at that time, but the testimony of the daughters was clear to the effect that he gave it into their possession without making any statement inconsistent with the theory that he was making a delivery of a conveyance to the grantees therein named, with the intent to vest in them the title of the property described therein. There was nothing in the relation of the parties or the circumstances surrounding the transaction as disclosed by the record to force a different conclusion. He himself testified that he said: "Here is the paper which you have been whining so much about." He also testified that he told them to take it, keep it for him, put it among his papers, and not record it during his lifetime. But this was expressly denied by the grantees. No question in regard to the matter arose until he subsequently contracted a second marriage in the year 1904. He admitted in his testimony that he told his married daughter, when she suggested that he borrow some money for her on the property, that the property was in the other daughters' names. Immediately after his second marriage, and prior to any question arising as to the deed, and prior to his discovery that it had been recorded, he obtained from the unmarried daughters a written promise and agreement that the property should be their "father's and his wife's and family's home during our father's (Andreas Zihn's) whole lifetime." The testimony quite clearly shows that this writing was prepared under his dictation and given at his suggestion, and was wholly inconsistent with the theory that the deed of gift had not been delivered to the daughters. The question of delivery is one of fact to be determined by the trial court, and, where the evidence is substantially conflicting, the finding of the trial court is conclusive.

It is contended that, even if the deed was delivered, it should be set aside on the ground of fraud. As before stated, this was not the

theory of the complaint, but certain facts alleged therein as to the relations of the parties, some of which were admitted by failure to deny in the answer, are relied on. This being simply an appeal from an order denying a new trial, the only question that can be considered in this connection is whether the evidence was sufficient to support the findings made in regard thereto. The trial court found upon this question "that plaintiff was not and is not unaccustomed to or inexperienced in business; * * * that the deed * * * was not executed by reason of any statement made by said defendants, as set forth in his said complaint, nor was it obtained by any threats, coercion, or fraud, but was freely and voluntarily given in consideration of love and affection, and for the better maintenance and support of said defendants." Counsel for plaintiff has not pointed out in his briefs wherein the evidence is insufficient to support these findings, except in so far as he claims that certain admitted facts and other facts shown by evidence without conflict as to the confidential relations of the parties were sufficient to raise the presumption of fraud. Without conceding this, for the purpose of the decision, it may be admitted. The utmost effect of such presumption would merely be to throw upon the donees the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Arellanes v. Arellanes* (Cal.) 90 Pac. 1059. The evidence amply warranted a conclusion that defendants had fully complied with this requirement, and that the case was one of an absolute gift, made freely and voluntarily in the execution of a purpose to so dispose of the property, without the exercise of any fraud on the part of the grantees. Considerable reliance is placed by plaintiff in this connection upon the finding heretofore referred to that at the time of delivery of the deed "it was understood and agreed by and between the parties thereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to plaintiff's life estate and right to use and occupy the same for his life." This finding, which is upon a matter not specifically referred to in any of the pleadings, does not necessarily imply any lack of understanding upon the part of the donor as to the effect of the absolute deed of gift, or that the deed as delivered was not fully in accord with the desire and intention of the grantor, but is entirely consistent with the fact of a separate understanding and agreement then assented to by the grantees, relying on which plaintiff was willing to make and knowingly and voluntarily made delivery of the absolute deed of gift, with full understanding of its legal effect. The finding is apparently based upon the testimony of plaintiff that the under-

standing was that the place was to be his home as long as he lived, and the writing subsequently executed by the donees to the effect that the property should be their "father's * * * whole lifetime." Although not material on this appeal, it may be noted that the judgment gives the plaintiff all that he can properly claim under such agreement, viz., a life estate in the property.

Certain other findings attacked upon the ground of insufficiency of evidence relate to probative facts, and are of such a nature that a finding in favor of plaintiff thereon could not affect the clear and specific finding of ultimate facts in favor of defendants, as there would be no necessary conflict between such findings. See *People v. McCue*, 150 Cal. 195, 88 Pac. 899. They are, therefore, immaterial, and need not be here considered.

What we have said in regard to the finding of the understanding and agreement at the time of the delivery of the deed disposes of another contention of plaintiff, viz., that if the deed was delivered, untainted by fraud, nevertheless it should be set aside on the ground that it did not express the intentions of the donor.

The only remaining contention of plaintiff relates to the ruling of the trial court in sustaining an objection to a question asked plaintiff, near the close of his direct examination, as follows: "And you never intended to deliver it to them, you say?" The matter under discussion was the question of the delivery of the deed of gift by plaintiff to the grantees, and the objection made was that it called for the conclusion of the witness. It is unnecessary to consider whether the ruling was technically erroneous, for certainly it was not prejudicial error. The subject-matter of the inquiry had been fully covered by the previous testimony of the witness, as the question itself indicated, the witness having testified substantially that he gave the custody of the deed to his daughters solely that they might keep it for him among the family papers, and he subsequently testified in effect that he did not want to deliver it, and allowed it to go into the possession of his daughters in order that they might put it away among his private papers. It is apparent that an additional statement by him that he never intended to deliver it could not have affected the result.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 448

SHELL v. GAMBLE et al. (S. F. 4,716.)
(Supreme Court of California. April 29, 1908.)

1. FRAUDULENT CONVEYANCES — INVALID TRANSACTIONS—INTENT TO DEFRAUD FUTURE CREDITORS.

While a deed of gift may be void because made with intent to enable the grantor to defraud future creditors, to bring a case within

that rule the deed must be fraudulent in its inception and made with the specific intent to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 178-184.]

2. SAME—BURDEN OF PROOF.

The burden of proving that a conveyance was made with intent to defraud future creditors is upon the complaining creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 806.]

3. APPEAL — REVIEW — CONCLUSIVENESS OF FINDINGS OF TRIAL COURT—STATUTORY PROVISIONS.

Under Civ. Code, § 3442, providing that the question of fraudulent intent in cases arising under the title relating to fraudulent transfers is one of fact and not of law, the decision of the trial court on an issue of fraudulent conveyance is conclusive where the most that an appellant can establish is a substantial conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3896-3913.]

4. FRAUDULENT CONVEYANCES — EVIDENCE — SUFFICIENCY.

In an action to subject certain property standing in the name of a son to the payment of debts of his father, on the ground that part of the property was conveyed directly to the son to defraud creditors, and the remaining portion was taken in the son's name to defraud creditors, though it was in fact the property of the father, evidence held to sustain findings for defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 892-895.]

Department 1. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by George W. Schell against A. W. Gamble and another. From a judgment for defendants, plaintiff appeals. Affirmed.

D. W. Burchard and R. H. Latimer, for appellant. M. R. Jones, for respondents.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff's motion for a new trial. The action was instituted September 15, 1902, by a judgment creditor of defendant A. W. Gamble, to subject certain real property in Santa Cruz and Contra Costa counties, standing of record in the name of defendant W. H. Gamble, son of defendant A. W. Gamble, to execution upon the judgment of plaintiff, upon the ground, as to the Santa Cruz property, that a conveyance thereof by the father to the son, made July 20, 1893, was made with intent to defraud certain designated creditors and is void, and upon the ground, as to the Contra Costa property, that the same is in fact the property of A. W. Gamble, purchased by him in November, 1898, and that the legal title thereto was at the time of the purchase caused by said A. W. Gamble to be placed in his son, with the intent and for the purpose of defrauding said creditors.

The principal contention of appellant is that the findings of the trial court in favor of defendants upon these matters are not sufficiently supported by the evidence. This contention cannot be upheld.

First, as to the Santa Cruz property: The conveyance of this property was made by A. W. Gamble to his son on July 20, 1893, although the deed was not recorded until July, 1894. At the time of the execution of the conveyance, no one of the designated creditors was a creditor of A. W. Gamble, and the record does not show that he then had any creditor at all. The designated creditors were one Lasserot, J. H. Skirm, and W. D. Storey, attorneys at law, and plaintiff. Lasserot's claim was founded in tort, and none of the acts upon which the claim is based was committed until December 1, 1893. Mr. Skirm's claim was for \$50 for legal services, rendered in the year 1894; he having been retained in December, 1893. Mr. Storey's claim was also for legal services; he having been first retained in July, 1894. Plaintiff's claim was for legal services rendered under employment of date March 2, 1898. The record does not show that, at the time of the execution and delivery of the conveyance, there was any probability that any of these parties would ever be a creditor of A. W. Gamble. It is true that a deed of gift, which we may assume this deed to have been, may be void because made with intent to enable the grantor to defraud future creditors. See *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967, and authorities there cited. But to bring a case within this rule the deed must be fraudulent in its inception, made with the specific intent to defraud future creditors. The question of such fraudulent intent as to such future creditors is one of fact and not of law (Civ. Code, § 3442), and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent (*Bush & Mallett Co. v. Helbing*, supra). We have carefully examined the evidence contained in the record, and find no warrant for holding that there is not therein substantial evidence to support the conclusion of the trial court in this matter so far as the conveyance of the Santa Cruz land on July 20, 1893, is concerned. The most that appellant can establish in this regard is that there was a substantial conflict of evidence, and, under the well-settled rule, the decision of the trial court is conclusive.

Second, as to the Contra Costa property: The evidence was ample to sustain the conclusion of the trial court that A. W. Gamble never owned any interest whatever in this property. It was acquired by W. H. Gamble from one Bishop in the year 1898, apparently in exchange for certain property of Mrs. A. W. Gamble, who was the wife of A. W. Gamble and the mother of W. H. Gamble, and the assumption by the grantee of certain existing mortgages on the property. No part of the consideration therefor came from A. W. Gamble. It is claimed that the real property given by Mrs. Gamble in exchange for this property had been fraudulently conveyed to her by W. H. Gamble. She acquired this property in the year 1893 by deed from her

husband, and there was substantial evidence to the effect that it was so conveyed to her in payment of a just debt due her from him, and without any intent on his part to defraud anybody.

Other findings attacked are not material in view of our conclusion upon those already discussed. Several alleged errors of law on the part of the trial court in the matter of the admission and rejection of testimony were assigned in the statement on motion for new trial, but they are noticed in appellant's brief only by a general statement that all of them were valid and well taken. We have, however, examined them, and find nothing therein of sufficient importance to warrant a reversal, even if any of them was technically erroneous.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 433

CRESCENT FEATHER CO. v. UNITED UPHOLSTERERS' UNION, LOCAL NO. 28, et al. (S. F. 4,593.)

(Supreme Court of California. April 28, 1908.)

1. APPEAL—SCOPE OF REVIEW—APPEAL FROM ORDER ON MOTION FOR NEW TRIAL.

Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the superior court is authorized to grant the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3486.]

2. SAME.

Upon an appeal from an order granting or denying a new trial, the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476-3486.]

3. INJUNCTION—RESTRAINING TRADE UNIONS—ISSUES AND PROOF.

In an action to enjoin a union from interfering with plaintiff's business, it was defendant's right to insist upon proof of every material allegation of the complaint which had been controverted by the answer, and such right was not in the least affected by the court's intimation that a complete case had been made out, which intimation caused plaintiff to refrain from offering further evidence.

In Bank. Appeal from Superior Court, Santa Cruz County; J. C. B. Hebbard, Judge.

Action by the Crescent Feather Company against the United Upholsterers' Union, Local No. 28, and others. Judgment for plaintiff. From an order denying a new trial, defendants appeal. Reversed.

F. V. Meyers, for appellants. Bush Finnell, for respondent.

SLOSS, J. This is an action brought by a manufacturing corporation against a labor union and some of its officers and members to obtain an injunction restraining the defendants from interfering with the plaintiff in the conduct of its business by stationing pickets

in the neighborhood of plaintiff's place of business, or otherwise molesting or interfering with any person or persons transacting business with plaintiff. The plaintiff recovered judgment as prayed. A motion by defendants for new trial was denied, and the defendants appeal from the order denying their said motion. There is no appeal from the judgment.

The defendants contend that the relief granted to the plaintiff was too broad; the judgment restraining the commission of acts which, it is said, should not, upon the facts as alleged and found, have been enjoined. This question cannot be raised on the record before us. "Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion." *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234. Upon such appeal the appellate court cannot consider either the sufficiency of the complaint or of the findings to support the judgment. *Martin v. Matfield*, 49 Cal. 42; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299; *Rauer v. Fay*, 128 Cal. 523, 61 Pac. 90; *Hunter v. Milam*, 133 Cal. 601, 65 Pac. 1079; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911; *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324. The record before us does, however, properly present the question whether the evidence is sufficient to justify the findings, and in our opinion this is the only question which need be considered.

The complaint alleges, in substance, that on October 5, 1904, a representative of the defendant union informed plaintiff, a corporation engaged in the business of manufacturing and selling mattresses and bedding, that six men, members of the said union, must quit plaintiff's employ, and that if plaintiff would not discharge all its nonunion mattress makers the said union would call out on a strike the six union members and would declare a boycott against the plaintiff's business. The plaintiff declined to comply with this demand. Thereupon the defendant union inaugurated and declared a boycott upon plaintiff's business, and called out the six men, who quit the employ of plaintiff, although said six men had informed plaintiff that they were willing to re-enter plaintiff's employ, but feared violence at the hands of members of the union if they did so. It is alleged that the defendants "entered into a combination, confederation, and conspiracy for the purpose of coercing the plaintiff and subjecting the control of plaintiff's business" to said union by inaugurating and declaring a boycott on plaintiff's business, and in pursuance of said combination, confederation, and conspiracy, placed pickets in the vicinity of plaintiff's place of business, and that said pickets intercepted, molested, intimidated, and frightened the non-

union employes of plaintiff by threats of violence and prevented them from remaining in the employ of plaintiff. In furtherance of the said conspiracy the defendants sent plaintiff's various customers a notice, informing them that a boycott had been placed on plaintiff by the defendant union, and requesting them to withdraw their patronage from plaintiff. A notice stating that plaintiff was so boycotted was similarly posted in many public places. It is averred that the pickets were so placed for the purpose of not only intimidating the plaintiff's employes into quitting its service, but for the purpose of intimidating customers of plaintiff. Plaintiff alleges on information and belief that many persons have been frightened and intimidated from plaintiff's said place of business by the pickets, and by said notices and posters above mentioned. It is alleged that the pickets threaten to continue the acts complained of; that plaintiff has already been damaged in the sum of \$1,000, and if said acts continue as threatened plaintiff will suffer irreparable injury; that there is no plain, speedy, or adequate remedy at law; and that each of the defendants is financially irresponsible.

The defendants filed an answer denying some of the allegations of the complaint and making certain affirmative averments. Upon the trial the court found that "all the allegations contained in the plaintiff's complaint are true and that all the allegations contained in the answer of the defendants are untrue." The bill of exceptions contains specifications questioning the sufficiency of the evidence to justify the finding in favor of each of the foregoing allegations of the complaint. As to some of these no issue is raised by the answer. The defendants did, however, make direct and positive denials that any representatives or pickets of the defendant "interfered or molested or intimidated or frightened non-union employes of plaintiff or any thereof, or any person"; that "any threats of violence or of doing violence to the person have ever been made by any person whatever on behalf of these defendants, or any thereof, to any of the employes of plaintiff or to any one else for any purpose whatever; that any of the defendants have ever placed any pickets in the neighborhood of plaintiff's place of business for the purpose of intimidating patrons or customers of plaintiff, or that any customer of plaintiff has ever been intimidated or frightened from patronizing the plaintiff by anything done or said by defendants, or any one acting upon their behalf, or any picket of said defendant union." It is denied that pickets or representatives of defendant union "were at the time of the filing of the complaint herein, or are now, engaged in any of the acts complained of."

It cannot be questioned that these denials raise material issues. The essence of plaintiff's complaint is the unlawful interference by defendants with the conduct of its business. Such interference is alleged to have

been exercised in two ways—by posting or sending out notices, and by stationing pickets about plaintiff's place of business. Of these two methods, the latter was probably the more objectionable, as more likely to have a coercive or intimidating effect. It is alleged that the pickets were intended to, and did in fact, threaten and intimidate prospective customers of plaintiff, and that they sought to frighten workmen from the employ of plaintiff by threats of physical violence. The record is entirely devoid of evidence tending to show that the pickets had come in contact with, or had in any manner whatever influenced, any one who may have desired to deal with plaintiff as a customer. It may be questioned whether there is any competent evidence tending to show, on the part of the pickets, any acts or words amounting to a threat, express or implied, of bodily violence as against the plaintiff's employés. But, if we assume that what was shown in this regard would justify the inference that the conduct of the pickets conveyed such threat to the workmen of plaintiff, it was not made to appear that any pickets were stationed at or near plaintiff's place of business at any time after the 12th of October. The complaint was filed on October 19th. There was no testimony, therefore, to justify the finding that the pickets "are still engaged in the acts * * * complained of." The findings here under discussion form the basis of much of the relief awarded by the decree, and the fact that no support for them is to be found in the evidence requires the reversal of the order appealed from.

In justice to counsel for respondent it should be stated that the meagerness of the evidence offered in support of the complaint was not due to any neglect upon his part. While he was examining a witness, and before he had given any indication of a readiness to close his case, the court interrupted and asked what the defense in the case was. This information having been given, the defendants were directed to put in their defense at once. This colloquy then ensued:

"Mr. Hutton (Attorney for Defendants): Do you close your case, Mr. Finnell?"

"Mr. Finnell (Attorney for Plaintiff): If his honor thinks it is sufficient."

"The Court: Put your defense in."

The defendants thereupon moved for a nonsuit, which was denied, and then rested their case without offering any evidence. Apparently the plaintiff was prepared to offer further evidence, but very naturally hesitated to insist upon his right to present it in the face of the court's intimation that a complete case had been made out. It is unfortunate for the respondent that it may have been thus prevented from fully proving its right to the relief sought. The fact remains, however, that it was the right of the defendants to insist upon proof of every material allegation of the complaint which had been controverted by the answer. The record failing to show

such proof the cause must be remanded for a new trial.

The order appealed from is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

153 Cal. 502

O'SULLIVAN v. GRIFFITH. (S. F. 4,621.)

(Supreme Court of California. April 30, 1908.

Rehearing Denied May 29, 1908.)

1. STREET RAILROADS — FRANCHISE—USE OF STREETS—NATURE OF RIGHT.

The right to use the streets of a city as a way upon which to operate a street railroad is a right in real property, an incorporeal hereditament.

2. VENDOR AND PURCHASER — ACTIONS FOR PURCHASE PRICE—DEFENSES—DEFECT IN TITLE.

At common law, where the deed contains no covenant of seisin, etc., a purchaser cannot avoid the payment of purchase price of land, on the ground that his vendor did not have good title, unless the sale was procured by fraud or by mistake of such a character that equity would relieve the purchaser from its effect.

3. STREET RAILROADS—SALE OF FRANCHISE—VALIDITY AND EFFECT—ESTOPPEL OF PURCHASER.

Plaintiff transferred to defendant by deed all of his interest in certain franchises for the building of a street railroad, which had been granted to him, the deed containing no covenants of title or seisin, and no fraud or mistake was alleged in making the sale. *Held*, that the deed transferred, not merely the paper under which plaintiff claimed, but was a transfer of an interest in real property, and amounted to a quitclaim deed; and hence the fact that plaintiff had no title to the franchise sold was not a defense in an action for the purchase price, and evidence that the original grant of the franchise to plaintiff was invalid was properly rejected.

4. COVENANTS—IMPLIED COVENANTS—WORDS OF CONVEYANCE.

A covenant of warranty is never implied from a mere recital, but any words in a deed which show an agreement to do a thing constitute a covenant, and where an agreement is contained in a deed an action will lie for its breach, whether it is contained in a recital or elsewhere.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1691, 1693.]

5. SAME — CONVEYANCE OF FRANCHISE—RECITALS.

Where plaintiff transferred to defendant certain franchises for a street railroad, the conveyance reciting that the franchise was "duly given" by the city council, such recital was merely a description of the thing granted; and, while it might constitute an estoppel against the grantors, it did not amount to an express agreement or covenant that plaintiff had good title to the franchise conveyed.

6. SALES—ACTIONS FOR PRICE—DEFENSES—DEFECT IN TITLE.

Even if a conveyance by plaintiff of certain franchises to defendant was merely a transfer of the instrument by which the franchise was granted, and not of an interest in real property, there being no warranty or title or seisin in plaintiff, in the absence of fraud or mistake, the doctrine of caveat emptor applies; and the fact that the instrument transferred was invalid was not a defense to an action for the purchase price of the franchise.

7. SAME — WARRANTIES OF TITLE—COMMON-LAW DOCTRINE.

The doctrine of the civil law, raising an implied warranty of title upon the sale of personal property, has no application in this state, where the common law on that subject prevails.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 749, 750.]

8. TRIAL — RECEPTION OF EVIDENCE—SUFFICIENCY OF OFFER.

In an action for the purchase price of certain franchises transferred by plaintiff to defendant, an offer by defendant to show that the franchises were wholly void, and were defective under the laws of the state wherein they were granted, cannot be construed as an offer to prove that the laws of such state did not permit the transfer of a franchise without the consent of the state.

9. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES—STATUTES AND COMMON LAW.

In the absence of proof to the contrary, the laws of another state, its statutes as well as the common law, are presumed to be the same as the law of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

10. STREET RAILROADS—FRANCHISES—SALE OF FRANCHISE—CONSENT OF STATE—NECESSITY.

Civ. Code, § 510, provides that street railways are governed by the provisions of title 3, in so far as they are applicable, unless such railroads are specially excepted. Section 511 provides that, when a street railway is constructed, owned, or operated by a natural person, this title is applicable to such person, as well as to corporations. Section 494 of title 3 provides that any railroad corporation or person owning any railroad in this state may transfer its franchise to any other railroad corporation, whether organized within or without this state, and the transferee may operate the franchise property within the state and exercise all the rights of a domestic corporation. *Held*, that a street railroad franchise may be transferred in this state, whether held by a corporation or natural person, and the formal or express consent of the state is not necessary.

11. SAME — VALIDITY—PUBLIC POLICY — SALE OF FRANCHISE — ISSUANCE OF CORPORATE BONDS TO PAY PURCHASE PRICE.

Where plaintiff transferred to defendant franchises for a street railroad, defendant agreeing to form a corporation, to build and operate a street railroad, and to cause corporate bonds to be issued to plaintiff in payment for the franchise, such agreement to issue bonds and to construct the road was not contrary to public policy, and was a legitimate and valid undertaking.

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. B. O'Sullivan against S. N. Griffith. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

N. C. Caldwell, for appellant. Smith & Ostrander, for respondent.

SHAW, J. Appeal from a judgment and from an order denying defendant's motion for a new trial.

Plaintiff sued to recover \$2,700 alleged to be due as the purchase price of all the right, title, and interest of plaintiff and J. Wiseman MacDonald in certain street railroad franchises in Reno, Nev., sold and conveyed by plaintiff and MacDonald to the defendant. The conveyance to the defendant recited the fact that the franchises had been duly given

to the plaintiff and two other persons, who had subsequently transferred their interest to the plaintiff, and then proceeded thus: "Now, it is witnessed that for a valuable consideration the said J. B. O'Sullivan hereby grants, bargains, sells, conveys, and assigns to S. N. Griffith, of Fresno, Cal., all and every his right, title, and interest in and to and under said franchises and each of them." MacDonald had previously obtained from O'Sullivan an option to purchase the franchises, and a clause was added to the effect that he likewise assigned and conveyed to O'Sullivan his interest under the option. A separate instrument of the same date was simultaneously executed, whereby Griffith agreed that he would at once form a corporation to build and operate the roads and cause it to issue bonds secured by a mortgage upon the roads, and would buy said bonds to the amount of \$2,700, par value, and deliver the same to MacDonald within six months from the date of the contract, and that "if said bonds are not issued and delivered in said time the said Griffith shall pay to the said MacDonald the sum of \$2,700." MacDonald assigned to plaintiff all his interest under the contract. The defendant did not cause said bonds to be issued and delivered to MacDonald within the six months specified, nor at all. The defendant alleged in his answer that the promise to pay the money sued for was without consideration. This claim is based on allegations that, under the laws of Nevada, the proceedings by which the alleged franchises were granted to the original grantees were so defective in several particulars that they were wholly void, and that, in consequence, the grants of the franchises were void, or, in other words, that the grantors of the defendant had no title to the franchises they attempted to convey to Griffith, that he received nothing for the transfer, and hence that there was no consideration. In support of this answer defendant offered in evidence the law of the state of Nevada. An objection that the evidence was immaterial and incompetent was sustained, and this ruling is assigned as error.

Appellant's argument is in part based on the theory that the things granted and forming the consideration of the promise were the papers or documents by which the grant of the franchise was manifested, and not the right to use the streets as a way upon which to construct and operate a street railroad. This is not the effect of the conveyance to Griffith. O'Sullivan and MacDonald did not merely transfer the paper; but, as the instrument itself declares, O'Sullivan and MacDonald each granted "his right, title, and interest in and to and under the franchises." This language purports to transfer the estate or property rights created by the original grant, and not merely the document containing the grant. The right to use the streets of a city as a way upon which to build and operate a street railroad is a right in real

property, an incorporeal hereditament. *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 319, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The grant to Griffith purports to convey only the right, title, and interest of the grantors, with no covenants of title, and is, in effect, a mere deed of quitclaim. *Gee v. Moore*, 14 Cal. 472; *Allen v. Holton*, 20 Pick. (Mass.) 458. The case, therefore, stands upon the same ground as a suit for the price of land granted by quitclaim deed, where the grantor had no title in the premises. "It has long been the settled rule at the common law that, where there are no covenants of seisin, etc., in the deed, the defendant cannot avoid payment of the purchase money on the ground that the title existed elsewhere than in the grantor." *Fowler v. Smith*, 2 Cal. 44. It is no defense to a note given in consideration of the conveyance to the maker of all the interest of the payee in a tract of land that the payee had no interest in the land, unless the sale was procured by the fraud of the payee, or by reason of mistake of such a character that equity would relieve the maker from its effects. *Rawle on Covenants*, § 321; *Perkins v. Bumford*, 3 N. H. 522; *Tobin v. Bell*, 61 Ala. 125; *Owens v. Thompson*, 4 Ill. 502; *Hulett v. Hamilton*, 60 Minn. 21, 61 N. W. 672; *Smith v. Winston*, 3 Miss. 601; *Foy v. Haughton*, 85 N. C. 168; *Cross v. Noble*, 67 Pa. 74. The defendant, by the conveyance, obtained exactly what his contract calls for; that is, all the right, title, and interest of the grantors in and under the franchises. No fraud or mistake is alleged. The grantors did not covenant that they had any interest, but only conveyed such as they had. In such cases the purchaser is deemed to take all the risk of title upon himself. The answer did not show a want of consideration and the evidence was properly rejected.

The appellant assumes, without argument, that from the recital in the instrument transferring the franchises to him that the franchises had been "duly given" the law will imply a covenant or warranty that they were valid. This assumption is not well founded. In *Rawle on Covenants*, § 280, that author says: "Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that covenants for title may be implied from a recital; but this has since been distinctly and decisively repudiated." A covenant or warranty is never implied from a mere recital. The true rule is thus stated in *Comyn's Digest*, quoted with approval in *Hale v. Finch*, 104 U. S. 269, 26 L. Ed. 732: "Any words in a deed, which show an agreement to do a thing, make a covenant; but, where words do not amount to an agreement, covenant does not lie." An agreement may be set forth in a deed, as well as in any other writing; and, where it is so expressed, an action will lie for its breach, whether it is contained in a recital or elsewhere in the conveyance. But it must be so drawn as to express a contract, and a mere

recital that a fact has transpired, that a franchise has been duly given, cannot be turned into an agreement to be held responsible in the event that it was not legally granted. The recitals in the conveyance that the franchise in the city of Reno was duly given by the city council, and regularly confirmed at a special election, that the franchise in the county of Washoe was duly given, and that both franchises had been duly transferred to O'Sullivan, do not state any contract or agreement on the part of the grantors. They merely declare the chain of title, and serve as a more particular description of the thing granted to Griffith. They might constitute an estoppel against the grantors in the instrument, but they do not express any agreement. *Ferguson v. Dent*, 8 Mo. 669; *Peck v. Hensley*, 20 Tex. 678. The same rule would obtain if the grant is regarded merely as a transfer of the instruments by which the franchises were granted. In that event, there being no warranty, fraud, or mistake, the rule is that the doctrine of caveat emptor applies, and the fact that the instrument transferred was void is no defense to an action for the price. *Christy v. Sullivan*, 50 Cal. 337; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14. The case of *Meyer v. Richards*, 163 U. S. 383, 16 Sup. Ct. 1148, 41 L. Ed. 199, was decided according to the rule of the civil law prevailing in Louisiana, whereby a sale or transfer of the thing implies a warranty of title. See *Fowler v. Smith*, supra. It has no application in this state, where the common-law rule on that subject prevails. We do not think the decision in *Amestoy v. Electric R. T. Co.*, 95 Cal. 311, 30 Pac. 550, announces a doctrine contrary to the common-law rule on this subject as settled by the decisions above cited.

The defendant further answered that under the law of the state of Nevada the franchises in question could not be assigned without the consent of the state. It may be conceded that the allegation on this point is an allegation of fact as to the law, and not a mere conclusion. It is not necessary to decide the question whether or not it is sufficient in form, for there was no offer to prove the laws of Nevada on this point. The offer which counsel for the defendant made to prove certain things by the law of Nevada cannot reasonably be construed as an offer to prove that that law did not permit the transfer of a franchise of this kind without the consent of the state. The defense, therefore, must rest upon the presumption which prevails in this state concerning the law of another state in the absence of proof thereof. Such law in that case is presumed to be the same as the law of this state. *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal. 60; *Marsters v. Lash*, 61 Cal. 624; *Shumway v. Leake*, 67 Cal. 460, 8 Pac. 12; *Mortimer v. Marder*, 93 Cal. 178, 28 Pac. 814; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674;

Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 357, 42 Pac 918, 52 Am. St. Rep. 94; Brown v. S. F. Gas Co., 58 Cal. 426. This rule applies to statute law as well as to the common law. Cavallaro v. Texas, etc., Co., supra. In this state a street railroad franchise may be transferred, whether held by a corporation or natural person, and no formal or express consent of the state is necessary. Civ. Code, §§ 494, 510, 511.

The franchises in question were not personal property, and the provisions of the civil law and the decisions relating to warranties implied from the sale of personalty have no application to this case. As above stated, there is no pleading attempting to show that the sale was made through fraud on the part of the grantors or by the mistake of the defendant. It is not alleged that the defendant was ignorant of the actual facts in regard to the proceedings for the granting of the franchises, nor that he relied on any representations or recitals in the deed, nor that he was not as well informed as to the validity of the franchises, both in law and in fact, as the plaintiff and MacDonald.

We do not perceive any ground on which to hold that the stipulations in the agreement sued on, requiring Griffith to form a corporation to build and operate a street railroad and to cause corporate bonds to be issued to MacDonald in payment for the franchises—that is, the rights of way upon which the road was to be built—are contrary to public policy, or of such effect as to make the entire contract void. It seems to be a perfectly legitimate and valid undertaking.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

153 Cal. 426

SEQUEIRA v. COLLINS et al. (S. F. 3,752.) (Supreme Court of California. April 28, 1908.)

1. APPEAL — NOTICE—SERVICE AND FILING—FAILURE TO FILE IN TIME.

A notice of appeal from a judgment, served and filed more than six months after the entry of the judgment, confers no jurisdiction on the appellate court to entertain the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1926–1931.]

2. PLEDGES—CREATION—CONTRACT.

Defendant, having possession, under an oral contract for purchase, of land on which he had commenced making brick, executed two written instruments, one of which purported to transfer all his interest in the contract for the purchase of the land and in and to the brick made and to be made thereon to plaintiff; the other instrument, after reciting the transfer, providing that it was made as security for all moneys to become due from defendant to plaintiff, who agreed to advance money for the making of the brick. The agreement further provided that plaintiff was to be and remain the owner of all brick made, and entitled to its possession, until payment of all sums due him. Held that, while the instrument purported to transfer the property, the transfer was made as security and operated to vest in plaintiff only a lien, and, as far as the bricks were concerned, the writings

were to be viewed as a contract for the creation of a pledge.

3. SAME—DELIVERY OF PROPERTY—STATUTORY PROVISIONS—EVIDENCE.

Civ. Code, § 3440, requires a transfer of personal property, in order to be good against creditors, to be accompanied by an immediate delivery and followed by an actual and continued change of possession, if made by a person having at the time the possession or control of the property. Held, that the statute by its terms excepts transfers of property not in existence at the time of the transfer from the requirement of immediate delivery, and where, at the time of the transfer of certain brick made and to be made, only the first arch in one kiln had been laid, which arch contained only 18,000 brick, none of which had been burned, no immediate delivery was required to make the transfer valid.

4. SAME.

Under Civ. Code, § 3440, requiring the transfer of personal property, in order to be good against creditors, to be accompanied by an immediate delivery and followed by an actual and continued change of possession, the possession taken by a pledgee must be actual, and not merely constructive, in order to give him a valid lien, and the mere fact that a pledgee of brick gave some directions to men engaged in making the brick did not show a taking of possession; it not appearing that he ever supplanted the pledgor in the general management of the work, or took the direction thereof out of his hands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28–40, 47.]

5. SAME.

Where goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferor, nor does the mere fact that the transferor retains some measure of control over the goods conclusively establish the absence of an actual and continued change of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28–40.]

6. SAME—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held insufficient to show that certain personal property ever passed from the possession of the pledgor into that of the pledgee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 28–40.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Antone George Sequeira against J. D. Collins and another. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Appeal from judgment dismissed, and order denying new trial reversed.

H. U. Brandenstein and Stanton L. Carter, for appellants. L. L. Cory, for respondent.

SLOSS, J. This is an action to recover damages for the conversion of 640,000 bricks alleged to be of the value of \$4,000. The plaintiff recovered judgment for \$3,100, and the defendants appeal from the judgment and from an order denying their motion for a new trial. The notice of appeal from the judgment was served and filed more than six months after the entry of judgment, and therefore conferred no jurisdiction on the appellate court to entertain this appeal.

The brick in question were in two kilns

standing upon land in Fresno county. The defendant Weihe commenced an action against one Spinney to recover \$4,000, with interest and costs, and in that action caused a writ of attachment to be issued and placed in the hands of defendant Collins, the sheriff of Fresno county, for levy. Pursuant to this writ and to the instructions given by Weihe, Collins attached and took into his possession the two kilns of brick. The plaintiff, claiming to be the owner and entitled to the possession of the attached property, served upon the sheriff a demand for the release of the attachment, and, his demand being refused, he instituted this action.

The main question between the parties is whether certain transactions had between Spinney and the plaintiff prior to the levy of the writ of attachment operated to transfer to the plaintiff an interest in the brick which he could assert as against an attaching creditor. It appears without controversy that the land upon which the kilns were standing had originally belonged to defendant Weihe. In August, 1897, Weihe made an oral agreement with Spinney whereby it was agreed that Spinney should purchase from Weihe the land in question for the sum of \$4,000, with interest, payable in annual installments of \$1,000 each. Spinney went into possession of the land under this agreement and remained in possession until after the levy of the writ of attachment. In 1901 Spinney commenced the manufacture of the brick in question; the material therefor being taken from the land. In May, 1901, some of the brick in one of the kilns being then in place but not yet burnt, he made an agreement with Sequeira, the plaintiff, whereby the latter agreed to advance the money necessary for the making of the brick. Two written instruments were executed. One of these purported to transfer to Sequeira all his right, title, and interest in and to the contract with Weihe for the purchase of the land, and also his right, title, and interest in and to the brick made and to be made thereon. The other, after reciting the transfer, provided that it "is made as security for the performance on the part of the said first party (Spinney) of the agreements herein mentioned and to secure to said second party (Sequeira) all sums due and in any manner to become due from said first party to second party." By this writing, Sequeira agreed to advance, for the making of the brick, such sums as he might "deem best," and was to receive interest on all sums advanced, and one-half of the net profits realized from the sale of the brick. The agreement in question further provided that Sequeira was to be and remain the owner of all brick made, and entitled to its possession, until payment of all sums due him. There is no room for controversy as to the legal effect of these instruments. While they purport to transfer the property, the transfer is plainly made as security, and operated to vest in the plaintiff only a lien. So far as the bricks are con-

cerned, the writings are to be viewed as a contract for the creation of a pledge. Civ. Code, § 2988.

Sequeira made advances from time to time to pay for the expense of preparing, manufacturing, and burning the brick; his advances amounting in all to \$3,270. Spinney completed the moulding and laying of the brick in the first kiln, laid a second kiln, and proceeded to burn both. One of the kilns was finished in August, and the other in September, 1901. The attachment was levied on the 16th day of April, 1902. It is contended by the appellants that there had been no such "immediate delivery" or "actual and continued change of possession" of the property transferred, as is required by section 3440 of the Civil Code, to make the transfer valid as against a creditor of the transferrer. In this connection the court found "that said bricks were not in existence at the time the said agreements were so entered into and executed, and thereafter, and long prior to this action, and since said bricks were manufactured, the plaintiff took possession thereof, and ever since maintained the possession thereof down to the time when the defendant J. D. Collins took possession thereof in pursuance of the writ of attachment herein referred to." Section 3440, above referred to, requires a transfer of personal property to be accompanied by an immediate delivery and followed by an actual and continued change of possession "if made by a person having at the time the possession or control of the property." If the property is not in existence at the time of the transfer, it is obviously impossible that it should be in the possession and control of the transferrer, and the statute by its terms excepts transfers of such property from the requirement of immediate delivery. There is evidence here that at the time of the transfer only the first arch in one kiln had been laid, and that this arch contained only 18,000 brick, none of which had been burned. We think this clearly brings the case within the exception of the statute, and that no immediate delivery was required in order to make the transfer valid. *Newell v. Desmond*, 74 Cal. 46, 15 Pac. 369. But, apart from the question of an immediate delivery, it was essential, in order to vest in plaintiff an interest in the property which would entitle him to hold it as against a creditor of Spinney, that he should have taken possession and held the bricks. The instruments under which the plaintiff claimed amounted, as has been said, to no more than a pledge of the brick. "A pledge is a deposit of personal property as security (Civ. Code, § 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee (Civ. Code, § 2988). The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open." *Lilienthal v. Ballou*, 125 Cal. 183, 57 Pac. 897.

The testimony relied upon to support the finding that plaintiff took and maintained possession is, in the main, that of the plaintiff himself. He stated that he took possession of the brick and always remained in possession of them until they were seized by the sheriff; that he went out to the land on which the bricks were being made "right along," sometimes at night, sometimes in the morning; that when there he would look around to see that everything was going along all right; that he went out every day during some weeks, and twice or three times a week at other times, sometimes staying and working on the premises all day; that he was there every night while the second kiln was being burnt, but that sometimes he did not go there for a month; and that he was in charge of the brick. He employed some men to work on the kilns, but this was at the request of Spinney. He instructed the men not to lay the brick too close. It appeared, without controversy, that Spinney was in possession of the land on which the kilns stood, and was conducting some farming operations on the portion of the tract not used in making brick. There was no evidence that Spinney ever did any act or said any word indicating an intent to make an actual or a constructive delivery of the kilns to the plaintiff. We think this testimony was insufficient to justify the finding that the plaintiff took or maintained possession of the brick. No importance is to be attached to his general statements that he had possession or was in charge. These are mere conclusions, and have no value if unsupported by the facts testified to. It clearly appears that Spinney, the man in possession of the land, commenced the manufacture of the bricks on that land, and carried that work to completion with the aid of men employed by him. There is nothing in the testimony of Sequeira to show that the possession of the brick ever passed from Spinney. There is no contention, and no basis for a contention, that Sequeira and Spinney were in joint possession, assuming that such joint possession would be sufficient. The claim that the plaintiff took possession must rest on the assumption that he took it from Spinney, with or without the latter's consent. But the record fails to show that Spinney's possession of the brick was not as full and complete at the date of the levy of the attachment as it had been at any prior time. The character of the possession which must be taken by a pledgee in order to give him a valid lien is, as above stated, the same as that defined in section 3440 of the Civil Code. *Lillenthal v. Ballou*, supra. That is to say, the change of possession must be actual, not merely constructive. *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167. It must be "open and unequivocal, carrying with it the usual marks and indications of ownership." *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53. As was said in

McKee Stair Co. v. Martin, 126 Cal. 557, 58 Pac. 1044: "There must be a visible and apparent change of the custody of the property, such as to give evidence to the world of the claims of the new owner." There was nothing in this case to show that Spinney did not at all times retain the full custody and control of the bricks. The mere fact that Sequeira gave some directions to the men engaged in the work cannot be given this effect, for it is not pretended that he ever supplanted Spinney in the general management of the work, or took its direction out of his hands.

We do not overlook the consideration that the acts necessary to constitute a change of possession depend upon the character and situation of the property transferred. "The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and requires only that a purchaser or donee shall take such possession as the character and nature of the property admit of." 14 Am. & Eng. Ency. of Law (2d Ed.) 374; *Chaffin v. Doub*, 14 Cal. 384; *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335; *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95. Where the goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferor. *Chaffin v. Doub*, supra; *Porter v. Bucher*, supra; *Dubois v. Spinks*, supra. Nor can it be said that the mere fact that the transferor retains some measure of control over the goods conclusively establishes the absence of an actual and continued change of possession. *Stevens v. Irwin*, supra. In *Dubois v. Spinks*, supra, it was held that a quantity of cord wood had passed into the possession of the transferee, although the wood had not been removed from the place where it had been piled. In *Tognini v. Kyle*, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442, the same rule was applied to the transfer of a large quantity of charcoal. In each of these cases, the vendor or transferor, by words of delivery, or otherwise, turned over his possession to the vendee. Other cases of similar purport are cited; but it has never been held, at least in this state, that an actual change of possession has taken place, where the transferor, after the transfer, continues to exercise the same control and dominion over the property as before, and has done nothing to indicate any intention of passing that control and dominion from himself to his transferee. *Woods v. Bugbey*, 29 Cal. 467, was a case, the facts of which were strikingly like those here presented. In holding that there had been no actual change of possession, the court used language which may well be applied to the case at bar: "In no case that we are aware of has the Supreme Court of this state laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like

kind of property. In *Lay v. Neville*, 25 Cal. 552, the court, in reference to the subject, say: 'It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent bona fide purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property.'” Testing the evidence by this rule, we are satisfied that it fails to show that the kilns ever passed from the possession of Spinney into that of Sequeira. There is nothing in the case tending to raise the slightest doubt as to the good faith of plaintiff in taking the assignment of the brick as security for his advances, but the hardship of a particular case furnishes no reason for disregarding the provision of the statute which makes the lien of the pledgee dependent upon actual possession of the property pledged.

The conclusion reached makes it unnecessary to consider the other points made.

The appeal from the judgment is dismissed. The order denying a new trial is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

153 Cal. 474

KAISER v. BARRON. (L. A. 1,963.)

(Supreme Court of California. April 29, 1908.)

1. PAYMENT—VOLUNTARY PAYMENT.

A payment of money made on execution is not a voluntary payment, even though there has been no seizure of the property of the one who makes the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 264.]

2. COSTS—TAXATION—DUTIES AND PROCEEDINGS OF TAXING OFFICER.

The only judgment for costs which the clerk has authority to enter is for costs which have been taxed, and an entry of costs in the judgment against plaintiff, while a motion to tax them was pending, was without authority, and an execution issued for the collection of such costs should be recalled.

In Bank. Appeal from Superior Court, Orange County; J. W. Taggart, Judge.

Suit to quiet title by Emil Kaiser against U. M. Barron. From a judgment for defendant, and from certain orders made after judgment, plaintiff appeals. Reversed and remanded.

F. C. Spencer, for appellant. Charles S. McKelvey, for respondent.

HENSHAW, J. Plaintiff sued to quiet title to a certain 25 acres of land. Defendant answered, setting forth a contract entered into by himself and plaintiff's predecessor in interest, the substance of which contract was that defendant would plant the northern 15 acres in walnut trees, and would nurture

and care for them until the 1st day of January, 1906, at which time defendant having fulfilled the conditions of his contract, plaintiff's predecessor in interest agreed to convey to him the southerly 10 acres. Defendant then averred that Sisson, plaintiff's predecessor in interest, placed him in the actual possession of the 25 acres of land for the purpose of fulfilling the covenants contained in the agreement, and that ever since he has been in such possession under the provisions of their contract. After trial, judgment passed for defendant; the judgment being to the effect that the contract above referred to was valid and subsisting, and that defendant was entitled to possession of the premises and was entitled, upon complying with the provisions thereof, to have a conveyance made to him of the southerly 10 acres. From this judgment plaintiff appeals upon the judgment roll. He also appeals from certain orders made after judgment, and which will hereinafter be more particularly specified.

Upon appeal from the judgment the contention is that the findings do not support it. The judgment, as has been said, decrees a rightful possession of the premises in defendant. Defendant pleaded, as above noted, that Sisson placed him in possession of all of the land for the purposes of fulfilling the contract and that such possession, under such license and in accordance with the contract, he has ever since maintained. The findings, however, are silent upon the matter, and while it may be said that it can be gathered from a reading of the contract that defendant, for the purposes of executing it, was entitled to the possession of the northerly 15 acres which he was to set out as an orchard and irrigate, cultivate, and prune, yet the contract is wholly silent as to the possession or right of possession of the southerly 10 acres. Defendant's right of possession of this comes, as he pleads, from the act of Sisson. But the court's failure to find upon this important matter leaves the judgment as to this 10 acres without any support in the findings. The same may be said of another piece of the northerly 15 acres, amounting to 1.92 acres. As to this, the finding of the court is that by executed parol agreement this portion of the 15 acres was excluded, or, in other words, defendant was called upon to put into orchard only 13.08 acres. Nothing in the findings justified the court's judgment awarding a continued possession to defendant of this 1.92 acres. It stands in this regard precisely as does the 10 acres above considered.

Defendant filed his cost bill, and plaintiff gave timely notice to tax the costs. The matter of taxing costs was continued by order of court, and, while so pending and undetermined, the judgment for costs was entered and docketed by the clerk and execution thereon issued. Plaintiff then made his motion to recall the execution, upon the ground that it was improvidently issued, and also to tax the costs, and in so doing to disallow an item of

\$3.75 for serving a subpoena, and an item of \$20 for reporter's charges, and to correct an error of \$9.95 in the addition of the items as they appeared upon the face of the bill. In response to this the defendant showed that, after the execution levy for the costs upon the land, plaintiff, desiring to make a sale of his interest therein, paid the amount called for. Upon this showing the court ruled that the costs had been voluntarily paid, and denied these motions. But it is well settled that a payment of money made on execution is not a voluntary payment, even though there has been no seizure of the property of the one who makes the payment. *First Nat. Bank v. Watkins*, 21 Mich. 483; *Knox Co. Bank v. Doty*, 9 Ohio St. 506, 75 Am. Dec. 479; *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645; *Manning v. Poling*, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30. The only judgment for costs which the clerk has authority to enter is for costs which have been taxed. The entry of costs in the judgment, while a motion to tax them was pending, was without authority, and the issuance of an execution for the collection of such costs and the levy upon plaintiff's property was improvident and untimely. The motion to recall the execution should have been granted, as well as the motion to tax costs.

The order refusing to tax costs and the order refusing to recall the execution are reversed. The judgment appealed from is reversed, and the cause remanded for a new trial. This renders unnecessary a consideration of the appeal from the order refusing to modify the judgment.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.

153 Cal. 398

PEOPLE v. DABNER. (Cr. 1,418.)

(Supreme Court of California. April 27, 1908.)

1. CRIMINAL LAW—APPEAL—APPEALABLE ORDERS.

An order refusing leave to withdraw a plea of guilty is not appealable, though it may be reviewed on appeal from the judgment.

2. HOMICIDE—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a homicide was murder in the first degree, without mitigating circumstances.

3. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—JUDICIAL DISCRETION.

A trial court did not abuse the sound discretion expressly vested in it by Pen. Code, § 1018, in refusing to permit one accused of murder to withdraw a plea of guilty after a finding that the homicide was murder in the first degree, without mitigating circumstances, where the plea was made after ample time for deliberation and with full knowledge of law, the facts, and course of procedure to follow such plea, and where there was no serious doubt as to accused's guilt, and it did not appear that evidence could be produced tending to mitigate the offense; that he voluntarily confessed; that his plea was prompted by a hope that he would escape death and be condemned to imprisonment; and that he had previously borne a good

reputation not entitling him to withdraw the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 629, 633.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Louis Dabner was convicted of murder in the first degree, and he appeals from a judgment on the conviction and from an order refusing leave to withdraw his plea of guilty. Affirmed.

G. P. Hall, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Wm. H. Langdon, Dist. Atty., for the People.

SHAW, J. The defendant and one John Siemsen were jointly charged with the murder of one M. Munekata. Upon arraignment Dabner pleaded guilty. Thereupon the court heard evidence to enable it to ascertain and determine the degree of the crime, and upon the evidence taken declared it to be murder of the first degree without mitigating circumstances, and punishable with death. When subsequently brought before the court for judgment and sentence upon the said plea, the defendant asked leave to withdraw his plea of guilty and enter a plea of not guilty to the charge. Evidence and affidavits in support of, and in opposition to, this application, were introduced. The court refused to allow the withdrawal of the plea of guilty, and pronounced judgment and sentence of death. The appeal purports to be taken from the judgment and also from the order refusing leave to withdraw the plea. The latter order is not appealable; but, inasmuch as it can be reviewed on appeal from the judgment, the point is immaterial. A bill of exceptions, setting forth the evidence taken and proceedings had upon the inquiry as to the degree of the crime and upon the motion for leave to withdraw the plea, was duly settled and appears in the record on appeal.

The evidence shows that Siemsen and Dabner about noon on November 3, 1906, entered a bank in San Francisco, known as the Japanese Bank, which was then in charge of the deceased Munekata, who was its manager, and an assistant named Sasaki, and asked to see the manager on business. They were admitted to the manager's private office, which was in the rear of the premises, and Siemsen immediately struck Munekata on the head with a piece of gas pipe which Dabner had procured the night before. Munekata was rendered unconscious by the blow, and died therefrom shortly afterwards. Dabner, as soon as the blow was struck and Munekata fell back unconscious, called to Sasaki, the assistant, to come to the manager's office. He came and he also was beaten over the head by Siemsen and rendered unconscious. Siemsen then took from the till some \$2,000 or \$3,000, and the two defend-

ants went off with it. The entire occurrence occupied but a few minutes and attracted no attention from the outside. The two had visited the bank the day before, for the purpose of observation to ascertain how the robbery could be accomplished, and had carefully planned the affair beforehand, even to the detail that Dabner was to call Sasaki to the manager's office as soon as Siemenzen had stricken down the manager with the gas pipe. There was no fact or circumstance connected with the commission of the murder that tends in the least degree to mitigate it. The only mitigating circumstance concerning the defendant was the fact that he confessed his crime when he was arrested. It was upon his confession that the details of the killing and the robbery were first disclosed. We cannot perceive that his subsequent confession has any bearing upon the question whether or not the crime itself was committed with deliberation and under circumstances which rendered it particularly flagrant and heinous. The court did not err in holding that it was murder of the first degree with no mitigating circumstances.

In support of the application to withdraw the plea of guilty, substitute a plea of not guilty, and go to trial before a jury, it was shown that the defendant was only 18 years old, and that until February, 1906, he had lived in or near the city of Petaluma; that he had there borne a good reputation for honesty, integrity, and good behavior; and that he was not a strong-minded person, but was easily influenced by others. It was also claimed that he was insane. The grounds of his motion were that his plea of guilty was made through inadvertence, without due deliberation, in ignorance of the law and the consequences of such a plea, in obedience to the advice and instruction of his father, and in the belief that, if he made that plea, a jury would be called to fix his punishment, and that he would be sentenced only to imprisonment for life. Evidence was given tending in some degree to support some of these grounds. On the other hand, the record shows that when he was arraigned, an attorney was appointed by the court to represent him; that two days were given him to consider his plea, that at the expiration of the two days other counsel were appointed to act as his attorneys and the case was continued for two more days; that a demurrer was then filed and submitted without argument and overruled by the court; that the attorneys then stated to the court that the defendant wished to plead guilty; that this was against their advice; and that they wanted to withdraw from the case. The court then asked the defendant personally if he wanted to plead guilty, and he said that he did. The court then informed him that he could have other counsel if he desired it, and proceeded to explain to him, clearly and at length, that, if he pleaded guilty, it would be the duty of the judge of the court, and not a jury, to as-

certain and determine whether the crime committed was murder of the first or second degree, and that, if it was determined to be of the first degree, the judge also would have to determine whether he was to be hanged, or sentenced only to life imprisonment, but that, if he pleaded not guilty, these questions would be decided by a jury. He was then directed to talk to his attorneys further about the matter, and after such conversation inform the court what he desired to do. He then talked with his attorney, and again signified his desire to plead guilty, his attorney again declaring that he had advised against it. On the hearing of the motion he testified that in this conversation with his attorney he was advised that, if he pleaded guilty, the court would determine the crime to be murder of the first degree and sentence him to death by hanging, and that he fully understood what was said to him by the attorney and by the court, but that he was governed in the matter by the advice of his father. After the last statement by the attorney, the court again asked the defendant if he fully understood what he was doing, and he answered that he did. His plea was then taken and entered of record, his attorneys immediately withdrawing from the case. The case was continued to the following day to take evidence as to the degree of the crime. At that time the evidence was given, the degree of the crime, and punishment was fixed as above stated, and the matter was continued two days for sentence. At the time fixed for sentence a different attorney appeared for the defendant and made the application for leave to withdraw the plea, as above stated.

It thus appears that the defendant was given five days for deliberation as to his plea; that during this time he had the counsel and advice of three attorneys, all urging him to plead not guilty; that he was fully informed by them as to the difference in the procedure if he pleaded guilty from that to be had if he pleaded not guilty; and that the court also explained to him the course of procedure. His own testimony taken in these proceedings indicates that he is a young man of at least ordinary intelligence and quickness of apprehension, while that of others tended to show that he was possessed of considerable shrewdness and cunning. It must be conceded that the court justly concluded that the defendant made his plea after ample time for deliberation and not in ignorance of the law, or facts, nor of the course of procedure to follow, and with full knowledge thereof. Doubtless he was prompted by the hope that he would escape death and be condemned only to imprisonment, and he seems to have been induced to indulge this hope largely by the suggestions and advice of his father. But we do not think this fact of sufficient force to have required the court to permit a withdrawal of this plea after the event had proven that his hope was vain. If this was

so, then the punishment upon a plea of guilty must always be something less than the greatest allowed by law, for the defendant in pleading guilty, always hopes for less, and, if his disappointment was sufficient to give the right to withdraw the plea, it would in such a case always be withdrawn. It was not until the court had declared that the penalty would be death, and after a subsequent delay of six days, that the defendant applied to withdraw and change his plea. There was no contention to the effect that there was any serious doubt as to the defendant's guilt, or that evidence could be produced which would tend to prove that the offense was anything less than murder of the first degree, or even to mitigate its atrocity and lay the foundation for a verdict of imprisonment for life, except the claim that the defendant was insane and that prior to his departure from Petaluma, 10 months before the time of sentence, he had borne a good reputation for honesty, integrity, and good behavior. The evidence of his insanity was very slight, but nevertheless the court appointed three physicians to examine him in that respect, and they unanimously pronounced him sane. His previous good character might have some bearing on the fact of his participation in the crime, if that were in doubt, but there is no pretense that he did not aid and assist therein with deliberation and previous knowledge of the character of assault which was to be made. A cold-blooded, cruel, and deliberate murder is not rendered any the less atrocious by the fact that the person committing it was previously of good reputation.

Section 1018 of the Penal Code provides that the court may at any time before judgment permit the withdrawal of a plea of guilty and a substitution of a plea of not guilty. It is a matter within the sound discretion of the court, and its action must be upheld unless an abuse of discretion is shown. The following remarks of the court in *People v. Miller*, 114 Cal. 16, 45 Pac. 987, are particularly applicable here: "The mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion, *People v. Lennox*, 67 Cal. 113, 7 Pac. 260. To hold that it did would be equivalent to saying that a defendant might speculate upon the supposed clemency of a judge, with the right to retract if, at any time before sentence, he began to think that his expectation would not be realized. * * * Only after it is made manifest that defendant is to suffer the extreme penalty, and that no further delay will be permitted, do counsel produce the affidavit, itself made upon the day of the hearing, but not offered until that mo-

ment, and asked to be allowed to retrace all these steps thus advisedly taken. What conclusion can be reached except the one that, because the court was about to pronounce sentence of death, defendant and his counsel, knowing that he could not fare worse at the hands of a jury, and might fare better, sought an opportunity to essay the other chance." If we could perceive anything in the evidence which would have called for a lesser punishment than that the trial court was about to impose, some reason might appear why defendant should have been permitted to withdraw his plea and put his fate before a jury. No showing of this kind is made. The record not only fails to show an abuse of discretion, but, to the contrary, from first to last makes manifest that the trial judge, placed in an unusual and trying position, conducted all of the proceedings with a just and even solicitous regard for the defendant's rights, and ruled as alone it was permissible for him to rule under the facts before him. The defendant's acts indicate that he is not so dangerous or vicious as his codefendant Siemsen. His voluntary confession seems to have been full and frank. These facts might have aroused in the mind of the court some degree of sympathy for him, and perhaps, if a jury had considered the case, such sympathy might have been sufficiently potent to have saved him from the death penalty. But the comparison with his partner in crime does not establish the fact that his own acts were not sufficiently atrocious to deserve the severest penalty, but only to show that there were degrees of viciousness to which his disposition and capacity did not carry him. His voluntary confession does not lessen or soften the character of his crime. But, whatever its effect may be, it was addressed to the discretion of the court below, and it is not of sufficient weight to control our action to such an extent as to justify us in declaring that that discretion was abused. The responsibility in such matters rests upon the superior court. This court has no function to perform regarding it, except to see that the discretion of that court is not unreasonably exercised. As a matter of law the action of the superior court is justified by the facts. If an appeal is to be made to sympathy and sentiment, it can only be done on an application for clemency and mercy addressed to the executive department of the state.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 451

COREA v. HIGUERA et ux. (S. F. 4,674.) (Supreme Court of California. April 29, 1908.)

1. EASEMENTS—WAYS OF NECESSITY—REQUISITES.

No right of way over another's land exists as a way of necessity where claimant's land is

bounded by a road connecting with the county roads, though there is no easy access to that road, and no constructed track for teams connecting his land with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 50–55.]

2. SAME—EFFECT OF CONVEYANCE OF LAND.

If a right of way over defendants' land was appurtenant to a tract which they conveyed to plaintiff's predecessor, it passed with the conveyance of the tract, under Civ. Code, § 1104, providing that a transfer of land passes all easements attached thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 66.]

3. SAME—"APPURTENANCE."

Under the express terms of Civ. Code, § 662, a thing is deemed to be incidental or "appurtenant" to land when it is by right used with the land for its benefit, e. g., a way, water course, or passage for light, air, or heat from or across the land of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 8, 9, 10.

For other definitions, see Words and Phrases, vol. 1, pp. 477, 487; vol. 8, p. 7580.]

4. SAME—NATURE.

An easement is real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 1, 2.]

5. TRIAL—FINDINGS—NATURE.

A finding or an allegation that plaintiff owned a right of way across defendants' land and that it was appurtenant to his land is a sufficient statement of ultimate facts to be established, and is not a conclusion of law.

6. APPEAL—REVIEW—FINDINGS.

A judgment, based upon allegations and findings of sufficient ultimate facts, cannot be attacked on an appeal on the judgment roll alone, merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment.

7. SAME.

Findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found.

8. LIMITATION OF ACTIONS—PLEADING—DEMURRER.

A demurrer to a complaint on the ground that limitations have run is not good unless the complaint shows affirmatively that they have run.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 671.]

9. EASEMENTS—DISUSE—PLEADING.

In an action involving plaintiff's right of way across defendant's land, if the right had been extinguished by disuse, under Civ. Code, § 811, prescribing how servitudes may be extinguished, it was a matter of defense to be pleaded and proved by defendants, and could not be raised by demurrer, where such extinguishment did not appear on the face of the complaint.

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Frank Corea against Bernardo Higuera and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Clark, for appellants. Wm. H. Johnson, for respondent.

SLOSS, J. The complaint in this action alleges that on November 2, 1894, the defend-

ant Bernardo Higuera was the owner of lot 7 of the Higuera rancho. On that day the defendants conveyed a portion of said lot to John Freitas, one of the boundaries of the tract conveyed being described as the center of the Higuera ranch road, a road connecting with the county road. Thereafter Freitas died, and in 1897 the executors of his will, pursuant to a probate sale duly authorized and confirmed by the superior court, conveyed the land so acquired by their testator to the plaintiff, who has ever since been the owner and in possession thereof. At all the times mentioned there had been a road leading from the land conveyed to Freitas across the remaining portion of lot 7 to the Higuera ranch road. The road which thus traversed lot 7 was used by defendants prior to their conveyance to Freitas, and at the time of the latter's purchase was open, laid out, and used as a means of ingress and egress to and from the land conveyed, "and was the only road so laid out and open by which said place could be reached by team; and * * * the said road was and had been appurtenant to said lands." The defendants claim to be the exclusive owners of said road and have obstructed it. It is alleged that plaintiff is the owner of and entitled to said right of way. A demurrer to the complaint having been overruled, the defendants answered, denying the allegations of the complaint regarding the existence of the road in question; denying that said alleged road was open, laid out, or used, at the time Freitas' purchase, or that of plaintiff, or that it was the only road by which said place could be reached by team. The answer denies, further, that the road was or is appurtenant to the land of plaintiff, or that plaintiff is the owner of any right of way over defendants' lands. By way of affirmative defense it is alleged that the land conveyed to Freitas and subsequently to plaintiff was at all times bounded on one side by the main Higuera ranch road, by which the plaintiff and his predecessors had access to and from his lands to the county roads. There is a further averment that any use which plaintiff or Freitas may have made of the road over defendants' lands was solely by the permission of the defendants. The court finds that at the times of the conveyances to Freitas and to plaintiff there had been and was, leading from the land so conveyed across the remaining portion of lot 7, a road used by the defendants prior to their conveyance with the lands conveyed to Freitas. This road is found to have been open, laid out, and used as a means of ingress or egress to said lands, and was the only road so laid out and open by which said lands could be reached by team. Said road was, at the time of Freitas' purchase, appurtenant to said lands and passed with the same. It was appurtenant to said lands at the time plaintiff purchased, and passed to him as appurtenant thereto. There is a finding that plaintiff "is the owner of and entitled to said

right of way over the lands of defendants to the county road, to pass and repass on foot and with team." The court further finds that the lands of plaintiff are bounded on one side by the Higuera ranch road, which was and is an open traveled road leading to the county road. Said Higuera ranch road was not, prior to the commencement of this action, used by plaintiff, and plaintiff "has not easy access to said Higuera ranch road for any purpose to and from his own lands or at all." It is found "that plaintiff is entitled to the said right of way as appurtenant over the lands of defendants," and there is a finding against the allegation of the answer that the use of said way by plaintiff and his predecessors was by the permission of defendants. Upon these findings the court entered a judgment declaring the plaintiff to be the owner of the roadway described in the complaint, and enjoining the defendants from obstructing said road or interfering with plaintiff's use thereof. The defendants appeal from the judgment. The evidence is not before us, the appeal being taken on the judgment roll alone.

The principal point urged is that neither the complaint nor the findings state a case entitling the plaintiff to relief. Assuming that the plaintiff claims a "way of necessity," the appellants argue that the facts alleged and found do not authorize the assertion of such right. This conclusion is undoubtedly sound. The complaint shows, as do the findings, that the land conveyed to plaintiff's predecessor was at all times bounded on one side by the Higuera ranch road, which connected with the county roads. This circumstance alone is fatal to the existence of a way of necessity. The facts that there was no constructed track for teams connecting plaintiff's land with the Higuera ranch road, as may be inferred from the complaint, or that, as the court finds, plaintiff had not "easy access" to that road, would not entitle him to assert a right of way by necessity. "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. * * * That the way over his land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879. But, as is pointed out by respondent, his right does not rest upon the claim of a way of necessity. The complaint alleges, and the court finds, that the right of way here in dispute was, at the time of the conveyance to Freitas, appurtenant to the land conveyed. It is also alleged and found that the plaintiff is the owner of said right of way, which is specifically described. If the right of way was appurtenant to the land, it passed with the transfer of that land. Civ. Code, § 1104. What is an appurtenance is defined by section 662 of the

Civil Code. The findings that the plaintiff was the owner of the way in question and that it did constitute such appurtenance are findings of fact, and such findings, in the absence of a claim that they are not supported by the evidence, necessarily lead to the conclusion that plaintiff was entitled to judgment. An easement is real property, and an allegation that plaintiff is the owner of specific real property, has always in this state been regarded as an averment of an ultimate fact not of a conclusion of law. *Payne v. Treadwell*, 16 Cal. 220; *Haight v. Green*, 19 Cal. 117; *Garwood v. Hastings*, 38 Cal. 218; *Johnson v. Vance*, 86 Cal. 130, 24 Pac. 863; *Haggin v. Kelly*, 136 Cal. 483, 69 Pac. 140. An averment that a certain road or street is a public highway is a statement of a fact (*Bequette v. Patterson*, 104 Cal. 282, 37 Pac. 917; *People v. McCue*, 150 Cal. 195, 88 Pac. 899), and we see no reason why an allegation that the plaintiff is the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land, should not be regarded as a sufficient statement of the ultimate facts to be established. Such allegations have been held to be sufficient in other jurisdictions (*Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145; *Hall v. Hedrick*, 125 Ind. 326, 25 N. E. 350), and we are cited to no authority in support of the contention that they set forth merely conclusions of law.

The appellants argue, however, that the specific facts alleged and found are insufficient to show the existence of a right of way appurtenant to the land conveyed. But, if we assume this to be true, the appellants would not be helped. The facts stated regarding the use of the way prior to the conveyance to Freitas are merely probative facts, and, if not inconsistent with the findings of ultimate facts, cannot affect those findings. This subject was fully considered by this court in *People v. McCue*, 150 Cal. 195, 88 Pac. 899. Upon a careful review of the authorities, it was there declared that upon an appeal on the judgment roll alone a judgment based upon allegations and findings of sufficient ultimate facts cannot be successfully assailed merely because the complaint and the findings contain in addition a showing of probative facts which, taken alone, might not support the judgment. The findings of probative facts can be used to overcome an express finding of the ultimate fact only where the probative facts found are inconsistent with the ultimate fact found, or where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found. These conditions do not exist here. The averments and findings regarding the use of the road prior to the conveyance to Freitas, if they are not sufficient to establish the existence of a right of way as appurtenant, are in no way inconsistent with such right; nor is there anything on the face of the findings to show

that the court treated the finding that the right of way was appurtenant, or the further finding that plaintiff was the owner of such way, as mere conclusions following from other facts found. The findings of these ultimate facts are separate and independent.

Appellants urge that plaintiff's cause of action is barred by the statute of limitations, and that their demurrer, which specified this ground, should have been sustained. A demurrer on this ground is not good unless the complaint affirmatively shows that the statutory period has run since the accrual of the cause of action. *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877. The complaint here does not show when the defendants first obstructed the road or interfered with plaintiff's use of it. If, as is suggested by appellants, plaintiff's right was extinguished by disuse (Civ. Code, § 811), such extinguishment did not appear on the face of the complaint, and, if it existed, was matter of defense to be averred and proved by the defendants.

There are no other points requiring notice. The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 421

REDWOOD CITY SALT CO. v. WHITNEY
et al. (S. F. 4,685.)

(Supreme Court of California. April 28, 1908.)

1. SALES—ACTION FOR VALUE OF GOODS—COMPLAINT—SUFFICIENCY.

A complaint against partners and against one of them individually, alleging that plaintiff sold "defendants' goods, etc., alleges clearly and intelligibly a joint purchase by the partnership and an individual.

2. PARTIES—JOINDER—PARTNERSHIP AND INDIVIDUAL.

A complaint against partners and one of them individually for the value of goods sold them does not show a misjoinder of causes of action; all the parties to the joint purchase being necessary parties defendant.

3. PARTNERSHIP—DEBTS—LIABILITY OF PARTNERS.

Under the express terms of Civ. Code, § 2442, partners are liable jointly with their copartners for partnership debts.

4. APPEAL—DISPOSITION—PARTLY ERRONEOUS JUDGMENT.

That judgment for goods sold should have been awarded against partners only, instead of against them and one of them individually, does not require a reversal of the judgment against the partners, since Code Civ. Proc. § 578, formerly Prac. Act, § 145 (St. 1851, p. 73, c. 5), providing that judgment may be given for or against one or more of several parties, has abrogated the common-law rule that in an action on a joint contract, plaintiff must recover against all or none of the defendants, and the judgment may be set aside on appeal so far as the individual liability of the partner is concerned.

5. SALES—ACTION FOR VALUE OF GOODS—PLEADING—VARIANCE—MATERIALITY.

Under Code Civ. Proc. § 469, providing that no variance between pleading and proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense, the variance

in an action to recover the price of goods sold between an allegation that they were sold to partners and one of them individually and proof that they were sold to the partners was not material.

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence in action for the value of goods sold held sufficient to show the value of the goods.

Department 1. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Redwood City Salt Company against Arthur L. Whitney individually and as a partner and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Hewlett, Bancroft & Ballantine, for appellants. Ross & Ross, for respondent.

ANGELLOTTI, J. This is an appeal by all the defendants from a judgment in favor of plaintiff against them for the sum of \$2,215.20 for goods sold and delivered.

1. The action was against Arthur L. Whitney and Albion H. Whitney, copartners doing business under the name and style of C. E. Whitney & Co., and said Arthur L. Whitney, individually. The complaint alleged that the plaintiff "at the special instance and request of the defendants sold and delivered to the said defendants goods, wares, and merchandise," the reasonable value of which was \$2,410, and that no part of said sum had been paid. A demurrer on the grounds (1) that several causes of action were improperly united, in that a cause of action against Arthur L. Whitney and Albion H. Whitney as copartners was joined with a cause of action against said Arthur L. Whitney, individually; (2) that there was a misjoinder of parties, in that said partners were joined as defendants with said Arthur L. Whitney individually; (3) that the complaint was uncertain in that it did not appear therefrom whether the goods, etc., were sold and delivered to said partners or to Arthur L. Whitney individually; (4) that it was ambiguous for the same reason; and (5) that it was unintelligible for the same reason—was overruled, and complaint is made of this ruling on this appeal. There was no uncertainty, ambiguity, or unintelligibility in the complaint. It is susceptible of but one construction, viz., that the goods were sold and delivered to the partnership, and Arthur L. Whitney as an individual, or, in other words, that Arthur L. Whitney and the firm of C. E. Whitney & Co., of which he was a member, jointly purchased the goods. We know of no reason why a member of a partnership as an individual cannot unite with the partnership in the purchase of property for the joint benefit of the partnership and himself personally. Certainly it would not be contended that property could not be purchased jointly by a partnership and a third person not a member of the firm, and there is no material distinction in this regard between the case

of a third person and that of one who is a member of the partnership. The complaint states clearly, unambiguously, and intelligibly the simple case of a joint purchase by a partnership and an individual. There was no misjoinder of causes of action. There was but a single cause of action stated, namely, a cause of action for the reasonable value of goods sold and delivered, to all the defendants, and there was no misjoinder of parties, for all of the parties jointly purchasing were necessary parties defendant. See *Harrison v. McCormick*, 69 Cal. 616, 620, 11 Pac. 456; *Cox v. Gille, etc., Co.*, 8 Okl. 483, 58 Pac. 645. The demurrer, therefore, was properly overruled.

2. The verdict and judgment must, likewise, be construed as being against Arthur L. Whitney jointly with the partnership. It is contended that the evidence was not sufficient to support a conclusion of any joint purchase by the firm and Arthur L. Whitney individually. We think it is true that there was no substantial evidence to show anything but a purchase by and delivery to the partnership firm of C. E. Whitney & Co. This the evidence amply shows with the result that each of the members of the firm, Arthur L. Whitney and Albion H. Whitney, was, jointly with his copartners, liable to plaintiff for the value of the goods. Civ. Code, § 2442. But there was no liability on the part of defendant Arthur L. Whitney except such as the law imposed upon him as a member of the partnership for a partnership debt. The judgment against him in so far as it may be a judgment for an individual debt as distinguished from a partnership debt is improper. It does not follow, however, as appears to be assumed by appellants, that the judgment against the partners must be reversed. It is established that the common-law rule to the effect that, in an action on a joint contract, the plaintiff must recover against all or none of the defendants has been abrogated in this state, and that in such an action the plaintiff is entitled to a judgment against those of the defendants who are shown to be liable on the obligation. This is held to be the effect of section 578 of the Code of Civil Procedure, Code 1906, p. 210, formerly section 145 of the practice act, providing that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. *Lewis v. Clarkin*, 18 Cal. 399; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962. This is undoubtedly the rule in this state, subject perhaps to the qualification that the defendants held liable are entitled to be protected against any material variance between the pleadings and the proof. See *Chetwood v. Cal. Nat. Bank*, 113 Cal. 424, 45 Pac. 704. The variance here was not material within the definition of that term in our Code of Civil Procedure (section 469), and judgment could properly have been given in the lower court

against the partners alone, without any amendment of the complaint (Code Civ. Proc. § 470). This court may on this appeal vacate the judgment in so far as it purports to impose any liability on Arthur L. Whitney in addition to his liability as a member of the partnership of C. E. Whitney & Co., and leave the judgment in force in all other respects. See *Nichols v. Dunphy*, 58 Cal. 605. We have discussed this question upon the assumption that it is of some practical importance to Arthur L. Whitney that the judgment should be so changed as to relieve him from any such apparent additional liability. It appears to us that this assumption may be well based, and we are satisfied that he is entitled to have the judgment show clearly that the liability imposed thereby on him is solely one for the debt of a general partnership of which he is a member.

3. The only other point made for reversal is that the evidence was insufficient to show the value of the goods sold and delivered, which consisted of 777½ tons of salt. As already stated, the verdict was for \$2,215.20. Of the 777½ tons, 185 tons were what is known as half ground salt, salt that had been run through the crusher, and it is admitted that the reasonable market value of such half ground salt, delivered, as this was, at the works of plaintiff at Redwood City, was \$3.10 per ton, or a total for the 185 tons of \$573.50. There being an admitted credit to defendants of \$156.38 for work done by their employes in sacking the salt, there would be left \$1,485.32 of the verdict for the remaining 592½ tons, which would make the price of such salt delivered in sacks at plaintiff's works about \$2.50 per ton. We do not think that it can be held that there was not sufficient evidence that such salt so delivered was reasonably worth at least this amount. The original understanding between the parties appears to have been that the salt to be furnished should be half ground salt, but as it was wanted immediately by defendants to fill an order for foreign shipment, and as it was impossible to run it through the crusher in time, Mr. Arthur L. Whitney, after a personal inspection of the salt at plaintiff's plant, authorized and directed the order to be filled by the sacking and delivery of a lot of "drift" salt on hand, which he said was sufficiently fine for the purpose. He himself testified that while in price there was some distinction between drift salt and half ground salt, without stating how much, there was practically none in character, that one is often sold for the other, and that he did not know that any one could tell the difference. The salt delivered, for which recovery is here sought, was in fact used by defendants in filling the contract for half ground salt for foreign shipment. It also appeared that defendants subsequently purchased from plaintiff salt of the same character as that here purchased for \$3.50 per ton. There was, it is true, evidence on the part of defendants

that some of the salt delivered did not come up to the standard of the drift salt authorized, but there was nothing to indicate how much there was of this. There is enough in the record to support a conclusion that the unground salt delivered was generally the drift salt described by Mr. Whitney, and that such drift salt was reasonably worth in the market nearly, if not quite, as much as half ground salt. In addition to this, there was the positive testimony of Mr. Lovie, the secretary of plaintiff, that the market value of the 777½ tons of salt was \$3.10 per ton. Certainly we cannot say that a conclusion that the unground salt delivered was reasonably worth \$2.50 per ton does not find sufficient support in the evidence.

It is ordered that the judgment be and the same is hereby modified by adding thereto the following provision, viz.: "This judgment, so far as defendant Arthur L. Whitney is concerned, is one against him solely in his capacity as a member of the partnership of C. E. Whitney & Co., and imposes no individual liability on him other than such as is imposed by reason of his membership in said firm." And, as so modified, said judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 418

BONESTELL, RICHARDSON & CO. v.
CURRY et al. (S. F. 4,451.)

(Supreme Court of California. April 28, 1908.)

1. VENUE—ACTION AGAINST PUBLIC OFFICER.

Code Civ. Proc. § 393, subd. 2, provides that an action against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office or against a person who by his command or in his aid does anything touching the duties of such officer, must be tried in the county where the cause arose, subject to the power of the court to change the place of trial. *Held*, that the subdivision applies only to such affirmative acts of the officer as directly interfere with the personal rights or property of a person, and not to mere omissions or neglect of official duty, and it is not applicable to an action against certain state officers and a firm to whom a contract for the furnishing of paper for use in the state printer's office had been awarded by the state officers in their official capacity, to enjoin further action under the contract on the ground of its illegality because not awarded to the lowest bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 20.]

2. SAME.

In all cases as to which express provision is not made to the contrary, the proper county for trial, subject to the power of the court under Code Civ. Proc. § 397, to change the place of trial on account of convenience of witnesses, disqualification of judge, or inability to have an impartial jury, is the county in which defendants or some of them reside at the commencement of the action, as provided by Code Civ. Proc. § 395.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 34-37.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Cal.Rep. 95-97 P.—9

Action by Bonestell, Richardson & Co. against Charles F. Curry and others. From an order denying a charge of venue, certain of the defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., and Geo. H. Sturtevant, Deputy Atty. Gen., for appellants. M. H. Wascerwitz, Hiram W. Johnson, and C. K. Bonestell, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of the city and county of San Francisco denying appellants' motion for a change of place of trial of the above-entitled action from said superior court to the superior court of the county of Sacramento. The action was one instituted in the superior court of the city and county of San Francisco against appellants, who were respectively Secretary of State, Assistant Attorney General, and state printer of the state of California, and the members of the partnership firm of A. Zellerbach & Sons, to which a contract for the furnishing of certain paper for use in the state printer's office had been awarded by appellants in their official capacity, to enjoin further action in regard to or under said contract, upon the ground that the same was illegal and void. The official acts of appellants in the matter were performed in the county of Sacramento, the place where they had their offices and transacted their official business. The defendants Zellerbach were residents of the city and county of San Francisco. The plaintiff corporation was a taxpayer of the state, and was engaged in the same line of business as A. Zellerbach & Sons, and claimed that it was the lowest bidder for the furnishing of the paper, and was itself entitled to the contract.

Appellants' motion for a change of place of trial was based entirely on the provisions of subdivision 2 of section 393 of the Code of Civil Procedure, which, so far as is material here, provides: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial: * * * (2) Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer." This subdivision is not applicable to the case at bar. This action is not one against a public officer "for an act done by him in virtue of his office" within the meaning of those words as the same are used in this law. It was held in *McMillan v. Vischer, Sheriff, etc.*, 9 Cal. 420, 70 Am. Dec. 655, that a similar provision in our practice act was not applicable to a proceeding in mandamus to compel a sheriff to execute a deed, the court saying through Field, J.: "The second subdivision of section nineteen, which provides that actions against a public officer for acts done by him in virtue of his office shall be tried in

the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *Elliott v. Cronke's Adm'rs*, 13 Wend. (N. Y.) 35; *Hopkins v. Haywood*, Id. 265." The cases cited, construing a practically similar New York statute, fully sustain the text. The provision was subsequently made a part of our Code of Civil Procedure in the light of the construction previously given by the courts, and with the intention, we must assume, that it should continue to be so construed. This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc. The complaint in the case at bar shows no such case. Moreover, the action is not one against public officers for an act done by them, but is an action against them and certain other persons solely to prevent the doing of certain acts by such officers and by the other defendants in the future. It is thoroughly established, both by statute and by the decisions, that in all cases as to which express provision is not made to the contrary the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial (Code Civ. Proc. § 397), is the county in which the defendants, or some of them, reside at the commencement of the action (Code Civ. Proc. § 395).

The order denying appellants' motion for a change of place of trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 477

YOUNG v. BLAKEMAN. (S. F. 4,213.)
(Supreme Court of California. April 29, 1908.)

1. BOUNDARIES—LOCATION BY PARTIES.

Where adjoining lot owners, being uncertain of the true position of a boundary established by measuring from a fixed object, agree upon its true location, mark it upon the ground, or build up to it, and acquiesce in the location for a period equal to that of the statute of limitations, or under such circumstances that substantial loss would be caused by a change, the line located becomes in law the true line called for by the descriptions of their deeds, regardless of the accuracy of the agreed location as it may appear by subsequent measurements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 212-226.]

2. SAME—PAROL AGREEMENT OF PARTIES.

The agreement as to the line may be in parol.

3. FRAUDS, STATUTE OF—CONVEYANCE OF LAND—ESTABLISHMENT OF BOUNDARY.

The agreement does not operate to convey title to the land which may lie between the agreed line and the true line, and hence is not in violation of the statute of frauds, although it is not in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

4. BOUNDARIES—LOCATION BY PARTIES—EFFECT OF SUBSEQUENT CONVEYANCE BY ORIGINAL DESCRIPTION—PRESUMPTION.

A conveyance of one of the lots by the original description, executed after the line has been established by the parties, will be presumed to have been intended to refer to the distance as fixed by the agreement and marked by the occupancy in pursuance thereof, unless there is something in the deed or in the attending circumstances to rebut the presumption.

5. ESTOPPEL—EQUITABLE ESTOPPEL—PLEADING—NECESSITY OF PLEADING ESTOPPEL AGAINST DEFENSE IN ANSWER.

Where no reply is allowed in pleading, if plaintiff claims an estoppel against defenses set up in the answer, he is entitled to give evidence concerning it without plea; the rule that estoppels must be pleaded not being applicable.

6. SAME—INCONSISTENT CLAIMS TO REAL PROPERTY.

Defendant held an option on a 20-foot lot, the boundaries on each side of which were in controversy. Former owners of the lot and of the one west had agreed upon a division line running a little west of the line called for by the description in the deeds, and a 20-foot building had been erected bordering on the agreed line. Pending a suit by defendant for specific performance of the contract to convey the lot in accordance with the option, a prospective purchaser of the lot east of defendant's was informed that the building on that lot extended over onto the lot described in the deeds to defendant's lot, and defendant and the opposing parties in the pending suit for specific performance agreed that the party who should prevail in that suit should quitclaim the strip on the east side of defendant's lot as described in the deeds which was covered by the building on the next lot east, for a specified consideration, which was fixed, not as the value of the strip, but as the probable cost of quieting title to the strip occupied by defendant on the west side. Defendant was successful in the specific performance suit, and he, as well as the opposing parties, quitclaimed the strip as agreed. *Held*, that defendant, by quitclaiming the strip on the east, was not estopped to claim the strip on the west side.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by W. W. Young against T. Z. Blakeman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

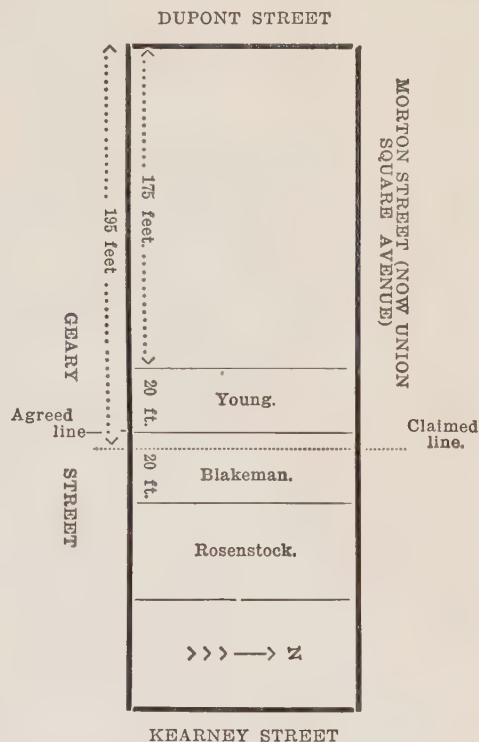
Olney & Olney, for appellant. Lindley & Eickhoff and T. Z. Blakeman, for respondent.

SHAW, J. This is an action to recover possession of land, and involves the location of the boundaries between the respective lots of the plaintiff and defendant, situated in San Francisco. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The two principal points urged by the plaintiff are: First, that, where adjoining owners have agreed upon and established a division line, a subsequent deed by one of them, purporting to convey his tract by the original description, will not convey the title to the grantee up to the agreed line, if it turns out that the position of the line, according to the calls of the deed, newly measured, is within the bounds of his possession and includes less territory on his

side than the agreed line; second, that the defendant is estopped to claim the strip in controversy.

1. The action was begun in January, 1903. The defendant's predecessor, Miller, owned the lot which, according to his title deeds, was bounded as follows: Beginning 195 feet easterly from the northeasterly corner of Geary and Dupont streets, and running thence easterly, along the line of Geary street, 20 feet; thence northerly at right angles, parallel with Dupont street, 122 feet 6 inches, to Morton street; thence at right angles westerly, along the southerly line of Morton street, 20 feet; thence southerly, at right angles, 122 feet 6 inches, to the place of beginning. The plaintiff's predecessor owned a lot which his deeds described in the same manner, except that the point of beginning was situated 175 feet easterly from the northeasterly corner of Geary and Dupont streets. Each owned a lot fronting 20 feet on Geary street, and by their title deeds the boundary between them was 195 feet westerly from the corner. More than 30 years before the action was begun they agreed upon the location of this division line and established it upon the ground. They and their respective successors have, ever since that time, acquiesced in the location and have erected buildings on their respective lots, with walls on the line, and have occupied the same for many years, without dispute until shortly before the action was begun. The buildings on the defendant's lot were erected in 1874. In 1884 Miller, the owner, made a lease of the lot to one Apel, for a term of 20 years, at a fixed rental, inserting therein a clause giving Apel or his assigns an option to purchase the lot, at any time after 15 years from the date of the agreement, at the price of \$40,000. In pursuance of this lease and option Miller delivered possession of the lot and buildings to Apel. In 1894 Blakeman purchased the lease and option agreement, and was given possession of the lot and buildings accordingly, and has ever since held possession thereof up to the agreed line in question. During all this period Young and his predecessors under the original title deeds have had possession of the lot to the west of the division line. After the expiration of the 15 years Blakeman elected to exercise the option and buy the Miller lot at the price fixed. He made a tender, which was refused, brought suit for specific performance, obtained judgment, and received from the heirs of Miller, who died before the suit was begun, a conveyance of the property. See *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120. In all the conveyances of all parties and their predecessors, and in the said lease, the respective lots were described by metes and bounds in the words above given; the Blakeman lot being described as a lot beginning 195 feet west of Dupont street, and the Young lot as a lot beginning 175 feet west thereof, without mention of any monument at the division line, or of any

agreement regarding the same. Dupont street is now known as Grant avenue. After the execution of the deed to Blakeman by the Miller heirs, they set up a claim to a strip of land on the west side of the lot 9 $\frac{3}{4}$ inches wide on Geary street and 13 $\frac{3}{4}$ inches wide on Morton street. This strip they quitclaimed to Young, who thereupon brought this suit for possession thereof. The subjoined plat, though not drawn exactly to scale, illustrates the position of the lots.



When the division line of adjoining owners is designated in their respective deeds as a line beginning at a specified distance from a fixed object, the only method of ascertaining the location of the line on the ground is by measuring the required distance from the object. Experience shows that such measurements, made at different times, by different persons, with different instruments, will usually vary somewhat. The position of the object or monument at which the course begins may also be changed, and the change may not be known to the parties, or there may be no means of ascertaining its original position. If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable. For these and other reasons the rule has been established that when such owners, being uncertain of the true position of the boundary so described,

agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. The court found that the line in question had been thus located by the predecessors in interest of the parties more than 30 years before the suit was begun. The evidence of the fact, though entirely circumstantial, is reasonably satisfactory.

It is conceded that such location is binding upon the parties who own the respective lots at the time the agreement is made, while their ownership continues. The plaintiff's theory is that the agreed line is good only between the original parties, and suffices to mark the line called for by the description only with respect to the deeds under which they hold; that if one of these owners transfers his lot by a deed giving only the original description, delivering possession up to the agreed line, the vendee would not take title to the agreed line, but only to the area called for by the metes and bounds of the deed; that the subject is reopened for settlement between him and his grantee, and if, upon a new measurement, it is found that part of the vendor's holding lies outside of the newly measured line and between that and the agreed line, the vendor will remain the owner thereof, and may convey it to another, or recover the possession thereof from the vendee. His argument is that the vendor, in such a case, is the owner of the intervening strip by adverse possession against the adjoining owner, and not by his original title deeds, and that a conveyance by the original description will not carry title to the land acquired by such adverse possession. The object of the rule is to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. If it had no greater force than is thus contended for, it would be of little benefit, and would fail to accomplish the purposes which led to its establishment. If the descriptions were not by metes and bounds, but designated the lots solely by their respective numbers, or, as in the case of government lands, by sectional subdivisions, and there had been an agreement of this character between previous owners fixing the common boundary, it would scarcely be contended that the division line thus fixed is not binding on their respective grantees, or between a subsequent grantor and his grantee. The effect, however, is precisely the same in this case. The designation of the land by its number or sectional subdivision is nothing more than a reference to a previous survey which states the distance of the line from some fixed object and an

adoption of that statement into the deed by the reference. It will still call for a measurement to ascertain the true position on the ground, unless it has been marked by a monument, and in that case, if the monument is removed and other means of locating its position are not available, as often happens, a measurement must still be resorted to. If a measurement is made, and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds. It is stated by the authorities that the line so agreed on becomes in legal effect the true line; that the agreement as to the line may be in parol, and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds, and not by virtue of the parol agreement; that "the division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed"; and that, if more is thus given to one than the calls of his deed actually requires, he "holds the excess by the same tenure that he holds the main body of his lands." *Sneed v. Osborne*, 25 Cal. 630; *White v. Spreckels*, 75 Cal. 616, 17 Pac. 715; 4 Am. & Eng. Ency. of Law, 861; 3 Wash. Real Prop. § 2232; *Lewis v. Ogram*, 149 Cal. 509, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151, and cases there cited; *Kellogg v. Smith*, 7 Cush. (Mass.) 382; *Miles v. Barrows*, 122 Mass. 579.

There is as much reason for the application of this rule to a grantor, so as to estop him from withholding from his grantee the possession up to the agreed line, or from asserting title to any part of the granted premises within the agreed line, as for applying it to the respective coterminous owners. Where land is occupied by buildings up to the agreed line, as in this case, the grantee is presumed to have bought the property with a view to the boundaries thus visibly marked, and to have relied thereon and fixed the price according to the value of the property as thus defined and used. There is every reason that the grantor should be estopped to claim the contrary. In 1884, when Miller agreed to sell the property to Apel after 15 years for \$40,000, the buildings were on the land in the same position as when this suit was begun, and they served to mark the boundaries. It is to be presumed that it was the land thus built upon, used, and occupied which Miller agreed to sell and Apel agreed to buy. It was this land and building that Miller delivered to Apel in pursuance of the agreement, and of which Blakeman obtained possession in 1894, when he succeeded to Apel's

right under that agreement. A boundary line thus fixed and marked has the same effect as a monument erected to mark a point in a survey. The distance does not control, and the course runs to the monument, or to the agreed termination. A conveyance by the original description, executed after the line has been thus established, will be presumed to have been intended to refer to the distance as fixed by the agreement and marked by the occupancy in pursuance thereof, unless there is something in the deed or in the attending circumstances to rebut the presumption, which is not the case here.

It may be remarked that there is no evidence that any subsequent survey has been made by which the true line is located at the exact point claimed by the plaintiff. There is a reference to a recent survey in the testimony of the plaintiff, but he does not give the results disclosed thereby. From the agreement between the heirs of Miller and Blakeman, to be hereinafter noticed, it may be inferred, by the aid of other evidence, that the true east line of the Blakeman lot is about 7 inches east of the east line of his building. But this would not prove that the west line of his lot was an average distance of about 11 inches east of the west line of the building as claimed by plaintiff. The building is exactly 20 feet in width. There is a finding to the effect that a line 195 feet easterly from Grant avenue would fall east of the agreed line the exact distance of the strip in dispute, according to the location of Grant avenue as "established at the time when this action was commenced." No evidence appears corresponding to this finding. But, conceding its truth, it does not follow that the line of Grant avenue was at the same place as that occupied by Dupont street in 1863, when the defendant's lot was first measured and located therefrom, or when the agreed line was established, or in 1884, when Apel received possession from Miller. Our conclusion is that the effect of the deed to Blakeman by the heirs of Miller was to convey title to Blakeman up to the agreed line on the west side of the lot, and that the subsequent deed from them to Young of the strip in controversy carried no title, unless Blakeman is estopped to claim that strip by reason of the transaction now to be considered.

2. The main contention of the appellant is that the defendant is estopped to claim the strip in dispute. It is objected that the estoppel was not pleaded. Under our system of pleading no reply is allowed, and if the plaintiff claims an estoppel against the defenses set up in the answer he is entitled to give evidence concerning the same without plea. The rule that estoppels must be pleaded does not apply in such cases. The question presented for our consideration is whether or not the evidence established the estoppel claimed. While the suit of Blakeman

against the Miller heirs for specific performance was pending, one Rosenstock, being about to purchase the lot adjoining Blakeman's lot on the east, was informed that the building on that lot extended over the west line thereof upon the lot described in the deeds to the Blakeman lot, covering a strip of the latter $7\frac{1}{4}$ inches wide at the north end and $6\frac{7}{8}$ inches wide at the south end. Wishing to settle all disputes about his boundary and title before buying, Rosenstock asked Blakeman to make him a quitclaim deed for this strip. This was agreed to, and Rosenstock agreed to pay \$2,000 for the deed. To satisfy his fears Rosenstock required that the Miller heirs should join in quitclaiming to him. Blakeman and the Millers thereupon executed a written agreement, reciting the description of the Blakeman lot as hereinbefore given, the pending suit for specific performance, and, in effect, that the west wall of the Rosenstock building projected over the east line of the lot as thus described and bounded, covering the strip proposed to be quitclaimed to Rosenstock, and providing that the \$2,000 should be deposited with a trust company, to be by it held until the suit for performance was determined, and then paid to the party who should finally prevail in said suit, whereupon both parties should quitclaim to Rosenstock the strip covered by his building. This agreement was carried out, the suit terminated in favor of Blakeman, the \$2,000 was paid to him, and he and the Millers, by separate deeds, quitclaimed to Rosenstock. Thereafter the Millers, as before stated, quitclaimed to Young the strip on the west side of Blakeman's lot, covered by Blakeman's building and described in the complaint, claiming as it now appears, that by reason of the conduct of Blakeman in asserting title to the strip on the east side and receiving the \$2,000 from Rosenstock he is estopped to claim title to the strip on the west side, even if their deed to him did have the effect of transferring the title up to the agreed line and beyond the true theoretical line. The evidence shows that Blakeman, in making the arrangement with Rosenstock for the payment of the \$2,000, did not fix that sum as the value of the strip to be conveyed to Rosenstock, but only as the amount which he estimated it might cost him to quiet his title to the land claimed and occupied by him on the west side of his lot.

We are of the opinion that the circumstances under which this agreement was made and executed did not create an estoppel as claimed. As we have seen, the subsequent instruments concerning the lot operated to convey title to the agreed line. Hence the option agreement with Apel bound the Millers to convey title to Blakeman, the assignee thereof, up to that line, and their deed in pursuance thereof transferred that title to Blakeman. The result of the suit for performance showed that the Millers had no legal defense to the suit and that they

were bound to convey as agreed. It is clearly apparent from the whole case that neither the Millers nor Blakeman had ever previously claimed title to the land under the Rosenstock building, and that Rosenstock's vendor had a good title thereto by adverse possession, if not by his title deeds. Blakeman did not in any manner impose on the Millers, or conceal anything from them. It does not appear that the Millers were then claiming that they were not bound to convey to Blakeman the strip on the west side of the Blakeman lot, if they were bound to convey at all. Their defense to the suit for performance made no reference to any mistake in the boundary on either side of the lot, but was founded on other circumstances having no relation to the boundary lines. There is nothing to indicate that either party contemplated or claimed that, if Blakeman won the suit and the \$2,000, it would in any manner affect his right to a conveyance of all the land included in the Apel option up to the agreed line, or would give the Millers, after executing the conveyance, any right to a strip including the greater part of the Blakeman west wall. The respective values of the two strips are not shown. But as the east side strip was in the adverse possession of Rosenstock, and was only an average of 7 inches wide, while the west side strip was in Blakeman's possession, was of an average width of 11 inches, and the Miller deed would give him title thereto, and as it included part of his wall, so that, if he had to relinquish it, he would be compelled to take down his west wall and reconstruct it again at a point 11 inches further east, it is reasonably certain that the strip on the west side was worth far more, and probably twice as much, as the strip deeded to Rosenstock. If Blakeman had understood that he was required to elect whether he would take one or the other, and could not have both, as against the Millers, if he prevailed in the pending suit, it is not improbable that he would have refused to make any agreement with them, or with Rosenstock, to accept \$2,000 in lieu of his rights, and that he would have chosen to retain his rights in the strip on the west side. His relations with the Millers, however, were not of a character to put him to such election, and he was entitled by his contract to a conveyance of all their rights in the premises. The most reasonable conclusion from the entire transaction as shown by the evidence is that both the Millers and Blakeman considered the \$2,000 as equivalent to the expense of quieting the title to the strip on the west side of the lot, and that it was to go for that purpose to the party who succeeded in gaining title to the lot in the suit for performance. This would not give the losing party any right whatever, either to the \$2,000 or to any part of the land. The plaintiff is claiming by virtue of what is usually designated as an "equitable estoppel." If the defendant were held to be estopped, under the

circumstances, it would clearly be an unjust and inequitable estoppel. The court was fully justified in refusing to make any finding on the subject of estoppel, on the ground that the evidence was insufficient to establish any estoppel.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J., expresses no opinion.

BEATTY, C. J. I dissent. Blakeman, after demanding and receiving the \$2,000 paid by Rosenstock for the strip on the east of the Miller building, in my opinion, is estopped to claim the strip on the west under his conveyance from the Miller heirs. They were bound by their father's agreement to convey to Blakeman, as assignee of Apel, a 20-foot lot, and no more. Conceding that a conveyance according to the description in that contract might have been claimed by Blakeman to effect a transfer of the 20 feet covered by the building, he could not claim at the same time that it would transfer the strip east of the building which Rosenstock was desiring to acquire. Blakeman must be held to have known what he was seeking by his suit for specific performance, and to have known that if he took the strip on one side he must relinquish that on the other. He made his election when he claimed the price of the strip on the east, and the decree and conveyance by which he got the legal title accurately described the particular 20 feet which he elected to take. The strip in controversy is not included in that description, and remained to the Miller heirs, who conveyed it to plaintiff. He had the title, legal and equitable, and should have prevailed.

153 Cal. 376

BARTHEL v. BOARD OF EDUCATION OF CITY OF SAN JOSÉ et al. (S. F. 4,643.)

(Supreme Court of California. April 27, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—TEACHERS—REMOVAL.

A teacher holding a city certificate and employed for an indefinite term is, by Pol. Code, § 1793, protected from removal, except for insubordination or when the board of examination recommend the revocation of his certificate for immorality, unprofessional conduct, profanity, intemperance, or unfitness for teaching, as provided by section 1791.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 302.]

2. SAME.

The election and dismissal of teachers in the public schools are not "municipal affairs" which may by a freeholders' charter be regulated in a manner in conflict with that provided by the general law.

3. SAME—CONTRACT OF EMPLOYMENT—VALIDITY.

It is valid to limit the term of a teacher's employment to one year.

4. SAME—REMOVAL.

Section 5, art. 9, San José Charter, gives the board of education power to employ, pay,

and dismiss teachers, and provided that no election of a teacher should be construed as a contract as to duration of time or amount of wages. Section 13 provides that teachers in their first or second year shall be classed as probationary teachers, and may be dropped on the adverse report of the classification committee by a majority of the board. *Held*, that a teacher duly elected for the year ending June 30, 1903, could not be legally removed, except upon such adverse report by the classification committee.

5. APPEAL—REVIEW—PRESUMPTIONS — FINDINGS — CONSTRUCTION TO SUPPORT JUDGMENT.

Findings of the trial court will be given such a construction on appeal as will support the judgment of the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3762-3771.]

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Mandamus by F. K. Barthel against the board of education of the city of San José and other to readmit plaintiff as a teacher in the city schools, and to draw its order for three months' salary. From a judgment ordering drawing of the order, defendants appeal. Affirmed.

John E. Richards, F. B. Brown, and F. H. Benson, City Attys., for appellants. Partridge & Jacobs, for respondent.

SLOSS, J. The plaintiff in November, 1902, applied to the superior court of Santa Clara county for a writ of mandate requiring the board of education of the city of San José and its members to admit plaintiff to the position of principal of the Washington school in said city, or an equivalent position, and to draw its order upon the proper officer directing the payment to plaintiff of three months' salary as such teacher. Plaintiff's claim was that he had in July, 1902, been elected and employed as a teacher in the San José school department, and that the defendants had prevented him from performing his duties as such teacher. The salary claimed was at the rate of \$100 per month for the months of July, August, and September, 1902. An alternative writ issued, and, the defendants answering, the matter came on for hearing. The court made findings, upon which it entered judgment awarding plaintiff a peremptory writ of mandate as prayed. This judgment was entered in November, 1903. In the meanwhile the plaintiff had, at the expiration of the school year, been duly removed by the board of education. These facts were shown to the court by the defendants, and, upon their motion, an order was made limiting the writ of mandate so that it omitted any direction requiring the reinstatement of plaintiff, but merely directed the board to draw its order upon the proper officer for the payment to plaintiff of the three months' salary claimed by him. The defendants appeal from the judgment. There is no bill of exceptions, and the sole question is whether, upon the facts alleged and found, the plaintiff was entitled to the writ directing the payment of the salary in question.

That the findings are responsive to the issues made by the pleadings is not questioned, and it will be sufficient, therefore, to briefly state the facts as found. On July 2, 1902, the board of education of the city of San José duly granted to plaintiff a city grammar grade certificate, authorizing him to teach in any of the common public schools of said city. On the same day, and after the granting of said city certificate, plaintiff was by said city board of education duly elected and employed as a teacher in the schools of said city, "without any term specified." He had on the 30th day of June, 1902, and again on the 2d day of July, 1902, prior to the granting of his city certificate, by separate orders of the board, been elected and employed as a teacher in the school department for the school year ending June 30, 1903, and had been assigned to the position of principal of the Washington school. The salary attached to such position was \$1,200 per year, payable in equal monthly installments. On July 30, 1902, the board passed an order purporting to remove and dismiss plaintiff, and to set aside the election of June 30, 1902. On August 5, 1902, said board adopted a resolution purporting to remove and dismiss all teachers (including plaintiff) elected on July 2, 1902. Plaintiff did not receive any notice prior to either attempted removal. No charges of any kind have ever been filed or made against him. On September 10, 1902, the schools in the city of San José were opened for the ensuing school year. Plaintiff presented himself at the Washington school, ready, able, and willing to perform his duties as principal, and has ever since been willing to perform these duties or those of a similar position, but the defendants have prevented him from so doing. His demand that he be permitted to perform such duties and for the payment of his salary have been refused.

The contention of the appellants is that the plaintiff was rightfully removed by virtue of certain provisions of the charter of the city of San José. In so far as plaintiff's rights are based on his election of July 2, 1902, for an indefinite term, it is difficult to see how this contention can be maintained, in view of the fact that at the time of such election the plaintiff was the holder of a city certificate, and as such was, by section 1793 of the Political Code, protected from removal except for causes mentioned in that section and in section 1791. *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 26. It is not, and cannot be, claimed that the election and dismissal of teachers in the public schools are "municipal affairs," which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. See *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558; *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180. It may be argued, however, that plaintiff's assignment to the particular position carrying the salary

claimed took place before his receipt of a city certificate, and that his right to recover such salary must rest on his election antedating such certificate. For the purposes of the present case we may assume this view to be correct.

Neither section 1793 of the Political Code nor any other provision of the general state law precludes a city board of education from removing at pleasure a teacher who does not hold a city certificate. *Stockton v. Board of Education*, 145 Cal. 247, 78 Pac. 730. We must look, then, to the charter of San José to see whether plaintiff, viewed as a teacher appointed without holding a city certificate, was removed pursuant to the provisions of that instrument. The two elections of plaintiff taking place prior to his receipt of a city certificate in terms limited his employment to the school year ending June 30, 1903. Such limitation was valid. *Marion v. Board of Education*, 97 Cal. 607, 32 Pac. 643, 20 L. R. A. 197. Here, however, the board sought to dismiss the plaintiff from the department before the expiration of the school year. The charter provisions relied on to sustain its action are found in article 9 of the charter. Section 5 of this article gives to the board of education power to employ, pay, and dismiss teachers, janitors, school census marshals, and such other persons as may be necessary to carry into effect the powers and duties of the board. " * * * provided, that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person." St. 1897, p. 621, c. 15. This section, standing alone, would probably authorize the board to dismiss teachers or other employés at will, but it is limited by section 13, reading as follows: "Teachers during their first and second years of service in the department, and all special teachers, shall be classed as probationary teachers, and may be dropped from the department on the adverse report of the classification committee by a vote of a majority of the board. Teachers who have been assigned to duty for more than two years, other than special teachers, shall be classed as permanent teachers, and shall hold their positions without re-election until removed in the manner hereinafter provided. No teacher shall be removed save at the close of the school year, who has not had at least one month's notice of such contemplated action, nor shall any teacher's salary be reduced, except when there is a corresponding reduction made in all the salaries in the same grade. A permanent teacher may be removed for cause by a majority vote of the board of education or upon the recommendation of the city superintendent and a vote of a majority of the board, or by a vote of four members of the board; a vote for removal shall be taken by ayes and noes, and the vote recorded in the minutes." St. 1901, p. 957, c. 37. Section 13 of article 9 of the San José char-

ter, as originally adopted, was construed in *Stockton v. Board of Education*, supra, but the section there considered was amended in 1901, and now reads as above set forth.

Under this section the plaintiff, who was in the first year of his service, is to be classed as a probationary teacher. While there does not appear to be any great difference between "dropping" a teacher from the department, and "removing" him, so far as the effect on the teacher is concerned, the section does apply the latter term only to permanent teachers, and it is reasonable to infer that the clause protecting teachers from removal without prior notice, except at the end of the school year, was intended to refer only to permanent teachers. The purpose of the section, as regards teachers newly appointed, is to provide a period during which they are on trial or probation, to be retained if their work is satisfactory or dismissed if they fail to show their fitness to the satisfaction of the board. During this period of probation their tenure must necessarily be uncertain. They may, long before the expiration of a year, prove their inability to do the work required of them. To hold that, in such case, they must have a month's notice of the contemplated dismissal, would bring about a result which is not required by the language of the section and seems at variance with its purposes. The facts that no charges had been made against plaintiff and that he had received no prior notice of a contemplated removal did not, therefore, prevent his being dropped from the department. But, under any construction that can be given to section 13, the power to "drop" a probationary teacher is not absolute. Authority to take such action is given to the board, or a majority of its members, only "on the adverse report of the classification committee." During the year for which plaintiff was appointed by the orders antedating his certificate an adverse report of this committee was the condition upon which depended the power of the board to dismiss him. One of the issues raised by the pleadings was whether or not every step necessary to give the board jurisdiction to remove plaintiff had been taken. While there is no finding dealing specifically with the matter of an adverse report by the classification committee, the findings, read as a whole, may fairly be said to show that no such report had been adopted. This construction should be given to the findings, in order that they may support the judgment. *People v. McCue*, 150 Cal. 195, 88 Pac. 899.

It follows that, regardless of the effect of the city certificate, the plaintiff, who had been duly elected for the year ending June 30, 1903, was not legally removed from his position, and was therefore entitled to an order for the payment of the salary demanded.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 441

PAYNE v. BAEHR. (S. F. 4,843.)

(Supreme Court of California. April 28, 1908.)

1. COUNTIES—OFFICERS—LIABILITIES—COUNTY AUDITOR—FAILURE TO COMPLY WITH STATUTE—GARNISHMENT OF MONEY DUE FROM COUNTY.

Code Civ. Proc. § 710, providing that when a transcript of a judgment for money against a defendant, accompanied by an affidavit stating the exact amount at the time due on the judgment, and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor of any county, etc., from which money is owing to the judgment debtor, such official shall draw a warrant in favor of the court wherein the judgment is docketed for so much of the money owing the judgment debtor as will satisfy the judgment, prescribes an official ministerial duty the failure or refusal to perform which by the auditor would render him liable to the creditor for any actual damages caused him by such official's refusal.

2. OFFICERS—LIABILITIES—NEGLIGENCE OR REFUSAL TO ACT.

A public officer is liable to respond in damages to one specially injured by his negligence or refusal to perform a ministerial duty to the extent of such special injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 193.]

3. SAME—LIABILITY ON OFFICIAL BOND—MANDAMUS—CUMULATIVE REMEDIES.

Pol. Code, § 4332 (County Government Act, St. 1897, p. 574, c. 277, § 222), providing that for every failure or refusal to perform an official duty, where the fees are tendered, the officer is liable on his official bond, gives the injured party a remedy independent of his right to compel a performance of the duty by mandamus.

4. COUNTIES—OFFICERS—LIABILITIES—COUNTY AUDITOR—GARNISHMENT OF MONEY DUE FROM COUNTY—PLEADING—COMPLAINT.

Code Civ. Proc. § 710, provides that when a transcript of a judgment for money, accompanied by an affidavit stating the amount due on a judgment and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor, etc., of any county, etc., from which money is owing to the judgment debtor, such official shall draw his warrant in favor of the court wherein the judgment is docketed for so much of the money owing the judgment debtor as will satisfy the judgment. In an action against defendant, as county auditor, to recover for his failure to pay over money garnished under the statute, the complaint alleged that defendant was at all times named the auditor of the county and city; that V. was a stenographer of the police court, and during certain months performed the duties pertaining to his position and all conditions to entitle him to have his demands against the treasury of the county for a certain sum audited by defendant; that defendant had audited each of the demands, but did not deliver any of the demands to V.; that a judgment was given for plaintiff against V. which was wholly unpaid, and a duly authenticated transcript of such judgment accompanied by the affidavit prescribed by the statute was filed with defendant; and that during a certain month V. performed the official duties and all conditions to entitle him to have his demand for a certain sum audited, and the auditor audited the demands to V., and, after the filing of the transcript and judgment, delivered to him the demand so audited, and when the affidavit and transcript were filed there was unpaid to him a certain sum due him from the county, and defendant had refused to draw his warrant to satisfy plaintiff's judgment to his damages, etc. *Held*, that the complaint stated a prima facie case, as against a general demurrer, and was not defective on demurrer in not alleging that

the demands of V. had been approved by the police judge, it being alleged that he had performed all conditions necessary to entitle his demands to be audited, and the complaint sufficiently alleged that the money was owing to the judgment debtor from the county when the affidavit and transcript were filed.

5. SAME—TIME OF FILING TRANSCRIPT.

It was unnecessary that the transcript be filed after the debtor's demands had been audited; it being sufficient within the statute if the claim of the judgment debtor had fully accrued when the transcript was filed, and that nothing remained to entitle the debtor to the money except to present his demand therefor and its approval by the auditor.

6. SAME—EXEMPTION OF MONEY GARNISHED—NECESSITY OF ALLEGING EXEMPTION.

It was not necessary for plaintiff to allege that none of the money owing to the debtor was exempt from execution, since, if any of the money was exempt, so that plaintiff would not have been able to obtain the amount due on the judgment had defendant drawn the warrant, that was a matter for defendant to show on the issue of damages.

7. SAME—APPROVAL OF CREDITOR'S CLAIM BY POLICE JUDGE—NECESSITY.

Even though it was necessary that the judgment debtor's demand against the county be approved by the police judge in whose employment the judgment debtor was, before it could be audited, it was not necessary that plaintiff's claim be approved by the police judge.

8. SAME—DEMAND BY JUDGMENT CREDITOR.

It was not essential, to entitle a judgment creditor to recover damages against a county auditor for his failure to draw a warrant to satisfy a judgment, as required by Code Civ. Proc. § 710, providing that if a transcript of a judgment against a person to whom money is owing from the county, etc., accompanied by the affidavit stating the amount, is filed with the auditor, he shall draw a warrant sufficient to satisfy the judgment, that the judgment creditor make a demand on the auditor other than the filing of the transcript and affidavit.

9. PLEADING—DEMURRER TO COMPLAINT—OPPORTUNITY TO AMEND.

Unless a defective complaint cannot be amended so as to obviate the objections thereto on demurrer, plaintiff should be allowed a reasonable opportunity to amend, if he desires to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 656.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Clyde S. Payne against Harry Baehr. From a judgment dismissing the complaint on demurrer thereto, plaintiff appeals. Reversed and remanded.

John Hubert Mee, for appellant. W. H. Cobb and A. L. Weil, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment dismissing the plaintiff's action upon sustaining defendant's demurrer to plaintiff's complaint. The action was one for the recovery of damages for the failure of defendant, as auditor of the city and county of San Francisco, to draw his warrants in favor of the justices' and superior courts of said city and county for sufficient to pay certain judgments recovered in said courts by plaintiff against one Howard Vernon, a creditor of said county. The complaint was in

two counts in substantially the same form; the first alleging a judgment of the justice's court given and made on October 9, 1901, for \$325.86, and the second alleging a judgment of the superior court given and made on June 22, 1904, for \$395.49, being apparently a judgment recovered on the justice's court judgment. The demurrer attacked each count, both for want of facts, and for uncertainty, ambiguity, and unintelligibility.

The action is based on the provisions of section 710, Code Civ. Proc., enacted March 20, 1903 (St. 1903, p. 362, c. 263), providing for the garnishment of moneys owing a judgment debtor from any county, city and county, city, or other municipal or public corporation. That section has been held constitutional by this court, and applicable to the salaries of public employes, at least to all except officers whose salaries are fixed by a provision of the Constitution, and in a proceeding for a writ of mandate instituted by a salaried employe to compel the auditor of the city and county of San Francisco to audit and allow a demand in favor of petitioner for his salary, the writ was denied on the ground that such auditor had been served by a creditor of the petitioner with a certified copy of a judgment for \$98 in his favor against the petitioner, accompanied by the affidavit prescribed by said section. It was held that it was the duty of the auditor, under this section, to deliver the demand, when audited, allowed, and indorsed, to the court rendering the judgment, or its authorized officer. *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782. Section 710, Code Civ. Proc., provides that when a duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court in this state, accompanied by an affidavit stating the exact amount at the time due on such judgment, and that the claimant desires to avail himself of the provisions of the section, is filed with the auditor of any county, city and county, etc., from which money "is owing to the judgment debtor in such action," "it shall be the duty of any such official * * * to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken," so much of the money owing to the judgment debtor as shall be necessary under the judgment, so that the court may properly apply the same. The law thus prescribes an official duty, ministerial in nature, to be performed by the auditor for the benefit of the judgment creditor, when properly requested, somewhat analogous to the duty of a sheriff to whom a writ of attachment or execution is delivered with directions to levy the same. It cannot reasonably be claimed that he would not be liable to the creditor properly demanding the performance of such duty, for any actual damage caused such creditor by his refusal to perform the same. It is elementary that a public officer is liable to respond in damages to one specially injured by his neglect or refusal to perform an official ministerial duty

to the extent of such special injury (see *Mock v. Santa Rosa et al.*, 126 Cal. 330, 344, 58 Pac. 826), and our statutes provide that for every failure or refusal to perform official duty where the fees are tendered the officer is liable on his official bond (Pol. Code, § 4332; County Government Act, St. 1897, p. 574, c. 277, § 222). This remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance of an official duty to compel the performance of the same by a resort to the proceeding of mandamus. We are of the opinion that, as against a general demurrer for want of facts, the complaint sufficiently stated a cause of action for damages specially caused plaintiff by the failure and refusal of defendant to perform a ministerial duty which he was called upon to perform for the benefit of plaintiff.

It is substantially alleged in the second count of the complaint that the defendant was at all the times named the auditor of the city and county of San Francisco; that ever since January 2, 1901, one Howard Vernon was a stenographer of the police court of said city and county under appointment by the judges thereof; that during the months of May, June, July, and August, 1903, said Vernon performed all duties pertaining to his said position, and "all conditions on his part to be performed to entitle him to have his demand against the treasury of said city and county" for \$200 for each of said months "audited by said auditor"; that said auditor has "audited" each of said demands, but did not deliver and has not delivered any of said demands to said Vernon; that on June 22, 1904, in the superior court of said city and county, a judgment was duly given and made, in favor of plaintiff and against said Vernon for \$395.49, which judgment remains wholly unpaid; that on September 1, 1904, a duly authenticated transcript of such judgment, accompanied by the affidavit prescribed by section 710, was filed with defendant as auditor; that during the month of August, 1904, said Vernon performed all the duties pertaining to his said position and "all conditions on his part to be performed to entitle him to have his demand against the treasury * * * for the sum of two hundred (\$200) dollars audited by said auditor"; that the auditor audited the same for said amount, "and after the filing of the authenticated transcript of judgment and affidavit" hereinbefore referred to, delivered the demand so audited to said Vernon; that at the time said affidavit and said transcript of judgment were filed with the auditor "there was unpaid to said Howard Vernon by said city and county of San Francisco" the sum of \$1,000 for services rendered by him as such stenographer for the months of May, June, July, and August, 1903, and August, 1904; that said defendant has refused and failed to comply with the demand of plaintiff and to draw his warrant in favor of said superior court for so much of

said money as would satisfy said judgment; and that "by reason of the premises plaintiff was damaged in the sum of" \$400.79, the amount due on said judgment. These allegations sufficiently make a prima facie case as against the general demurrer.

In regard to the objection that it was not alleged that the demands of Vernon had been approved in writing by the police judges, it was alleged that Vernon had performed all conditions on his part to be performed "to entitle him to have his demand against the treasury * * * audited by said auditor," which sufficiently implied, as against the general demurrer, the presentation of a demand in proper form to be audited by the auditor. The objection that it does not appear in the complaint that the authenticated transcript was filed subsequent to the auditing by the auditor is immaterial. It is undoubtedly true that the judgment creditor can obtain under section 710, Code Civ. Proc., only such money as "is owing to the judgment debtor" at the time of the filing of the authenticated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient for all the purposes of this section that the claim of the judgment debtor against the city and county has fully accrued at the time of the filing of the transcript, etc., and that nothing remains to be done to entitle him to the money except the presentation of a proper demand therefor and the approval of the same by the auditor. The auditor is, of course, not required to do anything in the way of drawing his warrant until after audit, but when finally the demand is audited and ready for payment, the transcript of judgment previously filed is sufficient to cover the audited claim to the extent that it had accrued at the time of such filing. The delivery of the audited claim to the person entitled thereto may, and generally does, immediately follow the auditing, and a construction of section 710 which would require the transcript of judgment to be filed after audit and before delivery would practically nullify the remedy sought to be granted judgment creditors thereby. The allegations sufficiently showed as against the general demurrer that there was \$1,000 "owing to the judgment debtor" from the city and county at the time of the filing of the transcript of judgment and affidavit. It was not necessary, in order to show damage to plaintiff, that the complaint should allege that the moneys owing to Vernon from the city and county were in whole or in part not exempt from execution. It was alleged in terms that plaintiff was damaged in the sum of \$400.79 by the failure of the auditor to perform the duty incumbent on him in the matter of plaintiff's claim, which sufficiently tendered an issue as to damage and the amount thereof. If the circumstances were such as to exempt all or any portion of this money from execution, so that plaintiff would not have been able to

obtain the amount due him on the judgment from the money that would have come into the possession of the court if the auditor had done his duty, that was, at most, a matter for the defendant to show on the issue of damage.

We have now discussed all the objections urged by defendants under the general demurrer for want of facts, which are applicable to the second count. There is an additional objection applicable only to the first count. The judgment upon which the claim set forth in that count was based was rendered in the year 1901, which was prior to the enactment of section 710, Code Civ. Proc., and it is claimed that the section has no application to judgments rendered prior to its enactment. It is not necessary to consider this contention for the purposes of this appeal, for, if the demurrer was improperly sustained as to the second count, the judgment must be reversed, and as the second count is apparently based on a later judgment obtained in an action given in 1901, the question may be immaterial in any further proceedings in this case.

The demurrer on the ground of uncertainty was not well taken in so far as the second count was concerned. Conceding that it was necessary that the demand of Vernon against the city and county should have been approved by the police judges of the city and county before it could be audited by the auditor, it was not necessary that the demand of plaintiff, Payne, should be approved by said police judges, and a specification of uncertainty in this regard is immaterial. It was not essential to a cause of action in favor of plaintiff against the auditor for damages that he should have made any demand on the auditor, other than the demand embraced in the filing of the authenticated transcript of judgment and affidavit provided for by section 710, Code Civ. Proc., which affidavit in terms stated that the creditor desired to avail himself of the provisions of this section. As we have seen, such a demand will cover moneys "owing" to the judgment debtor at the time of the filing, although the claim therefor has not as yet been audited. It does clearly appear in the complaint that the demand of Vernon was audited prior to the commencement of the action. This disposes of all objections on the ground of uncertainty which were applicable to the second count. Specifications of ambiguity and unintelligibility were the same as those of uncertainty, and none of them was well taken.

It thus appears that the demurrer should have been overruled, at least so far as the second count is concerned. It is therefore unnecessary to consider the contention of appellant that, even if the demurrer was good, the trial court erred in sustaining it without leave to plaintiff to amend. It is proper, however, to state that, unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate

the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend. See *Schaaake v. Eagle, etc., Can Co.*, 135 Cal. 480, 63 Pac. 1025, 67 Pac. 759.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 496

HERZOG et al. v. ATCHISON, T. & S. F. R. CO. (S. F. 4,575.)

(Supreme Court of California. April 30, 1908.)

1. ACTION—NATURE AND FORM—SPECIFIC PERFORMANCE OR BREACH OF CONTRACT.

A complaint alleged that, in consideration of a conveyance to a railroad company of a right of way over plaintiffs' land, the railroad agreed to establish a station at a certain place, that thereafter the company laid tracks and operated trains on the right of way, and that subsequently another railroad company purchased the right of way and continued the operation of the trains. It further alleged that neither of the companies established the station at the place specified by the contract, on account of which plaintiffs were irreparably damaged, and prayed for a decree compelling the railroad purchasing the right of way to establish a station, as agreed. *Held*, that the action was for specific performance of a contract, and not to recover for its breach.

2. RAILROADS—LOCATION OF STATIONS—CONTRACTS RELATING TO—VALIDITY—ENFORCEMENT.

The rule that it is the duty of railroad corporations which are performing functions partaking of a public character to locate their stations where they will best serve the public needs and convenience, and that a court of equity will not, in order to subserve mere private interests, compel the location of stations so as to hamper the company in the performance of its duties to the public, does not apply so as to preclude a party contracting with a railroad from specifically enforcing a contract by which the railroad agreed to establish a station at a certain place, where the contract does not debar the company from establishing stations at any other place, or from fully complying with all its duties to others entitled to its service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 133.]

3. SPECIFIC PERFORMANCE—GROUNDS FOR REFUSING—RATIO OF BENEFIT TO INJURY.

Specific performance of a contract will be denied where to enforce it will impose a great burden upon defendant, with a slight or no corresponding benefit to the plaintiff, and where the performance of the contract will be detrimental to the interests of the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 35.]

4. SAME—COMPLAINT—REQUISITES.

A complaint for specific performance must, in order to be good against a general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is, as to the defendant, just and reasonable, and that it would not be inequitable to enforce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 35, 356-372.]

5. SAME.

A complaint, in a suit against a railroad company to compel specific performance of a

contract of the railroad's predecessor in interest to establish a station at a certain place, in consideration for the conveyance of a right of way to it, did not state the value of the right of way conveyed, did not allege the costs to the defendant of compliance with the contract, nor any facts indicating the adequacy of the consideration or the fitness of the contract, and did not contain even a general allegation that the contract was just and fair as between the parties, or that plaintiffs owned land adjoining the right of way, at any time after its conveyance to the defendant's predecessor. *Held* that, so far as appeared from the complaint, the plaintiffs were endeavoring to enforce a bare legal right to have defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to plaintiffs' convenience or to the value of any property owned by them at the time of the suit, and hence the complaint did not show that the contract as originally made was fair and just as between the parties, or that it would be equitable to enforce it.

6. SAME—DEFENSES—REMEDY AT LAW—PLEADING.

A complaint in a suit for specific performance must show that a recovery for breach of the contract would not be an adequate remedy, a condition which is essential to obtaining the relief prayed for, as well as for obtaining other forms of equitable relief for the infringement of legal rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 356-372.]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by J. Herzog and another against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment sustaining defendant's demurrer to the complaint, plaintiffs appeal. Affirmed.

J. J. Scrivner and Alfred H. Cohen, for appellants. T. J. Norton, H. D. Pillsbury, and E. E. Milliken, for respondent.

SLOSS, J. To plaintiffs' complaint the defendant interposed a demurrer for want of facts constituting a cause of action. The demurrer was sustained without leave to amend, and plaintiffs appeal from the ensuing judgment in favor of defendant.

The complaint states these facts: On September 20, 1881, and long prior thereto, the plaintiffs were the owners and in possession of a tract of land in Alameda county containing some 65 acres. On September 30, 1881, the California & Nevada Railroad Company executed and delivered to plaintiffs a writing, whereby, in consideration of plaintiffs "signing for" a right of way for said railroad over their land, the railroad company agreed to "establish and maintain a permanent station to deliver and take passengers and freight at each passing train, said station to be situated at the north side of said Alcatraz avenue and on the west side of Lowell street, and to receive and discharge passengers from all but express trains upon proper signal." At the same time, and in consideration of the execution and delivery of this instrument, the plaintiffs signed and delivered to the railroad company the right

of way over their lands referred to in the instrument. Subsequently, the California & Nevada Railroad Company laid down railroad tracks over such right of way and operated passenger and freight trains thereon. In 1893 the defendant, Atchison, Topeka & Santa Fé Railroad Company, purchased of the California & Nevada Railroad Company the right of way granted by plaintiffs, and has ever since been in possession of the same, and has been operating passenger and freight trains thereon. At the time of its purchase, the defendant had notice of its predecessor's agreement with plaintiff and assumed the obligation to perform the same. Neither the defendant nor its predecessor in interest has ever established or maintained a permanent or any station at the place or for the purposes specified in the agreement, nor has either of them stopped any train at such place. On June 2, 1904, plaintiffs requested the defendant to comply with the terms and conditions of said agreement, but the defendant has failed and refused to perform any of such terms and conditions. Plaintiffs have, upon their part, performed all the terms and conditions required of them to be performed. On account of the failure and refusal of the defendant to so comply, plaintiffs "have suffered great and irreparable damage, and, if said terms and conditions, as aforesaid, are not carried out and performed by defendant, these plaintiffs will continue to suffer great and irreparable damage." The complaint concludes with a prayer for a decree compelling the defendant to establish a station as agreed, to deliver, receive, and discharge passengers thereat, and to stop all trains except express trains, at such station for these purposes.

The action is clearly one for specific performance of a contract, not to recover damages for its breach (*Pittsburgh Coal Co. v. Greenwood*, 39 Cal. 71; *Bohall v. Diller*, 41 Cal. 532; *Prince v. Lamb*, 128 Cal. 130, 60 Pac. 689), and the sole question is whether the complaint alleges facts entitling the plaintiff to the equitable relief sought. It is argued by the respondent that it is the duty of railroad corporations, which are performing functions partaking of a public character, to locate their stations at places where they will best serve the public needs and convenience, and that, accordingly, a court of equity will not, in order to subserve mere private interests, compel the location of stations for the stopping of trains in such manner as to hamper the company in the performance of its duties to the public. The rule thus invoked has been applied to cases more or less similar to the present one. *Texas & P. R. Co. v. City of Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Beasley v. Texas & P. R. Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Mobile, etc., R. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; *St. Joseph, etc., R. Co. v. Ryan*, 11

Kan. 602, 15 Am. Rep. 357; *Pac. R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Holladay v. Patterson*, 5 Or. 177; *Texas, etc., R. Co. v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94. Nearly all of these cases, however, involved contracts which undertook to bind the railroad company, not merely to locate a station at a particular place, but to establish no other station within a given distance of such places. In such cases, it was the exclusive character of the accommodation contracted for that was thought by the courts to involve an attempt to interfere with the companies in the performance of their duty to the public. In other words, the common carrier could not be permitted to bind itself not to furnish accommodations wherever they might be needed. This consideration does not apply to the case of a contract which merely binds the company affirmatively to furnish certain accommodations to the plaintiff, without in any way debarring it from fully complying with all its duties to others entitled to its service. The contract here alleged did not bind the company to limit in any degree the facilities to be furnished to the public. It required the establishment and maintenance of a station at a place named, but left the company free to establish additional stations as they might be needed, without limitation of number or location. Contracts similar to the one here in question have been specifically enforced. *Hood v. N. E. Ry. Co.*, L. R. 8 Eq. 661; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun (N. Y.) 468, cited with approval in *P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 153, 39 N. E. 17, 26 L. R. A. 610; *Murray v. N. W. R. R. Co.*, 64 S. C. 520, 42 S. E. 617. Where such contracts are limited to the creation of a right to a certain station or train service at given points, without in any way making the right exclusive or infringing upon the company's obligation to furnish proper service at any other place where it may be needed we are not prepared to hold that their enforcement would necessarily be violative of public policy. *Texas & St. L. R. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Int. & G. N. R. R. Co. v. Dawson*, 62 Tex. 260; *Greene v. West Cheshire Ry. Co.*, L. R. 13 Eq. 44. A different question is presented where, upon the trial, or from the allegations of the bill, it appears that the enforcement of the contract would impose a great burden upon the defendant, with a slight or no corresponding benefit to the plaintiff, or that such enforcement would be detrimental to the interests of the public. Such circumstances, showing that the performance sought would be oppressive or inequitable, will warrant the denial of specific relief. 6 Pom. Eq. Jur. § 796; *Conger v. N. Y., etc., R. R. Co.*, 120 N. Y. 29, 23 N. E. 983; *Murdfeldt v. N. Y., etc., R. R. Co.*, 102 N. Y. 703, 7 N. E. 404; *Clarke v. Rochester R. R. Co.*, 18 Barb. (N. Y.) 350.

The consideration last suggested points

directly to a fatal objection to the complaint under discussion. It is thoroughly settled in this state that a complaint for specific performance must in order to make out a case good as against general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant just and reasonable. Civ. Code, § 3391. In *Agard v. Valencia*, 39 Cal. 302, the court says: "Another well-established rule of courts of equity is that, in a suit for specific performance, it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law. It is incumbent upon the plaintiff therefore to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it." This court has frequently restated its adherence to this rule. *Bruck v. Tucker*, 42 Cal. 352; *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148; *White v. Sage*, 149 Cal. 613, 87 Pac. 193.

The complaint in this case is entirely devoid of any showing of this character. The value of the right of way conveyed is not stated, nor is there any allegation of the cost to the defendant of compliance with its contract. No attempt is made to state any facts indicating the adequacy of the consideration or the fairness of the contract. There is not even an allegation in general terms of the conclusion that the contract is just and fair as between the parties. As bearing upon the question whether the granting of the relief sought would be equitable, it is to be observed that the complaint does not aver that the plaintiffs, at any time since 1881, have been the owners of any land in the neighborhood of the proposed station, or that they live near it. The allegation that they owned land adjoining the right of way in 1881 is not an allegation that they owned it at any later date. The presumption of the continuance of facts once shown to exist (Code Civ. Proc. § 1963, subd. 32) declares merely a rule of evidence and has no application to the statement of facts in a pleading (*Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750). So far as appears from their complaint, the plaintiffs are endeavoring to enforce a bare legal right to have the defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to their convenience or to the value of any property owned by them. The complaint therefore fails to show that the contract as originally made was fair and just as between the par-

ties or that it would be equitable to enforce it. Furthermore, it fails to show that the recovery of damages for a breach of the contract would not be an adequate remedy, a condition which is as essential to the obtaining of specific performance as of other forms of equitable relief for the infringement of legal rights. *Senter v. Davis*, 38 Cal. 450; *Flood v. Templeton*, supra.

Respondent urges some additional points in support of the rulings sustaining the demurrer, but these need not be discussed in view of the conclusions above expressed.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

153 Cal. 488

ALDRICH v. BARTON et al. (GREIG et al. Interveners). (S. F. 4,702.)

(Supreme Court of California. April 30, 1908.)

1. WILLS—CONSTRUCTION—TERMINATION OF TRUST.

Testator gave the residue of his estate to trustees to pay out the net income derived from one-fourth thereof for the maintenance and support of plaintiff so long as he should be incompetent to hold and properly manage his affairs and property, and, on his restoration to capacity, to turn over one-fourth of the residue with all accumulations to him and his heirs forever; but, if he should be permanently of unsound mind up to the time of his death, his share should pass to and be distributed among testator's heirs at law then living according to the laws of descent. Held, that the event on which testator intended to make plaintiff's right to possession of one-fourth of the residue depend was his actual recovery in fact from his mental incapacity, and not on the mere making of an order purporting to declare such recovery.

2. INSANE PERSONS—RESTORATION TO CAPACITY—PROCEEDINGS.

The proceeding for the restoration of an insane person to capacity defined by Code Civ. Proc. § 1766, is not applicable to the case of one who was confined in an insane asylum without having been put under guardianship.

3. SAME—DISCHARGE BY ASYLUM AUTHORITIES.

The discharge of an insane person not under guardianship confined in an insane asylum by the asylum authorities prior to St. 1903, p. 485, c. 364, regulating the care of insane persons, while an adjudication that the person committed and discharged had recovered from his insanity, was nevertheless only prima facie evidence of legal capacity in the person so discharged, under Civ. Code, § 40, declaring that such a certificate shall establish the presumption of legal capacity in the person discharged from the time of such discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, *Insane Persons*, § 42.]

4. SAME—PROCEEDING—NATURE AND EFFECT—JUDGMENT.

The proceeding defined by Code Civ. Proc. § 1766, for the determination of whether an insane person has been restored to capacity, is judicial in its nature, and the judgment rendered is conclusive on the condition or relation of the person, as expressly provided by Code Civ. Proc. § 1908.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, *Insane Persons*, § 42.]

5. JUDGMENT—COLLATERAL ATTACK—JURISDICTION.

A judgment of a court of general jurisdiction cannot be collaterally attacked even for

want of jurisdiction, unless it appears on the face of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 924, 940.]

6. INSANE PERSONS—DISCHARGE—CERTIFICATE OF CAPACITY—EFFECT.

Pol. Code, § 2189, subd. 6, declares that, when a person is discharged as recovered from the state hospital for the insane, a copy of the certificate of discharge may be filed with the clerk of the superior court of the county from which the person was committed, which record shall have the same legal effect as a judgment of restoration to capacity made under Code Civ. Proc. § 1766. *Held*, that such a certificate of restoration to capacity was not effective to deprive a party against whom such certificate was offered to show that it was in fact issued in a case in which the superintendent of the asylum issuing it had no power to act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

7. SAME—INMATES OF HOSPITAL.

Where plaintiff was released from an insane asylum on parol in 1892, after which from time to time, until 1900, he went to the asylum occasionally to visit the physicians, but from that time until 1905, when he applied for and received a certificate of discharge, he had not been in the asylum at all, he was not an inmate at the time such certificate was issued.

8. SAME—CERTIFICATE OF DISCHARGE—JURISDICTION TO ISSUE.

Under Pol. Code, § 2189, authorizing the superintendent of a state hospital for the insane to discharge a patient who in his judgment has recovered, such superintendent had no jurisdiction to issue a certificate of discharge to a person who was not a patient in the sense of having been committed to the asylum and having remained there for care and treatment except in case of temporary absence at the time of such discharge.

9. SAME—CERTIFICATE UNDER FORMER ACTS.

A certificate of capacity, granted by the superintendent of an insane asylum under St. 1897, p. 331, c. 227, covering the commitment and care of insane persons, or under St. 1901, p. 639, c. 211, providing for the discharge of persons who have been committed to a hospital for the insane but are not confined in such hospital, constitutes only prima facie proof of sanity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 42.]

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by George Albert Aldrich against Annie Aldrich Barton and another; Helen H. Greig and others, interveners. A decree was entered denying plaintiff the relief asked, and he appeals. Affirmed.

Aldrich & Gentry, for appellant. Drown, Leicester & Drown, for respondents. A. Everett Ball, for interveners.

SLOSS, J. William A. Aldrich, the father of plaintiff, died on February 25, 1892, leaving a will dated the 29th day of October, 1891. In May, 1888, the plaintiff, George Albert Aldrich, had been duly committed to the Napa State Asylum for the Insane by a judge of the superior court of Alameda county, and he remained a patient in said asylum until after his father's death. By said will the testator gave the residue of his estate to trustees, in trust, among other things, to

appropriate and pay out of the net income derived from one-fourth of such residue "so much thereof as may be required for the proper and comfortable maintenance, support and care of my son George Albert Aldrich, now at the State Asylum for the Insane in Napa county, California, so long as he shall be incompetent to hold and properly manage his affairs and property. Upon the restoration of my said son George Albert Aldrich to mental soundness and capacity to turn over and pay and deliver to him the said one-fourth of such residue of my estate, with all increment and accumulations thereof, to have and to hold the same to him and his heirs forever. If, however, my said son George Albert Aldrich shall prove to be permanently of unsound mind and shall so continue up to the time of his death, the said one-fourth of such residue of my estate shall, upon his death, pass to and be thereupon paid and delivered to and distributed among my heirs at law then living, according to the laws of the state of California then in force relating to the succession to the property of the estate of those dying intestate." The will was duly admitted to probate, and on the 31st day of May, 1893, at the close of the administration of the estate, a decree of distribution was made, whereby the residue of the estate was distributed to the trustees named in the will upon the trusts therein declared. The defendants Annie Aldrich Barton and Helen Aldrich Dunning are the sole remaining trustees.

This action was brought by plaintiff against such trustees to obtain a decree terminating the trust and requiring the defendants to account for and turn over to plaintiff one-fourth of the residue of the estate. The complaint alleges that on or about January 30, 1905, the medical superintendent of the Napa State Hospital for the Insane filed with the secretary of the board of managers of said Napa State Hospital his certificate of discharge of plaintiff, and that on the 1st day of February, 1905, a copy of said certificate, certified by the secretary of the board of managers of said Napa State Hospital, was filed with the county clerk of Alameda county and entered by said county clerk in a book kept by him for that purpose. It is further alleged that plaintiff was, prior to the commencement of this action, discharged from said asylum and restored to mental soundness and capacity. The defendant trustees answered, admitting the filing and recording of the discharge in question, but averring on information and belief that said certificate of discharge is void and of no legal effect, and that the medical superintendent of the Napa State Hospital for the Insane did not, when he signed, made, or filed said certificate of discharge, have any jurisdiction over or concerning the person of the plaintiff or the subject-matter of the discharge of the plaintiff from the said hospital. They further alleged that at the time of said discharge, and at all times since the 1st day of January,

1905, the plaintiff was not in said hospital, nor a patient at said hospital, nor an inmate thereof, nor within the control nor under the jurisdiction of said hospital, or of the medical superintendent thereof or any of the officers of the same, nor within said county of Napa. The answer further denied that the plaintiff was, prior to the commencement of this action, or that he has been at any time, restored to mental soundness or capacity. Other matters are set up in the answer, but the statement here made is sufficient to make clear every point which need be considered in disposing of this appeal. There was also a complaint in intervention, filed by persons claiming to be heirs at law of the testator, and as such entitled to an interest in the trust fund upon the death of plaintiff, if he should remain incompetent until his death. The interveners joined with the defendants in opposing plaintiff's prayer for relief. The court found in favor of the foregoing allegations and denials of the answer. With reference to the mental condition of the plaintiff, there is a finding numbered 11, as follows: "That said plaintiff George Albert Aldrich was not, at the date of the death of his said father, William A. Aldrich, to wit, on the 25th day of February, 1902, and that he was not on the 12th day of November, 1902, or on the said 30th day of January, 1905, and that he has not been at any time since the date of the death of his said father, and is not now of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity; but that ever since the date of the death of his said father he has been, and he is now, of unsound mind and incompetent to hold and properly manage his affairs." As conclusions of law the court found that the discharge of plaintiff from the said asylum did not terminate or extinguish the said trust, but that the same still continues. A decree, denying the plaintiff any relief and declaring the right of the defendants to hold the property upon such trust, followed. The plaintiff appeals and brings up the evidence by a bill of exceptions.

While the record contains numerous exceptions, but a single question is presented. The plaintiff relies exclusively upon the certificate of discharge given by the superintendent of the state asylum, or hospital, as it is now called, on January 31, 1905. By an act of March 26, 1903 (St. 1903, p. 485, c. 364), chapter 1 of title 5 of part 3 of the Political Code was repealed, and there was substituted therefor a new chapter, comprising sections 2136 to 2199, inclusive, of that Code, and dealing with the care and custody of insane persons, etc. Section 2189 deals with the discharge of patients from state hospitals. Subdivision 1 of that section authorizes the superintendent of a state hospital to discharge "a patient who, in his judgment, has recovered," and subdivision 6 provides that: "When any person is discharged as recovered from a state

hospital, a copy of the certificate of discharge, duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. * * * Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person, as provided by sections 1763 and 1764 of the Code of Civil Procedure, such certificate and duly certified copies thereof and such record thereof shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section 1766 of the Code of Civil Procedure." The contention of the plaintiff is that, by this provision, the certificate of discharge of the superintendent is made final and conclusive upon all parties. It is expressly conceded that if the court was authorized to go behind the certificate and inquire into the question of whether, as a matter of fact, the plaintiff had ever become competent, the evidence is ample to sustain finding 11 above quoted, to the effect that he had not at any time since the date of his father's death been of sound mind or competent to hold and properly manage his affairs and property, or restored to mental soundness or capacity.

There is no discussion in the briefs regarding the proper construction of the trust clause; both parties apparently assuming that the event upon which the testator intended to make the plaintiff's right to the principal of one-fourth of the residue depend was his actual recovery, in fact, from mental derangement or incompetency, rather than the mere making of an order purporting to declare such recovery. And this, we think, is the proper interpretation of the clause. The testator provided that the trust should continue so long as the plaintiff should be incompetent. Upon his "restoration to mental soundness and capacity," he was to receive the corpus of the trust. The phrase "restoration to capacity," standing alone, might be construed to mean a judicial or other adjudication of restoration, regardless of the actual fact. But the only proceeding known to our law which, at the date of testator's will, could with propriety be designated as a "restoration to capacity" was the proceeding defined in section 1766 of the Code of Civil Procedure, and that proceeding was not applicable to the case of one who was confined in an insane asylum without having been put under guardianship. *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104. Leaving out of consideration such relief as might be afforded by a court on habeas corpus, the asylum authorities alone had power to affect the status of such person, and while a discharge by such authorities was an adjudication that the person committed has recovered from insanity (*Kellogg v. Cochran*, supra), it afforded, prior to the enactments of 1903, only prima facie

evidence of legal capacity in the person so discharged (Civ. Code, § 40). Such order of discharge is not fairly within the meaning of the phrase "restoration to mental soundness and capacity," as used by the testator. What effect it may have as evidence of such restoration is another question.

The appellant, as has been stated, takes the position that a certificate of discharge which formerly only raised a presumption of capacity is, if issued under section 2189 of the Political Code, as that section now reads, conclusive evidence of restoration to capacity of the person discharged. This contention is based upon the provision of the statute that such certificate shall have "the same legal force and effect" as a judgment of restoration under section 1766 of the Code of Civil Procedure. The proceeding defined in section 1766 is, in its nature, a judicial proceeding. In it a court, upon application by petition on behalf of a person declared incompetent, and after notice to adverse parties and a hearing, is authorized to "judicially determine" the fact of the restoration to capacity of such person. The judgment rendered in such case is one "in respect to the personal, political, or legal condition or relation of a particular person," and, when rendered by a court having jurisdiction to pronounce the judgment or order, is "conclusive upon the condition or relation of the person." Code Civ. Proc. § 1908. The decision in *Kellogg v. Cochran*, supra, established the proposition that this proceeding had no application to the case of a person who had been committed to an insane asylum, but had not been put under guardianship by virtue of sections 1763 and 1764 of the Code of Civil Procedure. The Legislature, in enacting section 2189 of the Political Code, doubtless intended to afford to persons who, upon recovery should be discharged from insane asylums, some record proof, which should operate to establish their recovery in the same way that the judgment of restoration under section 1766 of the Code of Civil Procedure, operated in the case of persons who had been declared incompetent, and for whom guardians had been appointed; that is to say, the certificate when made by an official having jurisdiction to make it, was made evidence of an adjudication of the fact that the person discharged had recovered. But the argument of the appellant goes, and, as will appear, necessarily goes, further than this. He contends that the certificate of discharge, in and of itself, conclusively proves the jurisdiction of the superintendent to make it; that is to say, that it cannot be collaterally attacked even for want of jurisdiction, unless such want of jurisdiction appears on the face of the record. This is, no doubt, the rule applicable to judgments of courts of general jurisdiction. *Carpentier v. Oakland*, 30 Cal. 439; *Hahn v. Kelly*, 34 Cal. 402, 94 Am. Dec. 742; *Drake v. Duvenick*, 45 Cal. 464; *Lyon v. Petty*, 65 Cal. 325, 4 Pac. 103; *Bennett v. Wil-*

son, 133 Cal. 379, 65 Pac. 880, 85 Am. St. Rep. 207. We need not here decide whether the superior court, acting under the provisions of section 1766 of the Code of Civil Procedure, is to be regarded as a court of general or one of limited jurisdiction. In any view, we are satisfied that the statute giving to the certificate of discharge the same legal force and effect possessed by a judgment under Code Civ. Proc., § 1766, is not to be construed as putting it beyond the power of a party against whom such certificate is offered to show that in fact it was issued in a case in which the superintendent of the asylum had no power to act. It is not to be supposed that the Legislature intended to give to an executive officer, acting *ex parte*, the power to determine conclusively, even as against collateral attack, that he had jurisdiction, when in fact he had none. It is not necessary to decide whether the effect contended for could, under fundamental constitutional restrictions, be given to a certificate such as the one here relied on. Nor need we consider whether, even if issued in a case within the jurisdiction of the superintendent, such certificate can constitutionally be made conclusive evidence of restoration to capacity. It is enough, for the purposes of this case, to say that the reasonable interpretation of section 2189 of the Political Code is that it purports to make a certificate conclusive as against collateral attack, if issued by one having authority, in the particular case, to make it, but that such certificate always remains open to attack for want of such authority. The purpose of the section was to give to a certificate of discharge the effect of a judgment, as an adjudication of a fact, not to confer upon it any evidentiary value as conclusive proof of jurisdiction to make such adjudication.

The court found that, at the time of said discharge, the plaintiff was not in the Napa State Hospital for the Insane, nor a patient at said hospital, nor an inmate thereof, nor within the control of the hospital or the medical superintendent thereof. These findings are fully sustained by the evidence, which shows that plaintiff was released from the asylum on parole in 1892. Between that time and 1900 he went to the asylum occasionally to visit the physicians. Since 1900 he has not been to the asylum at all. In 1902 there was granted to plaintiff, at his request, a certificate of discharge. The discharge of 1902, whether valid or not, was treated as effectual by the asylum authorities and by the plaintiff. Plaintiff had no communication thereafter with any official of the asylum until 1905, when he applied for the certificate now relied on. This certificate was issued by Dr. Stone, whose incumbency of the office of medical superintendent began after plaintiff left the asylum. The certificate was issued after an examination of plaintiff made by Dr. Stone at San Francisco. There can be no doubt that the jurisdiction

of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under Pol. Code, § 2189, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a "patient," and that by such "patient" is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence as on parole) for care and treatment, is clear from a reading of the entire chapter of the Political Code dealing with the commitment and care of insane persons. One who has for many years been away from the asylum, claiming, without opposition, to have been discharged by virtue of an order purporting to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise any power of restraint whatever, cannot be said to be a "patient" within the meaning of the law. Such was the condition of the plaintiff, as is found by the court on ample evidence. Nor would plaintiff's situation be improved if the discharge of 1902 could be regarded as valid, either under the act of 1897 covering the commitment and care of insane persons (St. 1897, p. 331, c. 227), or under the act of 1901, providing for the discharge of persons who have been committed to a hospital for the insane, but are not confined in such hospital (St. 1901, p. 639, c. 211). A certificate granted under either act would afford no more than *prima facie* proof of sanity.

The certificate of 1905, having been issued without authority, was ineffectual for any purpose, and the plaintiff's right to recover depended upon his establishing that he had in fact been restored to a condition of competency. On this issue, the finding was against him, and, as is conceded, there was sufficient evidence to support the finding. Since every point made by appellant is based on the claim that the certificate was conclusive in his favor, it follows that the court below rightly gave judgment for the defendants.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

7 Cal. App. 735

GERTH v. GERTII. (Civ. 421.)

(Court of Appeal, First District, California.
March 23, 1908.)

1. REPLEVIN—PARTIES—PARTIES DEFENDANT—PARTIES CLAIMING INTEREST.

In an action in claim and delivery to recover certain promissory notes payable to plaintiff, executed by a person of whom defendant was formerly guardian, defendant alleged that while guardian of such person and in possession of the notes she applied the money belonging to her ward on certain of the notes payable by him, and that she had filed her accounts as guardian, and that the ward had objected thereto, and the accounts and objections were then pending, but did not claim that she had accounted to plaintiff for the money which she claimed to have applied on the notes. *Held*,

that it was not error to refuse to make defendant's ward a party to the action, since he claimed no interest in the notes or right to their possession, his only claim being against defendant for the money which she claimed to have applied to their payment.

2. APPEAL—REVIEW—HARMLESS ERROR—ERROR NOT AFFECTING RESULT.

A judgment will not be reversed for failure to find upon a material issue, if the omitted finding must have been adverse to appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

3. SAME—FINDINGS ON IMMATERIAL MATTER.

In an action to recover possession of promissory notes, where defendant had deposited all the notes with the trial court for delivery to plaintiff if the judgment for him should be affirmed, it was immaterial whether or not the trial court may have found the value of the notes to be greater than the evidence warranted, and the question will not be reviewed.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Henry Gerth against Annie Gerth. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Rogers, Bloomingdale & Free, for appellant. Samuel G. Tompkins, for respondent.

HALL, J. This is an appeal by defendant from a judgment rendered against her for the possession of certain promissory notes, and from the order denying her motion for a new trial.

The point principally relied upon by appellant concerns the action of the trial court in denying a motion made by defendant to have one Andrew Gerth, the maker of some of the notes sued for, made a party to the action. The action is in claim and delivery, wherein plaintiff prays for judgment for the possession of five certain promissory notes, or, in the event that possession thereof cannot be given, for the value thereof. Three of the notes sued for were executed by the said Andrew Gerth, and all are in terms payable to plaintiff. Defendant set forth in her affidavit used on her said motion the fact that she had been the guardian of said Andrew Gerth during a time that he was incompetent, and while such guardian, and while she had possession of the said notes, certain moneys belonging to said Andrew Gerth had come into her possession, which she had applied on certain of the said notes payable by him; that she had filed her accounts as such guardian showing such application of said moneys, and that said Andrew Gerth had filed objections thereto, which said accounts and objections were pending in the superior court of Santa Clara county, unsettled and yet unheard. She did not claim that she had accounted to plaintiff for any of the money of Andrew Gerth which she claimed to have applied on the said notes. Under the circumstances the court did not err in refusing to make Andrew Gerth a party to the action. The action was

brought by plaintiff, the payee of the notes, to recover the possession thereof from defendant. Andrew Gerth claimed no interest in the notes, or any right to the possession of them or of any of them. His only claim was that defendant had no right to apply any of his money in payment of said notes, or had not in fact made any such application. This was a matter to be settled between him and her in the court having jurisdiction of the guardianship proceeding. No matter how it should be settled, its proper settlement could not affect plaintiff's right to recover possession of the notes from defendant. At the outset of the oral argument upon this appeal appellant conceded that the evidence supported the finding as to the ownership and right of possession of the notes being in plaintiff. Upon delivery of the notes to plaintiff and payment of the costs the judgment in this case against her will be fully satisfied. It was admitted at the oral argument that the notes not only can be delivered, but that they had been placed in possession of the court to be delivered to plaintiff if the judgment be affirmed. Neither in her affidavit nor in her evidence does she claim to have ever accounted to plaintiff for any money that she may have received or applied on the Andrew Gerth notes, and plaintiff in this action is not seeking to recover of her any money that she may have received on the Henry Gerth notes. We think the court properly denied appellant's motion to have Andrew Gerth made a party to this action.

Appellant also makes the point that the court erred in not finding upon the issues presented by the allegations in her answer that the consideration for which the notes were given consisted in part of separate property of defendant, and that there was an agreement between plaintiff and defendant and that she should hold, manage, and control said notes. We are not pointed to any evidence in the record that would have sustained any finding upon either of these issues favorable to appellant. Upon the contrary, all the evidence in the record is the other way. It is not pretended that the findings as made do not support the judgment. A judgment will not be reversed for failure to find upon a material issue, if the omitted finding must have been adverse to appellant. *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Hutchings v. Castle*, 48 Cal. 152. See also *Hihn Company v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Rogers v. Duff*, 97 Cal. 67, 31 Pac. 836; *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504.

We do not think it necessary to examine the evidence for the purpose of ascertaining whether or not the court may have found the value of the notes to be greater than the evidence warrants. It was admitted at the oral argument that appellant has deposited all the notes with the clerk of the trial

court for delivery to plaintiff if the judgment shall be affirmed. It is therefore of no consequence to either plaintiff or defendant as to what the value of the notes may be. The question of value has become a moot question.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 725

BADEN BRICK CO. v. CHUBBUCK et al.
(Civ. 460.)

(Court of Appeal, First District, California.
March 18, 1908.)

CORPORATIONS—SALES—ACTIONS FOR PRICE—EVIDENCE.

A corporation operating a brickyard contracted to sell brick therefrom to a buyer. The contract was signed by the corporation per its president. Thereafter a bill of sale of brick at another yard was executed by the president individually. The president testified that, while the lease of the latter yard was in his name, it was the yard of the corporation, and that he signed the bill of sale personally because he was president and manager of the corporation and generally made its contracts in his own name. Brick from both yards was delivered to the buyer, and his books showed that the corporation was credited for all the brick received. He testified that the books were so kept for convenience only. *Held*, to authorize a verdict in favor of the corporation for all brick delivered.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Baden Brick Company against C. I. Chubbuck and another. From a judgment for plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Henry G. W. Dinkelspiel, for appellants.
Roger Johnson, for respondent.

KERRIGAN, J. This action was commenced to recover a balance of an account for goods, wares, and merchandise sold and delivered by plaintiff to defendants. Judgment went for plaintiff. From an order denying a motion for a new trial, this appeal is prosecuted.

The ground chiefly relied upon by appellants is the insufficiency of the evidence to justify the decision. It appears from the record that the respondent owned and operated a brickyard near Baden, in San Mateo county; that on March 3, 1906, it entered into a contract with appellants for the sale of brick. The contract was signed by Thomas Butler, the president of the respondent, as follows: "The Baden Brick Company, per Thos. Butler." Two days later a bill of sale was executed of certain brick at a brickyard in San Francisco at Sixth and Berry streets by Thomas Butler individually to the appellants. The appellants expressly admit the indebtedness alleged, but claim it is due,

not to the respondent, but to Thomas Butler. This claim is without merit.

The amount sued for covers brick delivered in March, 1906, from both the yards in San Francisco and in Baden; and appellants' own ledger, which was introduced in evidence by respondent, shows that the Baden Brick Company was credited by them for all the brick received during that month. C. I. Chubbuck, one of the appellants who kept the books for his firm, in explanation of the entries in their books just referred to, said: "In keeping our ledger account, for convenience sake I put into one account the transactions with the Baden Brick Company and with Thomas Butler." Thomas Butler, a witness for respondent, testified that while the lease of the brickyard at Sixth and Berry streets stood in his name at the date of the contract of March 3, 1906, nevertheless the respondent owned that yard and everything there, including the brick mentioned in the bill of sale of March 5, 1906; that he signed the bill of sale of March 5, 1906, personally because he was president and manager of respondent, and generally made its contracts in his own name.

It is true, as contended by appellants, that the testimony on cross-examination of Butler revealed some inconsistencies. It is also true that appellants introduced testimony to show that the sale of the brick at Sixth and Berry streets was by Butler personally, and not for the respondent. But we are satisfied that there is sufficient evidence to support the findings of the court.

There are other points urged in appellants' brief which we have carefully examined, and which we think do not merit discussion.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 717

JERRUE et al. v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.
(Civ. 327.)

(Court of Appeal, Second District, California.
March 17, 1908.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S PROPERTY—REVIEW—PRESUMPTIONS—JURISDICTION.

An order confirming an administratrix's sale of personal assets being one within the power of the superior court in a proper case, its authority to act will be presumed unless the absence thereof is clearly made to appear.

2. SAME — SALES — CONTINUOUS BID — EVIDENCE.

Evidence held to justify a presumption that a bid made by petitioners to an administratrix for the sale of saloon fixtures was an open and continuous one, subject only to petitioners being successful in their efforts to secure a transfer of the license.

3. CERTIORARI — SCOPE OF WRIT — ADEQUATE REMEDY AT LAW.

Since want of jurisdiction alone will not justify the issuance of certiorari, the writ would not lie to review an order confirming an administratrix's sale of certain personal property belonging to the estate on the ground that there was no bid by petitioners which the administra-

trix could accept at the time the order was made, as in such case the bidder had an adequate remedy at law by defense to a suit for the purchase price.

4. EXECUTORS AND ADMINISTRATORS—SALE—CONFIRMATION—EFFECT.

An order confirming an administratrix's sale of assets pursuant to an order of sale is not an adjudication against the purchaser, but is only sufficient to constitute a prima facie case in an action against the bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1535.]

Petition for a writ of certiorari by D. B. Jerrue and others to review an order entered by the superior court of Los Angeles county confirming an alleged sale of the stock of a saloon, fixtures, etc., by an administratrix. Writ refused.

E. F. Wehrle and Frank James, for petitioners. C. W. Pendleton, E. A. Meserve, R. J. Dillon, and Mott & Dillon, for respondents.

SHAW, J. Petition for writ of certiorari. By an order made on April 14, 1906, the administratrix of the estate of Charles A. Robb, deceased, was authorized to sell at private sale certain personal property, consisting of the stock, fixtures, license to sell liquor at retail, lease, and good will of a certain retail liquor business, all of which belonged to said estate. The petitioners bid \$7,000 for said property, which bid, however, was made subject to their obtaining from the board of police commissioners of the city of Los Angeles a transfer of the license to conduct the business described in said order of sale. The administratrix accepted said bid and sold the property to petitioners, and on April 30, 1906, made due return of said sale to the court, asking that the same be confirmed. At the hearing upon the return and petition for confirmation one Kutzmann in open court made a bid in writing whereby he offered the sum of \$7,025 for the property, provided the said police commission would grant or assent to the transfer to him of the said liquor license. By the terms of said bid the amount thereof, less 10 per cent., accompanying the same, was payable upon confirmation of sale and the making of the transfer of said liquor license, and in case of failure to obtain said transfer the bid was by its terms to be null and void. On the same day, April 30th, the court made its order reciting the return made by the administratrix, the bid in open court made by Kutzmann, the acceptance of which it found was for the best interest of the estate, and ordered that his bid be accepted and the sale to him confirmed. Thereafter the administratrix filed a petition reciting the foregoing facts, and stating that said police commission had refused to transfer said license to Kutzmann, by reason whereof she was unable to comply with the terms of his bid; that the license had been transferred to Jerrue & Co.; and that she had sold all of said personal property to Jerrue & Co., who had paid her the sum of \$3,759.50 as a partial payment therefor. She further asked that the order

confirming the sale to Kutzmann be vacated and an order made confirming the sale to Jerrue & Co. On June 6, 1906, the court made the order as prayed for.

The order being one within the power of the court to make in a proper case, its authority to act will be presumed unless the want of such authority is clearly made to appear. It appears that both bids were conditional upon the success of the bidder in securing a transfer of the license to himself. The order confirming the sale to Kutzmann contained a like condition which could not be fulfilled by reason of the fact that Jerrue & Co. secured the transfer. These facts, together with the further fact that the administratrix had sold the property to Jerrue & Co., who had made a partial payment of \$3,759.50 upon the purchase price, was set forth in her supplementary report in the matter made to the court on June 6, 1906. The fact that petitioners did secure the transfer of the license and paid the sum of \$3,759.50 as a partial payment for the property, it not appearing that he had paid anything thereon at the time of the making of the order confirming the sale to Kutzmann, justifies the presumption that they made their bid an open and continuous one, subject only to their being successful in their efforts to secure a transfer of the license. Additional color at least is given to this presumption by reason of the fact that on July 14, 1906, and after the making of the order complained of, petitioners in writing gave notice to the administratrix that they withdrew their bid made on April 14, 1906, and rescinded the same. This action on the part of petitioners is indicative of the fact that up to the time of the giving of such notice they regarded their bid on file as an existing, open, and standing bid for the purchase of the property as made to the administratrix.

Want of jurisdiction alone, however, will not justify the issuance of a writ of review. Conceding that no presumption of jurisdiction arises in this case, and admitting a want of jurisdiction in the court making the order confirming the sale to petitioners, nevertheless it seems clear that they have a plain, speedy, and adequate remedy in due course of law. *Auzerais v. Superior Court*, 101 Cal. 542, 36 Pac. 6. If, in fact, at the time of making the order confirming the sale there was no existing bid whereby petitioners were legally bound to complete the purchase upon a transfer of the license in accordance with their proposal as set forth in the return of the sale and report of the administratrix, then such fact would constitute a complete defense to any action brought to enforce payment or otherwise compel performance of the alleged contract. The fact that the court confirms a sale upon the return thereof made by an administrator pursuant to an order of sale is not an adjudication against the alleged purchaser. He may not have bid at all, or, if he did bid, he may have been, by timely

withdrawal or otherwise, legally released from any obligation thereon. In an action to enforce the alleged contract of purchase against him the proceedings at most could constitute evidence only of a prima facie case.

The order, in so far as its effect is to vacate and set aside the order confirming the sale to Kutzmann, whether properly or erroneously made, is not a subject wherein petitioners are concerned. Since they are not affected by such action, they are in no wise interested therein.

The demurrer interposed by respondents is sustained, and the proceeding dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 710

LUNNUN v. MORRIS et al. (Civ. 389.)

(Court of Appeal, Second District, California.
Sept. 24, 1907. On Rehearing,
March 17, 1908.)

1. JUDGMENT—DEFAULT—OPENING—MISTAKE—MATTERS FOR CONSIDERATION.

On application for relief from the consequences of the mistake and inadvertence of counsel, all the circumstances surrounding the parties and the litigation, as shown by the papers, are proper matters to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 265-268.]

2. SAME.

Whether acts of counsel amount to a mistake is to be ascertained by the court from the facts before it, and not from the conclusion of counsel or party that there was a mistake.

3. APPEAL—REVIEW—DISCRETION OF COURT—OPENING DEFAULT.

Whether or not the circumstances of a particular case are such that a mistake or inadvertence should be excused rests largely in the discretion of the court to which application is made, and the exercise of its discretion will not be disturbed, except where a clear abuse of discretion is apparent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3577-3579.]

4. JUDGMENT—OPENING DEFAULT—VERIFIED ANSWER AS AFFIDAVIT OF MERITS—SUFFICIENCY.

A verified answer, which denies every material allegation of the complaint, is sufficient as an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 312, 314-316.]

5. SAME—PLEADING BEFORE DEFAULT ENTERED—POWER TO ENTER DEFAULT WHILE PLEA STANDS.

As a general rule in ordinary civil actions, where a party pleads before his default is entered, though out of time or without leave, if the plea be good in form and substance, his default cannot be entered while the plea stands, but the proper practice is to move to strike the plea from the files.

6. SAME—ENTRY OF DEFAULT.

The entry of a defendant's default is not a step in acquiring jurisdiction, but is an act done after jurisdiction has been acquired for the purpose of limiting the time during which he may file his answer.

7. SAME—ENTRY—AUTHORITY TO ENTER—JURISDICTION.

The power to enter judgment depends solely upon the court having acquired jurisdiction by proper service of process on defendant, or by his appearance, and the failure of its ministerial of-

ficer to enter up a default, like the failure to make a proper return of service of process, in no way affects the court's power to act.

8. PLEADING — ANSWER FILED AFTER TIME—EFFECT—DISCRETION OF COURT.

Not only is an answer filed after time not a nullity, but plaintiff is not as a matter of right entitled to have it stricken from the files; but the court in its discretion may retain the answer or permit another to be filed, or may pursue whatever course justice may require.

On Rehearing.

9. APPEAL—RECORD—JUDGMENT ROLL—BILL OF EXCEPTIONS.

A bill of exceptions, when duly settled, becomes a part of the judgment roll on appeal from a final judgment, and is presumed to contain all evidence material to the rulings, to which exceptions are reserved and specified therein, under Code Civ. Proc. § 950, providing that any bill of exceptions settled as provided by statute may be used on appeal from a final judgment equally as upon appeal from an order granting or refusing a new trial.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. Lunnun against J. E. Morris and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded on rehearing.

H. C. Millsap, for appellants. Haas, Garrett & Dunnigan, for respondent.

TAGGART, J. This is an action of forcible entry under section 1159, Code Civ. Proc., and the appeal is by defendants from a judgment in favor of plaintiff.

Complaint was filed December 20, 1906, and summons thereupon issued directing the defendants to appear and answer on or before December 26, 1906. On the latter date attorneys for defendants served plaintiff's attorneys and filed with the clerk notice of their appearance for defendants. On the same day an order of court was made giving them three days in addition to the time fixed in the summons in which to plead. On the 31st day of December, 1906, and prior to any other or further proceedings in the case, defendants filed with the clerk of the court their verified answer. At the time of such filing no default had been taken against defendants or either of them. Thereafter, and on the same day, and when plaintiff's attorneys were in court and about to proceed with the introduction of testimony in said action, they were served with a copy of the said answer so filed as above stated. Attorneys for defendants thereupon called the attention of the court to the filing of the answer and objected to the introduction of any testimony for the reason that the case was at issue, and had not been regularly set for trial, and that they had no notice of trial under section 594 of the Code of Civil Procedure. Plaintiff asked that the default of defendants be entered, and that the testimony of plaintiff's witnesses be heard, upon the ground that the time for the filing and serving of said answer had expired before the same had been filed. Defendants then asked leave of the court to pre-

pare motion, affidavits, etc., upon an application to be relieved from the failure to serve and file their answer within the time allowed by law, on the ground of mistake, inadvertence, and excusable neglect of defendants' counsel. By consent, the attorney for defendants made a statement in open court of the facts upon which he based said motion for relief and introduced the verified answer as an affidavit of merits. His statement was accepted as true for the purpose of the motion, and, together with said answer, appears in the bill of exceptions in the record. The evidence on behalf of plaintiff in the cause was then heard and the objection and motion of defendants taken under submission, and thereafter, on the 2d day of January, 1907, the objection was overruled and the motion denied. Judgment by default in favor of plaintiff for the recovery of the premises was filed January 5, 1907, and the recital in this judgment shows that it was made upon a hearing had on December 31, 1906, at which time evidence was introduced on behalf of plaintiff. The above-mentioned appearance of defendants, the extension of time to plead, and their failure to answer within said time are recited in the judgment.

In the consideration of the application for relief from the consequences of the mistake and inadvertence of counsel, all the circumstances surrounding the parties and the litigation as shown by the papers were before the court and were proper matters for it to weigh in reaching a conclusion. *Lakeshore v. Modoc*, 108 Cal. 263, 41 Pac. 472; *Montijo v. Sherer & Co.* (Cal. App.) 91 Pac. 261. It does not clearly appear from the bill of exceptions whether or not evidence on the part of plaintiff was heard on the motion. If there was, it is not stated. The language of the bill in this respect is as follows: "The verified answer of the defendants was read and used as and for an affidavit of merit. Whereupon the court stated that the evidence of plaintiff would be heard, and the objection and motion would be submitted." The real inadvertence or mistake of counsel consisted of having on Friday, December 28, 1906, informed his associate, who was to prepare, serve, and file the answer in the case, that the answer must be filed December 31, 1906, instead of December 29, 1906. His reason given for doing this is that when telephoning to plaintiff's attorneys for an extension of time to plead, on December 26, he made the entry of his office diary under the date of December 28, "Last day to plead in case of *Lunnun v. Morris et al.*," and, when asked by his associate when the answer was due, looked at his office diary and computed the time allowed by the order of the court (three days) from December 28th instead of December 26th. There is nothing in the statement from which the court could determine that this information was not given by counsel with full knowledge that the three days terminated December 29th, and not December 31st, except

his characterization of it as a mistake in the statement. This the court might well regard as not sufficient. The character of the mistake is to be ascertained by the court from the facts before it, and not from the conclusion of counsel or party that the act was a mistake. *Shearman v. Jorgensen*, 106 Cal. 484, 39 Pac. 863. Even if there was no showing upon plaintiff's part, which does not seem clear from the record, we cannot say that the trial court abused its discretion in denying the motion. Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that an appellate court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. *Freeman v. Brown* (Cal. App.) 90 Pac. 970; *Vinson v. L. A. P. R. Co.*, 147 Cal. 483, 82 Pac. 53. While this discretion is best exercised when it tends to bring about a judgment on the merits, it would cease to be a discretion if it could only be exercised to this end.

The answer denies every material allegation of the complaint and is a sufficient affidavit of merits. *Montijo v. Sherer & Co.*, supra; *Melde v. Reynolds*, 129 Cal. 314, 61 Pac. 932. The application was not made for leave to file the answer. That had already been filed by the clerk when the default was entered. While there are jurisdictions in which it has been held that an answer filed after the time limited by the statute, without leave of the court, may be disregarded as a nullity (6 Enc. of Pl. & Pr. p. 86), the general rule, and that adopted by the Supreme Court of this state in ordinary civil actions, appears to be that, where a party pleads before default entered, though out of time or without leave, if the plea be good in form and substance, his default cannot be entered while the plea stands. The proper practice in such case is to move to strike the plea from the files. 6 Enc. of Pl. & Pr. pp. 82, 85; *Bowers v. Dickerson*, 18 Cal. 420; *Acock v. Halsey*, 90 Cal. 216, 27 Pac. 193.

The entry of the default is not a step in acquiring jurisdiction, but an act done after jurisdiction has been acquired by the court. *Siehler v. Look*, 93 Cal. 608, 29 Pac. 220. The purpose of the entry of default is to limit the time during which the defendant may file his answer (*Drake v. Duvenick*, 45 Cal. 463), but such entry is not necessary in order that the court may enter a judgment against the defaulting party. The power to enter judgment depends solely upon the court having acquired jurisdiction by proper service of process, on the defendant, or his appearance, and, the failure of its ministerial officer to enter up a default, like such failure to make proper return of service of process, in no way affects the power of the court to act. *Iiibernia Saving Soc. v. Matthai*, 116 Cal. 426, 48 Pac.

370; *Herman v. Santee*, 103 Cal. 523, 37 Pac. 509, 42 Am. St. Rep. 145. Not only is the answer filed after time not a nullity, but the plaintiff is not as a matter of right entitled to have it stricken from the files. The discretion to do this is lodged in the court, which has absolute power either to retain the answer or permit another to be filed, or pursue whatever course in that respect the justice of the case may require. *Bowers v. Dickerson*, supra.

There is nothing in the bill of exceptions to show that any motion was made to have the answer stricken from the files, nor does it appear that the court of its own motion did this. Neither is there anything in the record to negative this; that is, to show that no such motion was made or that such action was not taken. The bill of exceptions contains merely the recital that "the following proceedings were had therein." It nowhere appears that the proceedings displayed and the action taken were all the proceedings had or acts done. In the absence of such showing, the presumption must be in favor of the court having done every act necessary to sustain the judgment. In support of the judgment all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary. *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361.

This holding renders it unnecessary for us to determine whether any distinction is to be drawn in this respect between the rules of practice in ordinary civil actions and summary proceedings in forcible entry. Presuming, then, in support of the judgment that the answer filed was stricken from the files before the default judgment was rendered, the record shows no reversible error, and the judgment should be affirmed.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

On Rehearing.

TAGGART, J. An action in forcible entry. The statement of facts in this case will be found in the decision rendered by this court September 24, 1907. We are satisfied with the views expressed in that opinion, except what is said as to the intendment declared to exist in support of the judgment.

The bill of exceptions contained in the record was treated as if entitled to be considered only in connection with the motion of appellant for relief under section 473 of the Code of Civil Procedure on the ground of mistake. In this we overlooked the fact that it was a part of the judgment roll, and the presumption which, under such circumstances, attached to it, to wit, that it contained all the evi-

dence material to the rulings to which exceptions were reserved and specified therein. This presumption rendered it unnecessary that it should negative the introduction of other evidence bearing upon the point to be considered. *Hidden v. Jordan*, 28 Cal. 301; *Bedan v. Turney*, 99 Cal. 652, 34 Pac. 442. The bill of exceptions when settled became a part of the judgment roll (section 950, Code Civ. Proc.), and the court's record of its own acts, and an appellate court could no more assume that error appearing therein was cured by some matter which is not contained in the bill, than it could consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. The oversight mentioned resulted in an erroneous conclusion and the entry of an improper order by this court.

Respondent, upon the rehearing, again urges that a distinction should be drawn between an action of forcible entry and an ordinary civil action in considering the question presented by the appeal. The question is one of practice, and, unless otherwise provided in the chapter relating to forcible entry and unlawful detainer, must be determined by the general rules of practice in civil actions. Section 1177, Code Civ. Proc. The particular question here involved is not covered by a statutory rule relating to either class of cases. An answer was filed after the expiration of the time provided by law. It was not stricken out before default was entered. The power to enter judgment does not depend in either case upon the entry of the default. Jurisdiction to enter the judgment is acquired by service of process in both cases, and the defendant in either may at the discretion of the court be relieved from a default and permitted to answer after the expiration of the time given by statute for that purpose. A reason from which a distinction might be drawn on account of the summary character of the action is apparent, but the statute provides that the general rule shall be followed in all instances for which express provisions are not made in the chapter relating to the special proceeding. In the absence of the special provision, we must be governed by the general rule declared in ordinary civil action, which is that the default should not be entered until the answer shall have first been stricken from the files. *Bowers v. Dickerson*, 18 Cal. 420; *Acocck v. Halsey*, 90 Cal. 216, 27 Pac. 193; 6 Ency. of Plead. & Prac. pp. 82, 85. A note under the last citation distinguishes the rule in the state of New York (from which cases are cited by appellant), as not being in accord with this; but the New York rule is stated as the exception. No decision in this state has been called to our attention which modifies the effect of *Bowers v. Dickerson*, supra, as an authority on this question.

Judgment reversed, and cause remanded.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 757

WHITAKER v. CALIFORNIA DOOR CO.
(Civ. 495.)

(Court of Appeal, First District, California.
March 24, 1908. Rehearing Denied April 22,
1908; Denied by Supreme Court May 19,
1908.)

1. APPEAL—ORDER DENYING NEW TRIAL—REVIEW OF EVIDENCE.

The appellate court will not disturb an order refusing a new trial where there is a substantial conflict in the evidence, and will not review the evidence as though the motion were presented directly to it, though it was denied by a judge of the trial court who did not hear the evidence at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3864, 3872.]

2. SAME—INSTRUCTIONS—HARMLESS ERROR.

Where the testimony was conflicting in all material points, an instruction that if the jury should find that the evidence was conflicting and that any witness had testified falsely as to any material fact the jury was at liberty to disregard and discard the whole testimony of the witness from further consideration, while objectionable, because limiting the rule to conflicting evidence alone, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]

3. TRIAL—WITNESSES—FALSE TESTIMONY—INSTRUCTIONS.

An instruction that if any witness had willfully testified falsely in regard to any material fact the jury was at liberty to "disregard and discard his entire testimony" was not objectionable because of the use of the words "disregard" and "discard" instead of "distrust"; Code Civ. Proc. § 2061, subd. 3, providing that when a witness is false in one part of his testimony he is to be "distrusted" in the others.

Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Clarence Whitaker, a minor, by his guardian, James A. Whitaker, against the California Door Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Myrick, Deering & Gibbons, for appellant. Charles E. Naylor, for respondent.

KERRIGAN, J. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

The action was brought to recover damages for injuries received by plaintiff, a boy 15 years of age, while operating a grooving machine in the defendant's mill. As there is a conflict in the evidence on the question involved, a statement of the facts of the case or even a summary of them is unnecessary. Appellant concedes, as indeed he must, that there is a conflict in the evidence; but he contends that the rule applied by appellate courts in such cases is inapplicable here under the peculiar circumstances of this case.

It appears from the record that the case was tried before the Honorable W. E. Greene, sitting with a jury; that before the motion for a new trial was made Judge Greene died, and the motion was submitted to another judge of the same court, the Honorable John Ellsworth. Appellant contends that the

judge who heard and denied the motion for a new trial, not having seen the witnesses nor observed their manner of testifying, was in no better position to weigh the testimony than is this court, and that therefore the rule which prevents appellate courts from examining the testimony when there is a conflict does not apply. In other words, appellant desires that we should examine and weigh the evidence as though the motion for a new trial were presented directly to us. Appellate courts will not disturb an order of a trial court in granting or refusing a new trial when there is a substantial conflict in the evidence, and the circumstance that the motion was decided by a judge of the trial court who did not hear the evidence at the trial makes no difference in the application of the rule.

In *Reay v. Butler*, 95 Cal. 214, 30 Pac. 208, the Supreme Court holds that the rule just stated is not adopted merely because courts of review do not have, as do trial courts, the advantage of observing the appearance and bearing of witnesses; but it is also founded on the essential distinction between trial and appellate courts, and grows out of a consideration of jurisdiction, that it is the province of the trial courts to decide questions of law and fact, and of the appellate courts to decide questions of law, and that appellate courts can rightfully set aside a finding for want of evidence only when there is no evidence to support it, or when the supporting evidence is so slight as to show an abuse of discretion. The court further says: "It has been held directly in several cases that the rule as to conflicting evidence applies to a case where the trial was before one judge and the motion for a new trial passed upon by his successor, and where the latter saw none of the witnesses, or where the trial was before the old district court and the motion before the succeeding superior court." See, also, *Garton v. Stern*, 121 Cal. 349, 53 Pac. 904. The rule is the same in all cases, whether the evidence is given orally or by deposition or affidavit (*Sheehan v. Osborn*, 138 Cal. 515, 71 Pac. 622; *Parrott v. Floyd*, 54 Cal. 535), or upon testimony in other cases (*Knox v. Moses*, 104 Cal. 505, 38 Pac. 318).

The judge who presided at the trial gave the following instructions: "*If in this case the consideration of it you shall find that the testimony is conflicting, and if you shall find from the evidence that it is so conflicting, and that any witness who has testified in it has willfully testified falsely in regard to any fact material to the issue in the case, you are at liberty to disregard and discard the whole testimony of such witness from your further consideration in coming to a verdict.*"

Appellant objects to the part of the instruction in italics, because it does not apply the rule that a witness, false in one part of his testimony, is to be distrusted in others to the whole testimony, but confines and limits the

rule to conflicting testimony. We do not approve of this instruction, but as the testimony was contradictory in all the material points in the case the instruction, even considering it apart from the others, was entirely harmless. Subdivision 3 of section 2061 provides that, when a witness is false in one part of his testimony, he is to be distrusted in others. The foregoing instruction, it will be noted, uses the words "disregard" and "discard" instead of the word "distrust," and appellant says that disregard and discard do not mean the same as distrust; that distrust means suspicion, not disbelief; and that therefore, so he contends, the court erred in giving this instruction. Code Civ. Proc.

This matter has been passed on adversely to appellant's views in the case of *People v. Soto*, 59 Cal. 367, in which case the same judge who tried this case gave an instruction almost word for word like the one under consideration. There as here the words "disregard" and "discard" were employed. The instruction read: "If you believe that the defendant or any other witness in this case who has testified has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard and entirely discard the whole testimony of such witness in coming to your verdict." And the Supreme Court, in sustaining the lower court, says (pages 369-370): "The court did not tell the jury that they ought to reject, or that they must reject, the entire evidence of the witness, but simply instructed them that they were at liberty to disregard and discard the whole evidence of a witness who had willfully testified falsely to a material fact in the case. We are at a loss to see how the court, by leaving the matter entirely within the discretion of the jury, in any manner invaded its province, and we think the instruction was a correct and proper one."

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 732

PAJARO VALLEY BANK v. SCURICH et al.
(Civ. 418.)

(Court of Appeal, First District, California.
March 23, 1908.)

1. ATTACHMENT—AFFIDAVITS—AMENDMENTS—
FATALLY DEFECTIVE AFFIDAVIT.

A fatally defective affidavit on which a writ of attachment was issued cannot be amended so as to meet a motion to discharge the writ
[Ed. Note.—For cases in point, see Cent. Dig vol. 5, Attachment, §§ 323-334.]

2. SAME.

Code Civ. Proc. § 556, permits a defendant, either before or after the release of the attached property, to move that the attachment be discharged as improperly or irregularly issued. Section 538 provides that an affidavit for attachment shall show that "the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant." In an action on a note against the maker and four indorsers, etc., the writ directed

a levy on any property of defendants, or either of them, and the affidavit upon which the writ was issued stated that "the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendants." Held, that the statute required the affidavit to negative an intention to hinder, etc., any creditor of any defendant against whom the writ ran, and the affidavit filed did not negative a purpose to hinder, etc., any creditor of any number less than all of them, and was fatally defective.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the Pajaro Valley Bank, a corporation, against Stephen Scurich and others, upon a note. From an order denying a motion to discharge a writ of attachment, one of defendants appeals. Reversed, with direction to discharge the attachment as against appellant.

Chas. B. Younger, for appellant. Dickerman and Torchiana, for respondent.

HALL, J. This is an appeal by defendant Stephen Scurich from an order of the trial court refusing to discharge a writ of attachment as to said defendant that had been issued in the above-entitled action, and been levied upon property of said defendant as well as upon property of the defendant corporation.

The motion was made under section 556, Code Civ. Proc., upon the ground that the writ was improperly and irregularly issued as to appellant, in this, that the complaint fails to state a cause of action against appellant, and that the affidavit for attachment is insufficient, in that it fails to show "that the said attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of defendant Scurich." The action is one upon a promissory note, and is against the defendant corporation as the maker thereof, and against the other defendants, including appellant, as indorsers thereof. By its terms the note is payable one day after date, and the complaint fails to allege that any demand was made on the maker on said day, or any notice of dishonor served at that time; the first demand and notice alleged being made and given about 20 months after the date of the note.

Whether or not the court should have granted the motion for this reason it is not necessary for us to decide in this case. It has been held that a motion of this kind cannot be made to take the place of a demurrer, and that, if the complaint can be amended so as to state a cause of action upon which an attachment will lie, the motion should be denied. But whether the amendment should be made before the determination of the motion may not be perfectly clear. See *Hale Bros. v. Milliken*, 142 Cal. 137, 75 Pac. 653; *Hathaway v. Davis*, 33 Cal. 161; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741. A fatally defective affidavit cannot be

amended so as to meet a motion to discharge the writ. *Winters v. Pearson*, 72 Cal. 553, 14 Pac. 304. And as we are of the opinion that the affidavit in this case is fatally defective, the court should have granted the motion. The statute requires that the affidavit shall show "that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant." Section 538, Code Civ. Proc. The manifest object and purpose of the statute is to require the affidavit to show that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of any defendant against whom the writ may run. In the case at bar there are five defendants, and the writ directs a levy upon any property of the said defendants, "or either of them," and the writ was in fact levied upon the property of the corporation defendant and also upon property of appellant. The affidavit upon which the writ issued stated that "the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendants." This statement would be perfectly true, and perjury could not be assigned thereon unless the attachment was sought or the action prosecuted to hinder, delay, or defraud a creditor of all the defendants. The purpose to hinder, delay, or defraud a creditor of the defendants, or any number less than all, is not negated by the affidavit. The affidavit should have stated that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the said defendants, or any creditor of either of said defendants.

We have not been cited to any case where the defect existing in this affidavit has been before the appellate courts of this state, or where the provision of our statute in this regard has been construed. But a similar provision of the attachment law of Texas has been construed by the courts of that state. The statute of that state requires that "the affidavit shall further state that the attachment is not sued out for the purpose of injuring or harassing the defendant." In *Lumber Co. v. Bank*, 91 Tex. 95, 41 S. W. 64, upon an appeal from an order refusing to quash an attachment, it was pointed out that an affidavit that "the attachment now applied for is not sued out for the purpose of injuring or harassing the said defendants," there being two defendants, was not a sufficient compliance with the statute, in that it did not negative a purpose to harass or injure "the defendants or either of them." In the Texas case the court reversed the order of the trial court for another reason, but took pains to clearly lay down the proper form of the affidavit where several defendants joined in an attachment suit. The defendants were the drawer and acceptor of a bill of exchange.

The order is reversed, and the court is

directed to discharge the writ of attachment as against appellant.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 760

COON v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 435.)

(Court of Appeal, First District, California. March 24, 1908. Rehearing Denied April 22, 1908.)

1. NUISANCE—PUBLIC NUISANCES—LIVERY STABLE.

The business of running a livery stable is not a nuisance per se, for whether a stable is a nuisance depends upon the manner in which it is conducted.

2 MUNICIPAL CORPORATIONS—BUILDING ORDINANCE—VALIDITY—CONSENT OF OTHER PROPERTY OWNERS.

An ordinance requiring the consent of owners of property within 200 feet of a proposed stable for more than six horses as a prerequisite to the issuance of a permit is unreasonable and void as vesting in private individuals the arbitrary power to determine whether the owner of real property may use it in pursuit of a lawful occupation.

3. MANDAMUS—SUFFICIENCY OF COMPLAINT.

The building law of a city provided that when a proposed building was to cost more than \$1,000 plans and specifications should be filed, and if it was to cost less than \$1,000 a written statement of the character of the improvement should be filed. The complaint for a writ of mandate for the issuance of a permit did not show the estimated cost of the building, but averred that the permit was refused because consent of adjoining property owners had not been obtained. It was admitted that the complaint was sufficient if the building was to cost more than \$1,000. *Held*, that a general demurrer was properly overruled, especially where the record indicated a cost exceeding \$1,000, since the defect in the complaint could have been remedied had it been pointed out or relied on in the trial court, and the permit was refused on other grounds.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Application by J. R. Coon for a writ of mandate to compel the board of public works of the city and county of San Francisco to issue a permit for the construction of a stable. From a judgment for plaintiff, defendants appeal. Affirmed.

James A. Devoto, for appellants. Van Ness and Denman, for respondent.

KERRIGAN, J. This is an appeal from a judgment granting a writ of mandate compelling appellants, as the board of public works of the city and county of San Francisco, to issue a permit for the construction of a certain one-story frame building in said city and county to be used as a stable.

Respondent set forth in his complaint, among other provisions of the building law of the city and county of San Francisco, section 320, which reads as follows: "Permits for public livery and boarding stables, or

for stables to accommodate more than six (6) horses, will be granted upon the presentation of the written consent of the owners of property within two hundred (200) feet of the stable. Buildings for stabling animals above the first or ground floor, unless fire-proof, shall not be erected nor altered."

It is also alleged in the complaint that respondent filed and submitted to the said board of public works an application in writing for a permit to erect a certain one-story building; that said building was to be used as a stable in said city and county to accommodate more than six horses; that said appellants refused to take any action looking to the granting of said permit unless the respondent should present to said board the written consent of the owners of the property within 200 feet of said stable proposed to be erected. The complaint further shows that respondent refused to comply with this demand of the board, and prays for a writ of mandate that appellants be required to receive and to examine the plans and specifications in the complaint described, and, if found to embody all the requirements applicable to such cases, to issue the permit demanded. Preliminarily it should be stated that the business of running a livery stable is not a nuisance per se. Whether a stable is a nuisance depends upon the manner in which it is conducted. *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721. See, also, *Ruffin, C. J.*, in *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406, 54 Am. Dec. 45; *Am. & Eng. Ency. of Law*, p. 935, note. In our judgment section 320 of the ordinance is unreasonable and void, because it vests in private individuals the arbitrary power to determine whether the owner of real property may use it in the pursuit of a lawful occupation.

In the case of *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218, a similar ordinance passed by the city of Chico was considered and held unreasonable and invalid. In that ordinance it was provided that no permit should be granted to maintain or carry on the business of a public laundry, unless the applicant should have first obtained the written consent of a majority of the property owners within the block in which it was proposed to carry on the laundry, and also the four blocks immediately surrounding that block. The court said: "The business of conducting a laundry is a lawful occupation precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens

or property owners within its limits, as it attempted in the ordinance under review. A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted. * * * But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends; but they commit the right to carry on such business at all in all but two blocks of the town to the unrestricted will and caprice of a majority of the real property owners within the block upon which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the guise of a police regulation."

The court in the same opinion quotes from the case of *Yick Wo v. Hopkins*, 118 U. S. 373, 6 Sup. Ct. 1070 (30 L. Ed. 220), which involved the validity of an ordinance of the city and county of San Francisco declaring it unlawful for a person to conduct a laundry within the corporate limits without first having obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone. The Supreme Court of the United States held this provision of the ordinance void, saying in the opinion therein filed: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this that they are tenants at will under the supervisors of their means of living."

The case of *City of St. Louis v. Russell*,

116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, involved the validity of an ordinance of the city of St. Louis, which provided that no livery stable should be located in any block of ground in St. Louis without the written consent of owners of one-half of the ground of that block; and it was held that the city had no right to delegate to the owners of one-half the ground in any block in which a livery stable was proposed to be erected the power to say whether it should be done or not, or to require any person desiring to construct such stable, before a building permit would be granted him for its erection, to obtain the consent in writing of the owners of one-half the ground of such block.

The building law of San Francisco provides that when the proposed building is to cost more than \$1,000 plans and specifications shall be filed; that when the building is to cost less than \$1,000 a written statement of the character of the improvement shall be filed. The averments of the complaint do not show whether the estimated cost of the building was over or under \$1,000; but the complaint does aver that the permit was refused solely on the ground that the consent of the adjoining property owners had not been obtained. It is virtually conceded that if the building was to cost more than \$1,000 the complaint is sufficient, but it is claimed that as the estimated cost of the building may have been less than \$1,000 the complaint is defective. The demurrer was general only, and the defect is one that could easily have been remedied had it been pointed out or relied upon in the trial court. The record indicates quite clearly that the building was to cost in excess of \$1,000. The permit was refused, as stated, on the single ground of want of consent of adjoining property owners, and the case was heard and submitted on this theory only. Under these circumstances, we think the point is wholly without merit.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 721

LEUSCHNER v. DUFF. (Civ. 461.)

(Court of Appeal, Second District, California.
March 17, 1908.)

1. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE.

A unilateral contract, though evidenced by a writing sufficient under the statute of frauds, is not necessarily a contract which may be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 89-98.]

2. SAME.

Under Civ. Code, §§ 3386, 3388, providing that neither party to an obligation can be compelled to perform it unless the other party has performed or can be compelled to specifically perform, and that a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed, where the latter has performed or offers to

perform it, the mutuality of remedy necessary to specific performance is supplied by an offer to perform or the filing of a bill for specific performance; but one executing a unilateral agreement to execute a contract for the sale of realty may withdraw his offer before acceptance thereof by the other party, in which case the latter is not entitled to a decree for specific performance, but is left to his action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 11.]

3. SAME—OTHER RELIEF—RETENTION OF JURISDICTION.

The court, in a suit for the specific performance of a unilateral agreement, may, on determining that plaintiff is not entitled to the relief demanded, retain jurisdiction and award him the relief he is entitled to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412-419.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Oscar Leuschner against Christina J. Duff. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Edw. F. Wehrle and C. H. Bretherton, for appellant. Galbreth & Bryson, for respondent.

TAGGART, J. Action to compel specific performance of a unilateral agreement to execute and deliver a contract of sale of real estate. Plaintiff appeals from a judgment in favor of defendant and from an order denying his motion for a new trial.

The writing relied upon to satisfy the requirements of the statute of frauds is set out in the complaint, and is in the words and figures following, to wit:

"Los Angeles, Cal., Nov. 13, 1905.

"Received from Oscar Leuschner ten dollars on part payment lot 30, block E, of West Los Angeles Tract, lot on N. W. corner Figueroa St. and 39th. 65 or more by 130. Price \$800.00; \$190 more on contract delivery; \$25.00 per month, interest 6 p. c.

"\$10. Christina J. Duff."

The sufficiency of the writing to satisfy the statute is not questioned by respondent, and although this matter is presented by appellant as if the judgment of the court rested upon the theory that the writing was not sufficient for this purpose, we find nothing in the findings to justify this assumption. Accepting it as sufficient for this purpose, it does not follow necessarily that it is a contract the specific performance of which can be compelled. It is not an option for which a valuable consideration was paid, and it is not a contract by its terms binding both parties to it. The \$10 received was accepted as a part of the purchase price, and the contract of sale to which plaintiff was entitled was dependent upon the payment of "\$190 more," and his obligating himself to pay the further sum of \$600, payable \$25 per month, being the residue of the price fixed, \$800. The court found in plaintiff's favor upon the defenses of inadequacy of consideration and unfair advantage alleged to have been taken of de-

fendant in procuring the execution of the contract. It also found that the writing was the only agreement between the parties; that the \$10 mentioned therein was in the form of plaintiff's personal check, which was never cashed; that the same day it was received by defendant she offered to return it to plaintiff, and notified him that she withdrew and revoked the offer contained in the contract; that there was no further act or offer of performance by plaintiff until 10 days after such revocation, when he demanded of defendant that she carry out the agreement, which she refused to do; and that no tender of the "\$190 more" was made by plaintiff until August 31, 1906.

A party to an obligation cannot be compelled to perform it unless the other party, claiming the right to enforce, has performed or can under the terms of the agreement be compelled to specifically perform. Civ. Code, § 3386. The exception to this rule is that: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it (is not bound to perform), if the latter has performed (as in section 3386), or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." Section 3388. The mutuality of remedy necessary to specific performance in the latter case is said to be supplied by the offer to perform or the filing of the bill for the purpose of procuring the decree. *Vassault v. Edwards*, 43 Cal. 458; *Sayward v. Houghton*, 119 Cal. 549, 51 Pac. 853, 52 Pac. 44. This is upon the theory that the want of mutuality of obligation which obtained at first is overcome by the acts mentioned; they being held sufficient to bind the party not originally obligated. *Spire v. Urbahn*, 124 Cal. 110, 56 Pac. 794; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

We are not aware of any rule which requires the signer of a unilateral agreement to maintain the status of the property affected in order that the other party thereto may offer to perform at his pleasure and thereby compel specific performance. A construction of section 3388 which would bring about this result would work a repeal of section 3386, and neither mutuality of remedy nor mutuality of obligation be a prerequisite to the specific performance of a contract. The offer having been withdrawn by the defendant before the offer of performance by plaintiff, the latter was not entitled to a decree compelling defendant to execute the contract and was left to his action at law for any relief to which he was entitled. *Pacific Electric Co. v. Campbell-Johnston* (Cal.) 94 Pac. 623. The trial court, applying the rule that a court of equity, having acquired jurisdiction of the cause, would grant any relief to which the parties were entitled, ascertained that the property had not appreciated in value since the contract was executed, and decreed that the restoration to plaintiff of the

\$10 check was all the relief he was entitled to.

The evidence is sufficient to sustain the findings against the attacks made upon them, and they in turn support the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 745

CONNELL v. HARRON, RICKARD & McCONE. (Civ. 432.)

(Court of Appeal, Second District, California. March 23, 1908.)

1. DAMAGES—EXPENSES INCURRED—BREACH OF CONTRACT.

A contract for the manufacture and sale of a machine contemplated that it should be manufactured in Ohio and shipped to California, and as a part of the contract the buyer guaranteed that the freight rate should not exceed \$1.25 per hundred, the rate for transportation of like machinery in car-load lots. The machine delivered did not comply with the contract. It was shipped to New York, and the buyer loaded it with a car of his goods and shipped it to California at the rate of \$1.25 per hundred. The buyer paid \$35 for freight. *Held*, that the buyer, in an action for damages for breach of contract, was not entitled to recover freight charges on the theory that the transportation charges would have been \$4.50 per hundred if the machine had been shipped separately, but his recovery was limited to the actual amount paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 92-99.]

2. APPEAL—REVERSAL—AMOUNT OF RECOVERY—TRIVIAL ERROR.

In an action for damages for breach of contract to manufacture and deliver a machine in accordance with specifications, the failure to award the buyer \$7.85 freight charges paid by him on a machine delivered by the seller, which did not comply with the specifications, was within Civ. Code, § 3533, declaring that the law disregards trifles, and did not warrant a reversal of the judgment.

3. SALES—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT—DAMAGES.

In an action for breach of contract to manufacture and deliver a machine in accordance with specifications, it appeared that the contract contemplated that the machine should be manufactured in Ohio and shipped to California, and that the machine which was shipped did not comply with the specifications. The buyer offered no evidence to prove the price for which he could have bought a machine constructed in accordance with the specifications in the market in California, but offered to prove the price at which he could have bought a machine similar in character and just as good. None of the witnesses pretended to give the price at which a machine of the pattern and make called for could be bought at any place. *Held*, that the damages were not controlled by Civ. Code, § 3354, providing that in estimating damages the value of property to the buyer deprived of its possession is deemed to be the price at which he might have bought an equivalent in the market nearest to the place where the property ought to have been put into his possession, and the damages must be limited as provided by section 3308, providing that the damage caused by the breach of a seller's agreement to deliver personally the price of which has not been fully paid is deemed to be the excess of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled.

4. NEW TRIAL—GROUNDS—RULINGS ON EVIDENCE.

In an action for breach of contract to manufacture and deliver a machine according to specifications, where the machine delivered did not comply with the specifications, a witness for the buyer having stated that he could tell what such machines of the same size were worth, and having been asked to do so, the question was objected to as incompetent, irrelevant, and immaterial, if the witness referred to machines of another make. The objection was overruled; the court stating that the measure of damages was the market price at which an equivalent could be purchased in the market, and that that did not mean necessarily the same thing. *Held*, that the admission of the testimony, with the statement that an equivalent article was not necessarily the same thing, could not be construed into a meaning that would justify the buyer in believing that the court regarded the evidence as other than one link in the chain of proof, and he was not entitled to a new trial on the ground of surprise from having been misled by such statement.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by J. F. Connell against the Harron, Rickard & McCone Company. From a judgment for plaintiff for an amount less than that claimed, and from an order denying a motion for a new trial, he appeals. Affirmed.

Earle & Creede, for appellant. Charles T. Howland, for respondent.

SHAW, J. Action for damages for breach of contract. At an agreed price of \$655, defendant sold and agreed to furnish to plaintiff, f. o. b. Los Angeles, Cal., a piece of machinery, known and designated as a lathe of Lodge & Shipley pattern, supplied with a Bullock motor; all of which machinery should be constructed in accordance with and conform to certain specifications designated in the contract. At the time of making the contract of purchase, plaintiff paid to defendant \$25 upon the purchase price thereof. The contract contemplated that the lathe and machinery should be manufactured in Ohio and shipped to Los Angeles, and as a part of the contract plaintiff guaranteed the freight rate should not exceed \$1.25 per hundred, which was the rate for transportation of like machinery in car-load lots. The contract called for a lathe 18 feet in length, but the lathe shipped, owing to an error of defendant's, was only 8 feet in length. The lathe was shipped from Ohio to a point in New York, where it was loaded with a car of goods of plaintiff's and shipped through to Los Angeles at a rate of \$1.25 per hundredweight; whereas, if it had been shipped alone, the transportation charges would have been \$4.50 per hundred on 2,800 pounds. The cost of shipping from Ohio to New York, where plaintiff's car was being loaded, was \$7.85, and this sum, as well as the \$1.25 per hundred on 2,800 pounds, was paid by plaintiff; but as the lathe shipped was not the one ordered by plaintiff, he, by separate cause of action, claims a freight charge of \$4.50 per hundred thereon, basing such claim upon the fact that had defendant shipped the lathe separately,

rather than in a car-load lot, it would have cost defendant such sum, and that he (plaintiff) did not guarantee the \$1.25 freight rate upon this lathe.

1. As to the amount of \$150.42, which plaintiff claimed to have paid on account of transportation charges, the court found that he was entitled to \$35, and no more. This finding is attacked as being unsupported by the evidence. According to appellant's contention, the charge of \$150.42 consists of \$7.85, freight from Ohio to New York, which he paid, and \$126, freight from New York to Los Angeles, \$35 only of which he paid, and \$16.55 for cartage, none of which he paid. As plaintiff only paid \$35 for transportation of the lathe from New York to Los Angeles, it is difficult to conceive of any theory upon which he could be entitled to any amount in excess of said sum. Under the circumstances of this case, there is no merit in the contention of appellant that he is entitled to a charge based upon quantum meruit. For transportation from New York to Los Angeles he paid \$35, and he is entitled to nothing more than reimbursement for such expenditure. As to the item of \$16.55 on account of cartage charges, we have been unable to find any evidence in the record bearing in the remotest degree upon the subject. Plaintiff paid out the sum of \$7.85, freight charges from Cincinnati to North Tonawanda, N. Y., where the machine was loaded upon a car with other freight consigned to plaintiff at Los Angeles. The evidence shows that plaintiff paid this sum solely for defendant's benefit, and, while he was entitled to be reimbursed for the outlay, we are nevertheless of the opinion that the case justifies the application of the doctrine of *de minimis non curat lex*. Section 3533, Civ. Code.

2. The court found that defendant neglected and failed to carry out the terms of the contract, in that it failed to deliver the lathe described in the contract, and that by reason of such breach plaintiff was damaged in the sum of \$25, and no more. For the purpose of ascertaining the amount of damages sustained, plaintiff introduced evidence which he claims tended to prove the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, as provided by section 3354 of the Civil Code. Unless the evidence fixes the damages in accordance with this rule, then the amount of damages must be ascertained in accordance with the rule prescribed in section 3308 of the Civil Code, under which plaintiff would be entitled to "the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled." Applying this latter rule, there is no evidence which would entitle plaintiff to damages other than the \$25 paid on account of the purchase price of the machine, as to which the court found in his favor. The lathe called

for by the contract was described as being, "a Lodge & Shipley make and pattern, to be and have a 16-inch swing and to be 18 feet long, also to be what is known and designated as the 'tool room lathe,' with cabinet legs, 18 feet in length as aforesaid, supplied with what is known and designated as 'the Bullock motor,' connected directly to the spindle of said lathe; said motor to be built for 110 volts direct current. Also to be supplied with compound rests, taper attachments, two modern and latest pattern chucks, and also to be fitted with all proper attachments, so that said lathe may be run and operated at varying speeds and with reverse attachment." While plaintiff offered no evidence tending to prove the price at which he could have bought a lathe constructed in accordance with these specifications in the market nearest Los Angeles, where under the contract it should have been placed in his possession, he did offer evidence tending to prove the price at which he could have bought lathes similar in character and "just as good"; the price thereof varying from \$1,000 to \$1,100, f. o. b. Los Angeles. None of the witnesses, however, pretended to give the price at which a lathe of this particular pattern and make and constructed in accordance with the specifications called for in the contract could be bought at any place. The evidence touching lathes of other pattern and specifications, even though similar in character and equally good, cannot be held to be the equivalent of this particular piece of machinery. The rule is usually applied to marketable commodities where the different grades of such articles are well recognized in the commercial world. *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17. In *Bateman Brothers v. Mapel & American Surety Co.*, 145 Cal. 241, 78 Pac. 734, suit grew out of a failure to deliver terra cotta and ornamental pressed brick of a certain pattern, and the measure of damage was held to be the cost of buying terra cotta and ornamental pressed brick of the specified quality and pattern. So, in the case at bar the equivalent of this lathe would be a duplicate thereof constructed of material of like quality. The evidence offered failed to bring the case within the rule prescribed by section 3354 for ascertaining the amount of damages. This being true, it follows that in ascertaining the amount of damages sustained by reason of the breach of the contract recourse must be had to the rule prescribed by section 3308 of the Civil Code, under which the court was justified by the evidence in fixing the damages in the sum of \$25; there being no evidence of any special damages.

3. Appellant contends that he was misled by the rulings of the court in admitting testimony, and insists that the order denying his motion for a new trial should be reversed on the ground of surprise. Upon the trial a witness for plaintiff stated (with reference to 18-foot lathes), "I could tell you what the lathes would be worth to-day of that particu-

lar size," and to the question, "You may do so, then," an objection was interposed upon the ground that it was "incompetent, irrelevant, and immaterial, if the witness refers to the American Tool Company lathe and not the Lodge & Shipley lathe." "The Court: The measure of damages is the price at which an equivalent could be purchased in the market. I am not holding that that means necessarily the same thing. Objection overruled." The witness then answered: "About \$760 for a lathe 16-inch swing and 18-foot bed, without a motor. The motor would cost extra." The question at issue was the price of an equivalent article. The size of the machine was an important factor in determining that question. Evidence of the price of an 18-foot lathe, followed by evidence that this lathe complied in other respects with the lathe described in the contract, would have tended to prove an equivalent article. Standing alone, however, it wholly failed of its purpose. Admitting this testimony, with the statement that an equivalent article was not necessarily the same thing, cannot be construed into a meaning that would justify appellant in believing that the court regarded the evidence as other than one link in the chain of proof. Standing alone, it did not even tend in the remotest degree to prove an equivalent article. The facts of this case do not bring it within the rule laid down in the authorities cited by appellant.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

153 Cal. 359

IN re MOFFITT'S ESTATE. (S. F. 4,896.)

(Supreme Court of California. May 20, 1908.)

CONSTITUTIONAL LAW—VESTED RIGHTS—ESTATES AND INTERESTS IN PROPERTY.

The inheritance tax law, declaring that all property, which shall pass by will or by the intestate laws, shall be subject to the tax therein prescribed, is not, where applied to tax the surviving wife's share of the community property, in violation of any provision of the Constitution of 1849 or 1879, or of Const. U. S. art. 1, § 10, or the Fourteenth amendment, since under Const. Cal. 1849, art. 11, § 14, requiring the Legislature to pass laws defining

the wife's right in the community property, and the laws passed in pursuance thereof, the interest of the wife is a mere expectancy, like the interest of an heir in the property of his ancestor.

On petition for rehearing. Petition denied. For former opinion, see 95 Pac. 653.

PER CURIAM. Upon petition for rehearing it is urged that the decision in this case fails to dispose of the federal question, which appellant presented in argument. To the decision rendered the following is therefore added and made a part thereof:

Appellant further shows that the community property here under consideration was acquired under the Constitution of 1849, and the laws referable thereto. That Constitution, after defining the separate property of the wife, declared (article 11, § 14): "Laws shall be passed more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband." Upon these facts appellant argues that the Constitution of 1849, together with the laws passed in conformity with its direction, "conferred upon the wife an equal interest with her husband in the common property," and it is said that while the Constitution of 1879 is silent upon the matter of the community property, nevertheless, neither that Constitution nor any new laws passed under it can deprive the wife of her interest in the community property, guaranteed and secured to her by the Constitution of 1849, and the question is asked: "Shall this court do what the Legislature cannot do and take from her a vested right?" Appellant's counsel answer this question to their own satisfaction by invoking the aid of article 1, § 10, and amendment 14, § 1, of the Constitution of the United States.

It cannot be doubted, indeed it is conceded, that the Constitution of 1849, in speaking of property "held in common with her husband," does not refer to tenancies in common, as known to the common law, but does mean property of the character, now universally designated "community property." Thus the declaration of the Constitution of 1849, above quoted, amounts to no more than a mandate to the Legislature to define and prescribe the rights of the wife in the property of the community. The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States, and it was the design of the Constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule. But even under the Spanish-Mexican civil law the wife had no vested estate in the community property. She had rights which may be loosely described as "vested," in the sense that the

person to whom the rights belonged was not doubtful or uncertain, but positive and known. In this sense her rights were vested, but those rights never amounted to an estate. She became vested with an estate only (under certain contingencies) upon the dissolution of the marriage, or upon the death of the husband, otherwise, as sums up Ballinger, after review of the system, "her interest seems to be a mere expectancy during coverture, similar to that under the French system." Ballinger on Community Property, p. 29. And, says the Supreme Court of Louisiana (Boyer's Succession, 36 La. Ann. 506): "The wife has, during the marriage, no vested proprietary interest in any property composing the community, but only on inchoate right which entitles her to the hope or expectation that, if she survives her husband, she can receive or own one-half of the property that may be left after payment of the community debts." And, again, says Platt (Property Rights of Married Women; see Fallbrook Ir. Dist. v. Abila, 106 Cal. 362, 39 Pac. 794): "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But passing from the enunciations of these writers, learned in the law on the subject, we may come directly to the declarations and adjudications of our own court under the Constitution of 1849 and the laws passed in accordance with its mandate, and we find Chief Justice Field, whose study of this Spanish-Mexican system was as profound as his mastery over it was complete, declaring "the interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." Van Maren v. Johnson, 15 Cal. 308. Soon thereafter Mr. Justice Cope, speaking for the court in Packard v. Arellanes, 17 Cal. 525, says: "So long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. This was held in Van Maren v. Johnson, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. This same doctrine prevails in Louisiana, and appears to be an established principle of the civil and Spanish law." And, again, Mr. Justice Thornton, speaking for the court in Greiner v. Greiner, 58 Cal. 119, says: "The interest of the wife during the same period [coverture] was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is thus apparent that the construction put upon the Constitution of 1849, and the laws passed thereunder, is identical with that declared in Estate of Burdick, 112 Cal. 387, 44 Pac. 734, and Spreckels v. Spreckels.

kels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. The Constitution of 1879 does not, as did the Constitution of 1849, command the Legislature to pass laws defining the wife's rights in the community property because, as for 30 years those laws had been upon the statute books, and as the rights under those laws had been from a very early date judicially determined and settled, no need existed in the new Constitution to call for legislative action upon the matter. For these reasons it is impossible to perceive where or how the inheritance law under consideration does violence to any provision of the Constitutions of California of 1849 or 1879, or to any provision of the Constitution of the United States.

Rehearing denied.

153 Cal. 382

CASTRO v. ADAMS et al. (S. F. 4,722.)

(Supreme Court of California. April 27, 1908.

Rehearing Denied May 27, 1908.)

1. ADVERSE POSSESSION—ACTUAL POSSESSION—EVIDENCE.

In an action to quiet title to land, it appeared that in November, 1853, plaintiff conveyed the land by deed, at which time he lived in his "adobe house," and that at the time of the trial in September, 1891, he lived in the same house, and that besides himself and his brother there were in 1853 other persons "in possession of a portion of this ranch." There was given in evidence a petition of plaintiff and another filed with the board of land commissioners in May, 1852, which alleged that they were in 1852 in possession of the ranch, and a decree of the land commission of July 3, 1855, confirming the claim of the petitioners under a Mexican grant. The ranch comprised some 20,000 acres, and there was nothing to show that the house was situated on the ranch, or, if it was, that plaintiff ever occupied any of the land outside the house. *Held*, that the evidence was insufficient to show title to the ranch by adverse possession at the time of the trial.

2. QUIETING TITLE—ACTIONS—LACHES.

A mortgage for the purchase price of property provided that the price was to be paid as soon as it should be realized by sales of the land made by the mortgagors, and that they should pay to the mortgagees the proceeds of sales until the whole sum was paid. No time was prescribed within which sales were to be made. *Held*, that the law implied an understanding that it should be within a time that would be reasonable under the circumstances, and in an action by the holder of the mortgage to recover the land after a delay of over 35 years, where it is alleged that the land was sold to about 200 persons, some of whom are unknown, but it does not appear from the pleadings or evidence when the sales were made, and no explanation is made of the inability to be more explicit as to the conveyances, their dates, parties, prices realized, and the disposition of the purchase money, or any circumstances excusing the delay in bringing suit, equity will refuse to grant relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 63.]

3. TRUSTS—VIOLATION OF TRUST.

Where owners of land conveyed it and received a mortgage for the purchase money, which was to be repaid as the mortgagors realized from sales of the land, if a constructive trust in the land was established in favor of

the mortgagees, it arose because of the existence of confidential relations among the parties and the violation of the agreement to carry out an express parol trust to sell the land and pay part of the proceeds to the mortgagees, and the breach of the agreement would start the statute of limitations as to the constructive trust, which would begin to run against its enforcement after the expiration of a reasonable time for the sale of the land.

Department 1. Appeal from Superior Court, Contra Costa County; J. V. Coffey, Judge.

Action by Victor Castro against Edson Adams and others, in which Clinton C. Tripp filed a cross-complaint. Judgment of nonsuit against plaintiff and cross-complainant, and they appeal separately. Pending appeal, plaintiff died, and his executrix was substituted. Affirmed.

Richard P. Henshall and Galpin, Elkins & Frost, for appellants. Charles E. Wilson and W. S. Tinning, for respondents.

SHAW, J. This action was begun on August 8, 1888. The amended complaint states a cause of action against a large number of persons, to quiet title to a tract of land, comprising a Mexican grant known as "Rancho el Sobrante." It alleges that the plaintiff is in possession and is the owner in fee of the lands. Clinton C. Tripp filed a cross-complaint, alleging that he is the owner and holder of a mortgage upon the land for \$40,000, executed by former owners in November, 1853, which is due and unpaid, and asking for a foreclosure thereof. The complaint and cross-complaint were each unverified, and the respective adverse parties thereto answered by a general denial and also set up the several statutes of limitations which the respective defendants deemed a bar to the action. The cause came on for trial. The plaintiff and cross-complainant each introduced evidence and rested, whereupon, on motion of the adverse parties, the court gave judgment of nonsuit against both the plaintiff Castro and the cross-complainant Tripp. The appeals from this judgment are taken by Tripp and Castro separately. The judgment was rendered on September 25, 1891, but for some unexplained reason it was not entered until March 21, 1906. Victor Castro had died in the meantime, and the appeals in his behalf are taken by Julia B. Galpin, as executrix of his will and as his successor in interest. A bill of exceptions showing the evidence taken at the trial was settled and filed on September 12, 1893.

The plaintiff offered evidence tending to show that prior to November, 1853, he and one Juan Jose Castro were the owners of the land, under a grant of the Mexican government made in 1841, and that proceedings were pending before the United States land commissioners, in 1853, to have their grant confirmed and obtain a patent for the land from the United States. He then introduced a deed executed on November 23, 1853, by

himself and Juan Jose Castro, whereby they conveyed the lands to John B. Frisbie and Ramon De Zaldo. He also introduced another instrument, executed on the same day as the deed, by Frisbie and De Zaldo to the two Castros, purporting to mortgage to the Castros the same land to secure the payment of the sum of \$40,000 by them to the Castros as soon as that sum should be realized from sales of the land to be made by the said mortgagors. Tripp claims as the holder of this instrument.

The motion for nonsuit as to the plaintiff was upon the ground that the evidence was insufficient to establish title in him. The only title he ever had was conveyed to Frisbie and De Zaldo by the deed above mentioned. The instrument executed on the same day by Frisbie and De Zaldo to him and Juan Jose Castro was merely a mortgage and vested no title or interest in the land in the mortgagees. This proposition was settled by the decision in the case of *Adams v. Hopkins*, 144 Cal. 32, 77 Pac. 712, a case to which the present appellants were parties and in which they asserted the same rights in this land under the same instruments. There is no evidence sufficient to show that any title or interest in the land ever thereafter became vested in the plaintiff.

In the briefs it is asserted that there was evidence that he was in possession at the time the action was begun, and it is suggested that this possession is prima facie evidence of title. The plaintiff testified that in November, 1853, at the time the deed was executed, he lived in a house on the San Pablo Road in Contra Costa county, which he described as "my adobe house," and that, at the time of the trial, in September, 1891, he lived in the same house, and that "besides myself and my brother, Juan Jose Castro, there were in 1853 other parties in possession of a portion of this ranch." There was also given in evidence a petition of plaintiff and Juan Jose Castro, filed with the board of land commissioners in May, 1852, which alleged that they were then in possession of the ranch, and a decree of the land commission, made July 3, 1855, confirming the claim of the petitioners under the Mexican grant. This was all the evidence tending to show title by possession. The statement of Castro as to present possession was a mere incidental remark, and referred only to a house in which he lived on the San Pablo Road. The ranch comprised some 20,000 acres, and there is nothing to show that the house was situated on the ranch, or, if it is situated thereon, that he ever occupied a foot of the land outside of the house. The petition to the land commissioners and the decree of that board were introduced to show a confirmation of the title under the Mexican grant, and not to establish possession. It is not shown who were parties to the proceeding, and the decree would not be evidence of possession

against persons who were not parties. The statements in the petition refer only to the possession in 1852, and not afterward. The trial took place nearly 40 years after that date. There is no presumption that he continued in possession after making the deed of November 23, 1853. It is clearly apparent from all these circumstances, and from the entire case as presented by the record, that there was no real attempt in the court below to show title by proof of possession. The evidence on the subject is much too vague and shadowy to justify a reversal of the judgment of nonsuit. The nonsuit was properly granted as to the plaintiff.

The nonsuit as to Tripp was granted on the ground that the evidence showed no title in him, that his right to foreclose the mortgage of Frisbie and De Zaldo, conceding him to be the holder thereof, was barred by the statute of limitations, and that the evidence showed that he was not the owner or holder of the mortgage. The mortgage set forth in the cross-complaint provided that the \$40,000 was to be paid "as soon as the same shall be realized from sales made by" the mortgagors of the ranch lands, and that the mortgagors should pay over to the Castros the proceeds of sales from the ranch, until the whole sum was paid. Any sum of money received upon a sale of any part thereof was due to the Castros as soon as it was received by Frisbie and De Zaldo. No time was prescribed wherein sales were to be made by them. The law would imply an understanding that it should be within a time that would be reasonable under all the circumstances. The cross-complaint alleges that Frisbie and De Zaldo "subsequently" made conveyances whereby they conveyed the property to the numerous defendants, some 200 in all, some of whose names were unknown, and it does not state when these conveyances were made, whether in separate tracts to the respective defendants, or jointly to all by several conveyances of different interests; nor does it give any explanation of the cross-complainant's inability to make more explicit statements as to the conveyances and parties, the dates when they were made, the prices realized and the disposition of the purchase money, or any circumstances which would excuse the delay in bringing the action. The evidence is also devoid of any such explanation. There was a delay of over 35 years. If it is conceded, or assumed, in the absence of such explanations, that a reasonable time might have extended to a period as long as five years after the execution of the instrument, the statute would begin to run at the end of that time, and the action would have been barred seven times over by the statute of limitations. Both the cross-complaint and the case as established on the trial indicate that the suit is a stale demand upon which equity should refuse to grant any relief.

It is argued that the transaction, as ex-

plained by Castro, was of such a nature that a constructive trust in the land was established in his favor. This, if true, would not avoid the bar of the statute nor remove the laches. If a constructive trust arose at all by virtue of that transaction, it was because Frisbie and De Zalido occupied fiduciary or confidential relations toward Castro and violated an agreement to execute an express parol trust to sell the land and pay a part of the proceeds to Castro. Equity might raise a constructive trust in favor of Castro, upon the failure of the grantees in the deed to perform the void parol trust, if confidential relations did exist as claimed. But, in such case, the breach of the parol agreement would at once set in motion the statute of limitations as to the constructive trust. They would be required to sell the land within a reasonable time. Their conceded failure to pay over the money within the extreme period of 35 years, with no showing of any reason for the delay, in connection with the averment that they sold all the property at some indefinite time after the inception of the trust, furnished at least presumptive evidence that the constructive trust and the obligation to pay had arisen, and that the bar of the statute of limitations and of the equitable doctrine of laches began to run against the enforcement of it many years before the period prescribed by the statute and the rules of equity.

There is no evidence in the record that the patent for the ranch from the United States was ever issued in pursuance of the decree of confirmation. The case is therefore to be decided upon the basis of the equitable rights and titles of the appellants, without regard to the issuance of such patent. The arguments based upon the fact that the patent was of recent issue are without foundation and must be dismissed without further consideration.

All the rights involved and asserted by the appellants here were asserted by them in an action in the same court, to which they were parties, for the partition of the same land, entitled *Adams v. Hopkins*. The complaint in that action was filed in 1888, a few days before the beginning of this action. That action was tried and an interlocutory decree of partition was made and entered therein denying any relief to the appellants in this action. They appealed from that decree to this court. The same points and questions that are presented upon these appeals were presented upon the appeals in that case, were elaborately argued, and were given prolonged consideration by this court; a rehearing having been twice granted in the case. It was finally decided adversely to Castro and Tripp on all points, and the judgment was finally affirmed on July 1, 1904. *Adams v. Hopkins*, supra.

The judgments of nonsuit are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

153 Cal. 411

WENDLING LUMBER CO. v. GLENWOOD LUMBER CO. (S. F. 4,607.)

(Supreme Court of California. April 27, 1908. On Rehearing, May 27, 1908.)

1. APPEAL AND ERROR—SCOPE OF REVIEW—GROUNDS OF MOTION FOR NEW TRIAL—EXCEPTIONS TO RULE.

If an order granting a new trial is warranted on any ground on which the motion was based, it will be affirmed on appeal, notwithstanding the order was not based on that ground, except when the trial court expressly excludes the ground of insufficiency of evidence as a basis for its action, in which case, if the evidence is conflicting, that ground cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3409-3413.]

2. SALES—VALIDITY—FRAUD—EFFECT.

Where a sale of personal property is procured by fraud, the ownership of the property is not changed, no title passes to the buyer, and the seller retains his right to the property, unless, after discovering the fraud, he assents and ratifies the act of sale, either positively, or by such delay as would authorize the inference of assent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 65-85, 115-117.]

3. SAME—REMEDIES—FORM.

Where property is purchased by fraud, the defrauded party has a remedy, either by trover, replevin in the detinet, trespass, or replevin in the cepit, at his election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 890.]

4. SAME—RESALE BY FRAUDULENT PURCHASER—EFFECT.

One acquiring property from a fraudulent purchaser, under circumstances preventing him from being a purchaser in good faith for a valuable consideration, is in no better position than the original fraudulent purchaser, and the defrauded party has the same remedy against him as against the original purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 607, 608.]

5. TROVER AND CONVERSION—PLEADING—NECESSARY ALLEGATIONS.

In actions for the conversion of personal property procured by fraud, it is unnecessary to allege the fraud, but it is sufficient to declare generally, and if the action is brought on the theory that the seller is the owner and entitled to possession, and that defendant unlawfully withholds possession, or has converted it to his own use, the general allegations of ownership and right to possession and unlawfully withholding or conversion are sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 197, 198.]

6. REPLEVIN — PLEADING—ISSUES—FRAUDULENT PURCHASE.

A plaintiff is not required to anticipate any defense, and the fact that defendant holds property because of a valid sale, or because acquired through a bona fide purchase from a fraudulent vendee, is a matter of defense in an action of replevin, and may be met by proof that the sale was void because of fraud, without any allegation of fraud in the complaint.

7. TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Where plaintiff in an action of replevin alleges his ownership and right to possession of property, which defendant claims to own, through a valid sale or a bona fide purchase from a fraudulent purchaser, though proof of fraud in the illegal sale is not a part of plaintiff's prima facie case, and is available only in reply, it is a mere matter of order of proof,

and admission of evidence of fraud in the sale in support of plaintiff's case is not error.

8. APPEAL AND ERROR—MOTIONS FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

To justify the Supreme Court in interfering with an order granting a new trial, on the ground of insufficiency of evidence, the case must be such as to require a holding that a verdict for the moving party would not have found sufficient legal support in the evidence; for if the evidence would have supported such a verdict, the trial court has absolute discretion, and it is his duty to grant a new trial if he is not satisfied with the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3876.]

9. SAME—MOTION GRANTED BY OTHER THAN TRIAL JUDGE.

The fact that the judge who heard and granted a motion for a new trial was not the one who presided at the trial does not affect the power of the Supreme Court, in relation to an order granting a new trial, in the case of insufficiency of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3876.]

10. SALES—FRAUDULENT PURCHASE—BURDEN OF PROOF.

In replevin by a seller, the burden of proving fraud in procuring the purchase is upon plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 122.]

11. FRAUD—EVIDENCE—PRESUMPTION.

Except where confidential relations are involved, the presumption of law is in favor of honesty and fair dealing, and the evidence in support of a claim of fraud must do more than to create a suspicion thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 46, 56.]

Department 1. Appeal from Superior Court, Santa Clara County; Hiram D. Tuttle, Judge.

Action by the Wendling Lumber Company, a corporation, against the Glenwood Lumber Company, a corporation. From an order granting a new trial, plaintiff appeals. Affirmed.

Louis H. Brownstone and B. A. Herrington, for appellant. Jackson Hatch and Walter H. Linforth, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order granting defendant's motion for a new trial, in an action for damages for the alleged conversion of certain lumber. The order granting the new trial was made by the successor of the judge who presided at the trial of the cause, and was expressly made upon the grounds that the evidence was insufficient to sustain the verdict, and that the jury did not follow the instructions of the court. Defendant claims that the order granting a new trial was correctly made, for a reason not specified therein, viz., that the trial court erred in admitting certain evidence. It is true, as claimed by counsel, that in our review of the order we are not confined to the grounds specified therein by the court granting the motion, but will affirm the order, if it was correctly made, upon any ground upon which the motion was based (see *Weisser v. Southern Pac. Ry. Co.*, 148 Cal. 428, 83 Pac. 439, and cases there cited),

the only limitation being that where the trial court has in its order expressly excluded the ground of insufficiency of evidence as a basis for its action, we will not consider that ground, if the evidence was conflicting. We are therefore called upon to determine whether the trial court erred in admitting the evidence referred to. The complaint was in the form ordinarily used in an action for the conversion of personal property, simply alleging the ownership and right to possession by plaintiff of the property on a day named, the wrongful deprival and conversion to its own use of said property by defendant on that day, the market value of said property, a demand for the return of the property, and a refusal by defendant to comply therewith, the consequent damage, and nonpayment of any part thereof. By its answer defendant simply denied each of the allegations of the complaint, except the one as to the value of the property, which it admitted, to the extent of \$4,856.40, which was the amount of the verdict.

The theory of plaintiff's case was that one J. H. Routt, not a party to this action, had obtained such property from plaintiff, by means of certain false representations, willfully made for that purpose, relying upon which plaintiff sold and delivered the property to Routt, that defendant received the property from Routt without giving any valuable consideration therefor, and with full knowledge of the fraud by means of which the same had been obtained, and that plaintiff, upon discovering the fraud, at once repudiated the sale, and, treating it as void because of the fraud, commenced this action for the wrongful conversion of the property. Over the objection of defendant plaintiff was permitted to introduce evidence in support of this theory. It is the admission of this evidence that is alleged to have been erroneous. The objection urged is that, no fraud being alleged in the complaint, the evidence of fraud was incompetent under the pleadings, defendant resting upon the general rule that where fraud is relied on by a party, he must allege it. We are satisfied that this rule is not applicable here. It appears to be thoroughly established that, where a sale of personal property is procured by fraud, the ownership of the property is not changed, and no title passes to the vendee, and the vendor retains his right in the property, unless, after discovering the fraud, he assents to and ratifies the act of sale, either positively or by such delay as would authorize the inference of assent. See *Butler v. Collins*, 12 Cal. 457, and *Amer v. Hightower*, 70 Cal. 440, 11 Pac. 697, and authorities therein cited. As was said in *Butler v. Collins*, supra, and approvingly quoted in *Amer v. Hightower*, supra, "the civil remedies of the party defrauded are clear, viz., trover or replevin in the detinet, or trespass or replevin in the cepit, at his election." One who acquires the property

from the fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration is in no better position than the fraudulent vendee, and the defrauded party has the same remedies against him that he had against such fraudulent vendee. See *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118. It seems clear that in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use, the general allegations of ownership and right to possession, and unlawful withholding or conversion are sufficient, and will render admissible proof of any facts sustaining such claim. It is elementary that a plaintiff is not required to anticipate in his complaint any defense that may be made by the defendant. See *Canfield v. Tobias*, 21 Cal. 349. The fact that a defendant owns and holds the property claimed because of a valid sale, or because he acquired the same from a fraudulent vendee, in good faith and for a valuable consideration, is purely a matter of defense, and when in such an action a defendant asserts any such claim, plaintiff can meet it by proof that such sale was void because of fraud, without having made any allegation of fraud in the complaint. This is illustrated by the case of *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630, an action to quiet title to land, where the defendant set up in defense an agreement of sale, and plaintiff was allowed to introduce evidence in rebuttal, showing that such instrument was obtained by fraud, without having alleged fraud in the complaint. The court, after saying that plaintiff could not know, when filing the complaint, that the defendant would answer, nor that, if he did, he would claim under the instrument in question, said that the principle governing the case was that stated in *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320, as follows: "No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer." The same is, of course, true as to the matters disclosed by evidence, in behalf of a defendant, properly given under denials contained in the answer. It is not correct to say, in a case of the character before us, that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property, and the conversion thereof by defendant, and fraud comes in only in reply to the defense that defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of fraud as to such sale was not a part of plaintiff's *prima facie* case, and was available only in reply to any claim of defendant based on the sale, but this was

a mere matter of order of proof. It is the general rule that, in actions for the conversion of personal property, where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally that the property was wrongfully converted. See 21 Ency. of Plead. & Prac. 1087; *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 92 N. W. 176; *Hunter v. Hudson River Co.*, 20 Barb (N. Y.) 493; *Bliss v. Cottle*, 32 Barb. (N. Y.) 323; *Benesch v. Waggener*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254. In our own case of *Amer v. Hightower*, supra, which was an action in replevin, the complaint was apparently destitute of allegation of fraud, and the judgment for defendant was reversed, because of the rejection, by the lower court, of evidence offered by the plaintiff tending to show fraud on the part of defendant in obtaining a bill of sale for and possession of the property. See, also, *Nudd v. Thompson*, 34 Cal. 39; *Summerville v. Stockton Mill Co.*, 142 Cal. 547, 76 Pac. 243; *Conner v. Bludworth*, 54 Cal. 635. If *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565, and *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458, are at all inconsistent with the views herein expressed, in so far as they are so inconsistent they have been modified by *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. The other cases relied on, with the exception of *Virginia Timber, etc., Co. v. Glenwood Lumber Co.* (Cal. App.) 90 Pac. 48, were clearly cases where the plaintiff's causes of action or the defendant's defense strictly rested on fraud, and the general rule requiring the allegation of the facts constituting the fraud was applicable. *Albertoli v. Branham*, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200, and *Wetherby v. Straus*, 93 Cal. 283, 28 Pac. 1045, are fair examples of this class of cases, each being a case where the claim of the defendant conceded the validity and completeness of a transfer as between the parties thereto, and it was sought to set the transfer aside or have it declared void in favor of creditors, on the ground that it was made with fraudulent intent. An action brought for the purpose of having a specified conveyance annulled on the ground of fraud would doubtless fall in the same class, but this is not such a case. The decision of the District Court of Appeal in *Virginia, etc., Co. v. Glenwood, etc., Co.*, supra, is precisely in point, but we are unable to accede to the views of the learned District Court of Appeal therein expressed.

We cannot hold, however, that the trial court was not warranted in granting a new trial on the ground of insufficiency of evidence to sustain the verdict. To justify any interference of this court with an order granting a new trial on the ground of insufficiency of evidence, the case must be such as to compel us to hold that a verdict in favor of the moving party would not have found sufficient legal support in the evidence given on the trial

If the case be one where a verdict in favor of such moving party would have had such support, the judge of the trial court is vested with absolute discretion in the matter, and, as has been heretofore said by this court, it was his duty to grant a new trial if he is not satisfied with the verdict (*Condee v. Gyger*, 126 Cal. 546, 59 Pac. 261); and this court will not interfere with the action of the trial court in such cases, even if it believes that the weight of the evidence was the other way. The fact that the judge who heard and granted the motion was not the judge who presided at the trial in no degree extends our power in the matter (*Churchill v. Flournoy*, 127 Cal. 355, 362, 59 Pac. 791). The burden was on plaintiff, of course, to establish the fraud on the part of Routt in the purchase of the lumber. The presumption of the law, except where confidential relations are involved, is in favor of honesty and fair dealing, and the evidence in support of the claim of fraud must do more than to create a mere suspicion thereof. See *Levy v. Scott*, 115 Cal. 42, 46 Pac. 892; *Casey v. Leggett*, 125 Cal. 671, 58 Pac. 264. The fraud in this case consisted of various alleged misrepresentations of fact, said to have been material, and upon the faith of which plaintiff claims to have acted in parting with the lumber. We have examined the evidence in regard to these alleged representations; and, so far as they may reasonably be held under the evidence to have been material, we find no reason to doubt that a verdict acquitting Routt of fraud would have had sufficient legal support. It would serve no useful purpose to here enter into an analysis of the evidence, and it is sufficient to say, as has been clearly stated in other cases, that the most that can be said for plaintiff's claim in this regard is that the case presented was one where the evidence on the subject of fraud was conflicting, and the decision of the trial court in the matter is conclusive upon us.

The order granting a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. In denying a rehearing it is proper to state that what is said in the opinion relative to want of title in the vendee, where a sale of personal property is obtained by fraud, was said entirely with relation to the respective rights of the vendor and vendee. That title passes in such a case, in the sense that the vendee, in good faith, and for a valuable consideration of the fraudulent vendee, takes a good title, cannot be disputed. But as between the vendor and fraudulent vendee, or any person taking from such fraudulent vendee with notice of the fraud or without consideration, the sale may, at the election of the vendor, promptly made, be treated as an absolute nullity.

7 Cal. App. 685

PEOPLE v. EMMONS. (Cr. 52.)

(Court of Appeal, Third District, California.
March 12, 1908. Rehearing Denied by
Supreme Court May 11, 1908.)

1. CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS.

To be reviewable on appeal any exception taken in a criminal case must be properly authenticated in the bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2807.]

2. SAME—WAIVER OF OBJECTIONS—FAILURE TO EXCEPT.

By failing to except to a ruling accused is deemed to waive any objection thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2656.]

3. BRIBERY—FACTS CONSTITUTING OFFENSE—STATE SENATOR.

An indictment for bribery alleging that accused asked and received a bribe as a member of a state senate committee, promising that his official action, vote, and opinion as state senator should be influenced thereby in connection with an investigation by such committee of building and loan associations, shows a public offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bribery, §§ 1-3, 5-8.]

4. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

In a trial for bribery, wherein it was the people's theory that accused and others conspired to extort money from associations for immunity from investigation, declarations by a co-conspirator were admissible against accused, though the conspiracy was not shown until later; the order of proof being within the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1012, 1013, 1611.]

5. SAME—EVIDENCE—WRITTEN STATEMENT OF WITNESS—COMPELLING PRODUCTION BY ADVERSE PARTY.

It was not an abuse of discretion in a criminal trial to refuse to require the district attorney to produce a writing containing oral statements made by a witness for the people, where it had only been partly read to the witness, he had not sworn to it, and did not know in whose possession it was, though the writing might have assisted accused in cross-examining witness and in attempting to lay a foundation for his impeachment, especially since no prejudice to accused is shown.

6. SAME—APPEAL—OBJECTION NOT URGED BELOW.

Accused having failed to move to strike out the unresponsive part of an answer, may not complain thereof on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2672-2674.]

7. BRIBERY—EVIDENCE—CONSPIRACY.

In a trial for asking and receiving a bribe as a state senator, wherein it was the people's theory that accused and others conspired to extort money from associations for immunity from investigation, witnesses for the people could testify what they did after conversations with a co-conspirator; the testimony not being improper as self-serving or hearsay, but being admissible on the issue whether the witnesses were real or feigned accomplices and to trace the money received as a bribe; the people contending that the witnesses were not accomplices, but that they were engaged in a scheme to expose the conspirators, while accused claimed they had a motive in discouraging an investigation of the associations, and were actual participants in the bribery.

8. CRIMINAL LAW—FEIGNED ACCOMPLICES.

One who feigns to be an accomplice in the commission of an offense to detect the offender need not take an officer of the law into his confidence to avoid an imputation of criminal intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 71, 79.]

9. SAME—CRIMINAL INTENT—NECESSITY.

Where persons did not suggest nor encourage a conspiracy by state senators to extort a bribe, but laid a trap to apprehend and punish the conspirators on learning of the conspiracy, they were guilty of no offense in feigning to be accomplices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 21, 79.]

10. WITNESSES—IMPEACHMENT—CREDIBILITY—EVIDENCE—ADMISSIBILITY.

In a trial for asking and receiving a bribe to secure to certain associations immunity from legislative investigation, accused could not show what an association's books showed respecting dealings of one of its officers with it as affecting the credibility of witnesses for the people; the officer not testifying, and not appearing to have influenced any witness, and no witness appearing to have a motive to prevent a disclosure of the association's affairs.

11. SAME—FOUNDATION.

If accused sought to discredit the people's witnesses on the ground of their interest or bias, he should have laid a foundation by suitable cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1200.]

12. CRIMINAL LAW—NEW TRIAL—SEPARATION OF JURY—EFFECT.

A conviction of bribery should not be set aside because, after the court had made an order requiring the jury to be kept together, as expressly authorized by Pen. Code, § 1121, the jury were allowed to separate during the trial, on accused's showing that a juror was seen talking to an outsider and was heard to say, "Well, ask him," that a deputy sheriff and another juror were seen in a store together, and afterwards drove away together, and that another juror was seen in a crowd at a park separated from the other jurors, where counter affidavits showed that the separations were for innocent purposes, and that the jurors did not discuss the case with outsiders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2257-2262.]

13. SAME—PREJUDICE—BURDEN OF PROOF.

Where a jury separates without leave of court after a criminal case has been submitted to them, the burden is upon the prosecution to show that accused has not been prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2385.]

14. SAME—USE OF INTOXICANTS.

Evidence held insufficient to show that jurors in a criminal case were guilty of misconduct by excessive drinking of intoxicants during the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2386.]

15. SAME—APPEAL—ESTOPPEL TO ASSERT ERROR.

One may not complain of error in an instruction given at his request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3007-3009.]

16. SAME—INSTRUCTION NOT SUSTAINED BY EVIDENCE—REFUSAL PROPER.

An instruction not sustained by evidence is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1985.]

17. SAME—PROMINENCE TO SPECIFIC TESTIMONY.

An instruction that, if a certain witness for the people was induced to testify by any promise of immunity from prosecution, etc., the jury should consider such facts in determining the weight to be given to his testimony, was properly refused as calling attention to particular testimony, especially since the court fully and clearly directed the jury as to its duty in determining the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1969-1973.]

18. SAME—INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Instructions are properly refused where they are covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

19. SAME—NEW TRIAL—DISQUALIFICATION OF JUROR.

Pen. Code, § 1181, subd. 3, authorizes a new trial after conviction for misconduct of the jury preventing a fair trial. A juror stated on his voir dire that he never discussed the case on trial, excepting with his family, and that he had no opinion as to accused's guilt. Held that, on motion for a new trial, accused could not show that the juror, before being sworn as a juror, had stated that accused was guilty and ought to be punished, since the proof was addressed to the juror's qualifications, and not to any misconduct within such statute, which relates only to one's conduct while acting as a juror, and since disqualification of a juror is not a ground for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2226, 2238-2247.]

20. SAME—REVIEW—PRESUMPTIONS.

In support of the trial court's action in denying a new trial on the ground of a juror's disqualification by having expressed an opinion to witness before the trial that accused was guilty, the District Court of Appeal must presume in the absence of a contrary showing that when accused examined the juror on his voir dire he knew what he could show by witness, and that by failing to present the facts before the trial he waived them.

21. SAME—GROUNDS FOR SUSTAINING DECISION NOT CONSIDERED.

The District Court of Appeal must sustain a ruling of a court of record, if proper, regardless of the form of the objection.

22. SAME.

On reviewing the denial of a new trial asked because of the disqualification of a juror, the District Court of Appeal cannot consider an affidavit filed upon suggestion of diminution of the record, stating that accused did not learn of the disqualification until after verdict, where it is not authenticated in any manner by the trial judge, and does not appear to have been used on the motion for new trial.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

E. J. Emmons was convicted of asking and receiving a bribe, and he appeals from the judgment and an order denying a new trial. Affirmed.

Grove L. Johnson, Rowen Irwin, and H. L. Partridge, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. By an indictment found by the grand jury of Sacramento county defendant was charged with the crime of "asking and receiving a bribe," committed in January,

1905, while he was a state senator of the Thirty-Second senatorial district and a member of the senate committee on commissions and retrenchment. The money was sought and received by appellant, so it is alleged, under a promise and agreement that his official action, vote, and opinion as such senator should be influenced thereby in connection with an investigation by said committee of certain building and loan associations. Defendant was convicted and sentenced to the penitentiary for the term of five years. He appeals from the judgment and the order denying his motion for a new trial.

For the reason that the record discloses no exception to the ruling of the court we are precluded from considering the question involved in the motion to set aside the indictment and the challenge to the panel of the grand jury. Any exception taken, in order to be reviewed, must be properly authenticated in the bill of exceptions, and, if the defendant does not save an exception to the ruling of the court, the objection is deemed to have been waived. *McCartney v. Fitz Henry*, 16 Cal. 185; *Keeran v. Griffith*, 34 Cal. 580; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *People v. Trask* (Cal.) 93 Pac. 891. In the last case it is said: "Defendant having reserved no objection to the action of the court above set forth, we are not called upon to determine whether the course adopted by the court was erroneous or not." That an exception is required to the ruling of the court in disallowing a challenge to the panel and in denying the motion to set aside the indictment is provided in sections 1170 and 1172 of the Penal Code. The point was made by the Attorney General in his brief, and it is passed by without notice in appellant's closing brief for the reason, we assume, that its conclusiveness is recognized by defendant and his learned counsel. At any rate we must presume in favor of the action of the court below that no exception was taken, and we are not at liberty to follow the interesting discussion of the method by which the grand jury was selected, and of the qualification of certain of its members in which counsel have indulged.

No authority is cited in support of appellant's contention that the demurrer to the indictment should have been sustained. It is declared simply that "an inspection of the indictment, together with the demurrer, will serve to call the attention of the court to the faults of said indictment better than any argument in this brief." We do not agree with appellant that the court committed error in overruling the demurrer, but we do not deem it necessary to elaborate our views, as the question has been virtually foreclosed by the decision of this court in the case of *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, in which the Supreme Court denied a rehearing, wherein it is said: "It is unnecessary to insert a copy of the indictment, or to consider its sufficiency in this opinion,

for such sufficiency was carefully considered in another proceeding, and a copy of the indictment is contained in the decision therein filed. Application of *Bunkers*, 1 Cal. App. 61, 81 Pac. 751." In the latter decision it is said: "We think the indictment here is sufficient to charge bribery, as defined in subdivision 6 of section 7 and section 86 of the Penal Code. Nor can we see how the district attorney could have well stated with greater particularity the acts of which the crime alleged is predicated." The two indictments are in the same language. In fact the prosecution is based upon the theory of a conspiracy on the part of *Bunkers*, appellant, and two other senators to use their official positions to extort money from certain building and loan associations for immunity from investigation, said conspiracy culminating in the receipt by each of the conspirators of the sum of \$350 upon a common understanding and agreement as to said investigation. In each case the demurrer was properly overruled.

That there may be no misunderstanding of the position of appellant as to certain rulings of the court during the trial, we quote from his brief as follows: "The defense at the trial was based upon the falsity of the testimony that was offered for the prosecution, and the further fact that the testimony so offered was the result of a conspiracy on the part of Grange, Corbin, and others to evade a thorough examination of the Continental Building & Loan Association because of the fact that the affairs of said association had been theretofore conducted in a manner detrimental to the stockholders of that institution, and that Corbin had been in the past using the funds of the association for his own private purposes. The evidence was offered for the purpose of showing, first, the animus of the witnesses against the defendant; and, second, for the purpose of affecting their credibility before the jury. * * * The further defense was made that there was no conspiracy as alleged by the prosecution and attempted to be shown by them." With the foregoing statement in view, we proceed to notice all the exceptions of appellant argued by him, which we consider worthy of specific attention. The first of these is based upon the order overruling an objection to the following question addressed to the witness *Bunkers*: "Now, then, what was the conversation between you and Jordan on the train?" The contention is that no conspiracy had been shown, and hence that the evidence sought to be elicited was within the rule excluding hearsay testimony; but the answer is that the order of proof is within the discretion of the court, and that subsequently other evidence was received that Jordan was a co-conspirator.

No error was committed by the court in refusing to direct the district attorney to produce a certain writing containing a statement of the witness *Bunkers*. The statement

was not signed by Bunkers. It had not been read over to him. He had heard read only a portion of it. He had not sworn to it, and did not know in whose possession it was. What is said in *People v. Glaze*, 139 Cal. 157, 72 Pac. 966, is in point here: "The statement could not have been used in evidence except for the purpose of impeaching the witness by showing thereby that he had made statements out of court inconsistent with the testimony given by him in the trial. The only statements that can be used for that purpose, if in writing, are statements made by the witness himself, either directly in his handwriting or over his signature, or indirectly by his adoption or admission of the correctness of a written report of his statements made by some other person. He cannot be held responsible for a statement taken down by another purporting to be a report of his oral declarations, unless he has been made acquainted with the contents of such statement, and directly or indirectly admitted that it was correct. Unless it is shown that there is good reason to believe that the document when produced would be admissible in evidence for some purpose in the case, the court need not compel its production." It may be that the statement would have been of assistance to defendant in his cross-examination of the witness Bunkers in an effort to lay a foundation for the latter's impeachment, but that is not a sufficient reason for interfering with the discretion of the trial court exercised in denying the request, especially as there is no showing that defendant suffered prejudice thereby.

Appellant complains of the action of the court in allowing witness Grange to testify to a declaration made by Jordan to the effect that defendant was trying to get evidence to enable him to have a warrant issued for the arrest of Gavin McNab and Washington Dodge. But it is apparent that the objection to the question, "State the conversation that took place at that time between you and him in regards to this matter, if anything," was properly overruled for reasons already stated. The court could not anticipate what the answer would be, and a portion of it was certainly responsive and material. The appellant should have moved to have the objectionable portion stricken out, if he so desired, but, having failed to do so, it is too late now to complain. *People v. Lawrence*, 143 Cal. 155, 76 Pac. 893, 68 L. R. A. 193.

Certain witnesses were allowed to testify as to what they did after conversations with Jordan, and it is insisted that this was error, "for the reason that all of this was done without the knowledge of the defendant, and in such a manner that the defendant could not have known anything about it, and it was not in furtherance of any conspiracy that the defendant was alleged to be engaged in." This testimony, however, was admissible on the question of whether these witnesses were real

or feigned accomplices, and also to trace the money that was received as a bribe. *People v. Northey*, 77 Cal. 632, 19 Pac. 865, 20 Pac. 129, and *People v. Bunkers*, supra. It was contended by the prosecution that these witnesses did not suggest, advise, or encourage the commission of the crime, and had no criminal intent, but were engaged merely in a scheme to detect, expose, and punish the senators. On the other hand, defendant insisted that they had a motive in discouraging the investigation of the building and loan associations, and were actual participants in the bribery. Their acts and declarations during the pendency of the negotiations were therefore important as throwing light upon this issue, and were not self-serving or hearsay, as they are justly considered by the decisions to be within the rule of *res gestæ*. We do not understand that it is necessary for a feigned accomplice to take into his confidence an officer of the law, or suffer the imputation of criminal intent. If he did consult an officer, it would be a circumstance in favor of innocence, but it is not the exclusive method by which he may show his freedom from participation in the crime. We think the evidence is sufficient to support the conclusion that these witnesses were not accomplices, and that they did not suggest nor encourage the commission of the crime, but that, after being informed of the purpose of the conspirators, they laid a trap for their apprehension and punishment. In this they did nothing against the law, and their conduct was not opposed to sound public policy. Nor does it follow, as contended by appellant, that no crime was committed by him, even if he received the money with a felonious intent. Some decisions are cited apparently to that effect, but the question has been set at rest here by the *Bunkers Case*, supra.

Among the points to which most importance seems to be attached by appellant is that growing out of the testimony of one W. J. Palethorpe, a witness for the defense. It is contended that his examination was confined within limits too narrow; it being restricted to the time of the examination by him of the books of the Continental Building & Loan Association during the months of November and December preceding the holding of the alleged investigation by the committee of which the defendant was a member. The particular question to which the objection was sustained, and of which ruling appellant complains, is as follows: "What, if anything, did the books of the Continental Building & Loan Association show with reference to the dealing of William Corbin with the association, and with reference to the condition of his accounts with that association in the year 1902?" The general objection was made, and also that it was too remote and not redirect examination. The last ground was undoubtedly well taken, but we think also the court's action was right for other reasons. The evidence was offered to show a motive for oppo-

sition to an investigation of the association on the part of certain persons who occupied prominent positions therein, or, in the language of appellant's counsel, "it necessarily would affect the minds of these people, and cause them to oppose an inquiry, to oppose an investigation, and to form a conspiracy and a plot to prevent an investigation." The purpose, then, was to affect the credibility and impeach the testimony of witnesses for the prosecution, and thereby reduce the effect of the evidence against defendant. It would make no difference how anxious certain persons were to prevent an investigation if that anxiety did not affect the evidence in the case on trial. Any reason for opposing said investigation would be entirely immaterial unless it could be seen that it might be of importance in determining whether any witness told the truth. How could any transaction of Mr. Corbin in 1902 with the association affect the credibility of any witness against the defendant? If Mr. Corbin had testified, there might be some ground for appellant's contention; but Mr. Corbin was not a witness in the case, nor was there any effort made to show that he had influenced any witness to testify, nor that any witness had a motive for preventing a disclosure of the affairs of the association. In the argument in favor of the admissibility of the evidence it was not claimed even that evidence would be offered to show how Mr. Corbin's interest in the investigation would be connected with the interest that any witness might have in coloring his testimony. There was indeed some intimation by counsel that Mr. McNab was concerned in concealing the said transactions of Mr. Corbin, but no evidence was offered to that effect, and it finds no support in the record. As far as disclosed by the proceedings the testimony sought to be elicited might relate as well to any other stockholder as to Mr. Corbin or to a stockholder in any other corporation. The contention really amounts to this: Mr. Corbin had certain transactions with the corporation in 1902 which he did not care to have made public; therefore he was interested in preventing an investigation. Hence we must assume that he entered into a conspiracy with some of the witnesses to commit a crime in order that a disclosure might not be made, and also that the testimony in the case has been affected by such conspiracy, or at least by Mr. Corbin's concern about the investigation. We cannot indulge in any such speculation.

Again, if it was sought, as claimed by appellant, to discredit any witness by showing his interest or bias, there is authority for holding that the proper foundation should have been laid by suitable cross-examination of said witness. The rule is so stated in *People v. Delbos*, 146 Cal. 734, 81 Pac. 131, as follows: "It was proper to impeach the motives of the prosecuting witness by proof that she had instituted the prosecution for the purpose of extorting money from the de-

fendant; but, in order to lay the foundation for such impeachment, the prosecuting witness should first be directly asked if she had not begun the prosecution for that purpose." But aside from the foregoing, assuming that it was proper to show Mr. Corbin's interest in the investigation, the line of inquiry was indulgently permitted by the court to be pursued sufficiently for that purpose. The fact sought to be shown would have been simply cumulative. It is due the witness, however, to say that in cross-examination he declared: "I told Mr. Corbin on several occasions that the Continental was an enormously large corporation, and, from what I could see, was financially sound."

The claim is made that the verdict should have been set aside on account of the separation of the jury during the trial. The court had made an order requiring the jury to be kept together, as provided in section 1121 of the Penal Code. The affidavits introduced by appellant upon this ground are to the effect that one of the jurors was seen talking with some one not a juror in the hallway of the courthouse, and that he was heard to say: "Well, ask him." And again, a deputy sheriff in company with one of the jurors was seen in a store on K street. After a time the officer came out alone and got into a buggy. The juror shortly after came out of the store unattended and got into the buggy, and they drove away together. Again, one of the jurors was seen standing in a crowd of people at Oak Park for some little time separated from the other jurors. The counter affidavits show that a deputy sheriff took one of the jurors to said store on K street to enable him to make a purchase; that they remained together while in the store; that said deputy sheriff walked out a few feet ahead of the juror to untie the horse; that no word was spoken about the case, and said juror had no communication whatever with any one except in reference to his purchase; furthermore, that the jurors were not allowed to separate at Oak Park, and not one of them had any communication about any matter connected with the case. The affidavits of the prosecution indeed are to the effect that whatever separation occurred was only for a few minutes, was for an innocent purpose, and was not the occasion for any communication at all concerning the case on trial.

Appellant cites *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, as authority for his claim that the separation was fatal to the verdict. That case, however, is not in point. The difference between that and this is clearly seen in the following statement by Mr. Justice Henshaw: "After the jury had been impaneled and sworn and had been placed in charge of the sheriff, and the sheriff had been sworn to take charge of the jury under section 1121 of the Penal Code, the court allowed eight of the jurors to separate and go to their homes, while the remaining four

were retained in the sheriff's custody." It is properly said that "there is absolutely no warrant in the law for the course adopted, and the order permitting the jury to separate was error—indeed, error of such nature that the brief of the state offers no word in extenuation or justification of it." But even in that case it is not intimated that the error would have been prejudicial if the evidence had shown that during the separation the jurors had no communication whatever with any one concerning the case.

But there are decisions of our Supreme Court directly upholding the ruling of the trial court that the alleged separation did not demand a new trial. In *People v. Symonds*, 22 Cal. 349, it is held that: "The mere fact that the jury in a criminal case separate without permission of the court does not require that a new trial should be granted. The presumption that the jury may have been subject to improper influences which attaches to the fact of such separation may be removed by an affirmative showing that no injury to the defendant resulted therefrom." In *People v. Bemmerly*, 98 Cal. 301, 33 Pac. 264, the facts are stated as follows: "It appears that after an adjournment upon one of the days while the cause was on trial certain of the jurors, while upon the street in company with the sheriff, joined a crowd of people who were listening to the utterances of a street fakir, and were for a few minutes out of the sight or custody of the sheriff; that on a Sunday which intervened during the trial eight of the jurors, in company with a deputy sheriff, attended church separately from the remaining four, and that some of the other four listened to the singing and preaching of the Salvation Army in the streets of Woodland; that one of the jurors, in the company of a deputy sheriff, visited his place of business without being accompanied by the others; that individual jurors were several times during the trial separated from the body of jurors for a few minutes at a time, and occasionally were out of sight of the officer who had them in charge and at times engaged in conversation with other persons." It is apparent from the foregoing statement that the appellant there made a much stronger showing than the appellant here. But the court declared: "We cannot hold that these facts constituted such misconduct as to justify setting aside the verdict. The direction to the sheriff to keep the jury together * * * was for the purpose of having the trial conducted in an orderly and discreet manner, and was evincive of the desire of the court to prevent the jury from being affected by any improper influences. The ultimate object of these instructions was not to keep the jury together, but to prevent them from improper intercourse with others, and their being kept together was merely a means of accomplishing the ultimate purpose. * * * The mere fact that the direction

of the court was violated does not give to the defendant the right to have the verdict set aside. He must show as fully as if the direction had not been given that one or more of the jurors was influenced in his verdict by some outside influence during or in consequence of such separation." We are not required in the case at bar to hold that the burden was upon defendant to show that the jurors were improperly influenced, because the prosecution assumed the burden of showing that the defendant was not prejudiced by the separation of the jury, and offered sufficient evidence to justify a finding to that effect. In *People v. Adams*, 143 Cal. 209, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92, the distinction is shown between a separation during the progress of the trial and one after the cause is submitted to the jury. It is there said: "As to the former there is no law requiring the jury to be kept together, although the court may order them to be so kept; and it is not necessary in the case at bar to consider the significance of a violation of such an order. But it is provided in the Penal Code (section 1128) that after the jury have finally retired for deliberation they must be kept together; and one of the express grounds for a new trial is 'when the jury has separated without leave of the court after retiring to deliberate upon their verdict' (section 1181)." The distinction is an important one, and it has been overlooked in some of the decisions. Whatever may be the rule in the former case, whenever the jury separates without leave of court after the case is submitted the burden should be cast upon the prosecution to show that the defendant has not been injured thereby. But as we have seen, the separation of which complaint is made here occurred before the case was submitted, and the showing by the appellant was exceedingly meager, and its effect was entirely overcome by the evidence for the people.

Appellant inveighs especially against the conduct of the majority of the jurors in partaking too freely of intoxicating liquors during the trial of the case. If the affidavits for appellant were not controverted, we should be constrained to hold that some of the jurors drank to excess, and more than is consistent with that clarity of judgment and equipoise of conscience essential to a proper discharge of the important duties of a juror. But the counter showing was amply sufficient to justify the court in finding that not one of the jurors was under the influence of liquor at any time, and no intoxicants at all were consumed after the jury had retired to deliberate upon a verdict. The character of the showing made by the people is illustrated by the following quotation from the affidavit of Mr. Chambers, the deputy sheriff who had charge of the jury: "Dr. G. C. Simmons instructed affiant that all of said jury who had been accustomed to the use of al-

coholic liquors must, during the progress of said trial, and while they were in charge of said sheriff, be permitted to have their usual rations of liquor, or that said jurors would suffer severe illness." He then details the times and occasions when liquor was consumed, and states that at no time did any of said jurors take more than one drink, and that of a very moderate quantity; that at no time did any member of the jury show in the slightest the effects of liquor; "that affiant was constantly in attendance upon said jury during the time of their deliberation on a verdict; that at no time from the time said jury retired from the courtroom to deliberate upon their verdict up to the time that they returned their verdict into court and were discharged was any member of said jury permitted to have any liquor of any kind, and during said time none of said jurors indulged in any liquor." There is not a particle of evidence that the trial judge or the attorneys noticed any evidence of intoxication on the part of any of the jurors at any time, and, unless we are prepared to hold that the consumption of any quantity of liquor by a juror disqualifies him, we must uphold the ruling of the court below. Indeed said ruling, under the showing made, is in strict accord with decisions of the Supreme Court. *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Benmerly*, supra; *People v. Van Horn*, 119 Cal. 333, 51 Pac. 538; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

The court committed no error in giving the instruction as to the corroboration of an accomplice. Appellant selects one sentence therefrom, and makes it the basis of the criticism that "it is not the law that proving the identity of the defendant, namely, that he is the man charged with the offense, is sufficient. Much more than that is needed." The instruction treats of the two phases of the question separately, to wit, the commission of the offense and the identity of the one committing it, and it is neither "misleading" nor "improper"; and besides it appears to have been given at the request of appellant, and hence he cannot complain.

The court was justified in refusing the following instruction: "If the jury believe from the evidence herein that the witness Harry Bunkers was induced or influenced to become a witness and testify in the case by any promise of immunity from prosecution or punishment, or by any hope held out to him that if he testified against the defendant he would not be prosecuted for any perjury committed by him, then the jury should take such facts into consideration in determining the weight which ought to be given to such testimony thus obtained. Such testimony should only be received by the jury with caution, and scrutinized with care." There is no evidence in the record that any promise was made to the witness that he would not be prosecuted for perjury if he would testify

in the case. Hence the instruction was properly refused for that reason. It is true that there is some evidence that Bunkers was promised immunity from prosecution for perjury—obviously referring to the testimony he gave at the trial of his own case—if he would make a statement to the district attorney, but that is entirely different from the hypothesis assumed in the instruction. Again, the practice by specific instructions of calling the attention of the jury to the testimony of a particular witness should not be encouraged. It is better, as was done here, to instruct the jury as to the principles of law involved, and leave their application to the facts—where it belongs under our system—to the jurors themselves.

The court fully and clearly directed the jury as to its duty and power of judging the evidence and determining the credibility of witnesses; for example: "You will weigh carefully the testimony of each and all of the witnesses in the case, and give to the same just such credit as you conscientiously believe it entitled to; and, in considering what weight you will give to the testimony of any and all the witnesses in the case, you will consider the character and appearance of the witnesses upon the stand, the consistency and reasonableness of their statements, their apparent interest and desire to tell the truth, their feelings, motives, and conduct so far as made known to you by the evidence during the course of the trial of this case." After hearing that and the other instructions given, if any juror would not understand that it was his duty to consider any promise of immunity made to a witness as affecting his credibility he would be incapable of enlightenment.

As to the other criticisms of the action of the court in reference to instructions, we deem it sufficient to say, in the language of *People v. Bunkers*: "The instructions requested by the defendant and refused by the court were either erroneous or inapplicable, or were fully covered by other instructions. The charge read as a whole was full, fair, and comprehensive, and the appellant certainly has no cause to complain that the law was not fully and clearly stated to the jury." The only other matter that we deem worthy of notice arises from the ruling of the court upon the following question addressed to one Patrick Kelly in support of the motion for a new trial: "State whether or not you had a conversation with him (Mr. Amariah Johnson, one of the jurors) last February, 1905, in this city concerning the charge against the defendant?" The general objection was made to the question, and the district attorney urged that, "if offered for the purpose of showing bias or prejudice on the part of juror Johnson, they are precluded from showing such fact at this time; that the bias or prejudice of any juror who may be sworn to try a criminal case cannot be shown for the first time on motion for a new

trial." The defendant offered to prove by the witness that he had a conversation with the said Johnson before he was sworn as a juror in which the latter stated that he had attended the examination before the senate committee which investigated the charge, and that all these senators, including the defendant, were guilty and ought to be punished, and that every one of them should be convicted, and that he was certain of their guilt." The said juror had stated on his voir dire that all he knew about the case was what he read in the Sacramento Union; that he attended the meeting of said senate committee one night, but that he was up in the gallery and could not hear anything that was said; that he had never discussed the matter with any one except the members of his own family; and that he had no opinion about the case.

The attack of appellant is really addressed to the qualification of the juror, although it is claimed that his declarations under oath, in view of his alleged statements to the witness Kelly, amount to such misconduct as to entitle appellant to a new trial. But it is clear that such misconduct, as far as the rights of appellant are concerned, is unimportant, except as it relates to the qualification of Johnson as a fair, unbiased juror. It is clear that the "misconduct" of a juror which is a ground for a new trial is misconduct while he is such juror, and has no reference to what he does before he is sworn to try the cause. Subdivision 3 of section 1181 of the Penal Code makes that plain as follows: "When the jury * * * has been guilty of any misconduct by which a fair and due consideration of the case has been prevented." Hence, if appellant's objection to juror Johnson amounts to anything, it goes to his qualification, and not to his misconduct as a juror.

But, whatever may be the rule in other jurisdictions, it has been decided in this state that the qualification of a juror is not a ground for a motion for a new trial. In *People v. Azoff*, 105 Cal. 635, 39 Pac. 61, it is said: "If public policy prohibits the jury from impeaching their verdict by their affidavits, it must follow that the same policy will prevent its being done by statements made by the jurors." To the same effect are *People v. Soap*, 127 Cal. 411, 59 Pac. 771; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339. In *People v. Fair*, 43 Cal. 137, the question is elaborately discussed, and it is held that: "The fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused is not, under our practice, ground for a new trial, when the objection is taken for the first time after the trial, upon affidavits showing disqualification." In *People v. Boren*, 139 Cal. 215, 72 Pac. 901, it is said: "Another ground upon which it is contended a new trial should have been granted is that an uncle by marriage of the district attorney was a member of the trial

jury, that this fact was unknown to the defendant or his counsel until after the trial, that defendant's peremptory challenges had not been exhausted, and that, if these facts had been known, defendant would have challenged him peremptorily. These facts appear by affidavit, but constitute no ground for a new trial. Section 1181 of the Penal Code specifies the only grounds upon which a new trial may be granted, and this objection is not included in the grounds there stated. An objection to a juror must be taken before the juror is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn and before the jury is completed."

Again, if the practice for which appellant contends should be tolerated, as it tends strongly to jeopardize the practical administration of justice and open wide the door to fraud and perjury, it should be permitted only after a satisfactory showing of diligence and good faith on the part of appellant. Even if it were a ground for a new trial, the court would not be justified in considering it unless it was shown that at the time of the examination of the juror the fact concerning the disqualification was not known to defendant nor his counsel. We must infer, of course, in support of the action of the court, that appellant knew at the time he examined the juror Johnson of what he proposed to show by the witness Kelly, and that, by his failure to present the facts before the trial, he waived them. *People v. Staples*, 149 Cal. 405, 86 Pac. 886. It is of no concern that the district attorney did not make this specific objection, as we are required to sustain the ruling of a court of record, if proper, regardless of the form of the objection. *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

Appellant, upon suggestion of diminution of the record, was permitted to file in this court his affidavit, which appears to have been filed in the office of the county clerk of Sacramento county October 24, 1905, in which he sets out that he "did not learn of the alleged misconduct of the juror A. Johnson until after the trial ended and the verdict had been rendered in the above-entitled action." It is obvious that this is an attempt to amend the bill of exceptions; but, admitting that we could consider the said affidavit, it is not authenticated in any manner by the trial judge, nor is there anything to indicate that it was used upon the said motion for a new trial.

We have given all the points made by appellant careful consideration but we are entirely satisfied that the record discloses no prejudicial error.

The defendant was fairly tried and justly convicted, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 738

BRISTOL v. HERSHEY. (Civ. 458.)

4Court of Appeals, Second District, California.
March 23, 1908. Rehearing Denied by Supreme Court May 14, 1908.)

1. MORTGAGES—FORECLOSURE BY ACTION—CERTIFICATE OF SALE—RECORDING.

Under Code Civ. Proc. § 400, providing simply that a duplicate of a certificate of sale on mortgage foreclosure shall be filed, and not requiring it to be recorded, where such a certificate is defective, in that the premises sold are incorrectly described, it may be corrected, and the original defective certificate filed need not be altered, but a corrected certificate may be refiled.

2. SAME—REDEMPTION—PERSONS ENTITLED TO REDEEM—JUNIOR MORTGAGEE.

A junior mortgagee, not having asked or received any affirmative relief in an action to foreclose a first mortgage, may, before the time of redemption expires, institute an action in foreclosure and obtain an appropriate decree and a sale thereunder, and having exercised this right and received a certificate of sale, as the holder of such certificate, becomes a successor in interest of the mortgagor, and entitled to redeem.

3. SAME—EFFECT OF REDEMPTION—SUBROGATION TO RIGHTS OF MORTGAGEE.

Where a junior mortgagee, as holder of a certificate of sale issued on a foreclosure of her own mortgage, exercised her right to redeem from the foreclosure sale on a first mortgage, she became subrogated to all of the first mortgagee's rights, to whom a certificate of sale had been issued on the sale under her first mortgage, to the same effect as though the first mortgagee had assigned to her the certificate of sale.

4. SAME—ASSIGNMENT OF CERTIFICATE OF REDEMPTION—EFFECT.

Where a first mortgagee took an assignment of a certificate of redemption issued to a junior mortgagee on redemption from the sale to the first mortgagee under such first mortgage, the first mortgagee acquired all rights held by the junior mortgagee thereunder, including the rights to which the junior mortgagee was subrogated on redemption from the sale under the first mortgage.

5. SAME—EFFECT OF REDEMPTION BY JUNIOR MORTGAGEE.

Code Civ. Proc. § 703, making the effect of a redemption from a mortgage foreclosure sale by a successor in interest holding the legal and equitable title an extinguishment of the sale, does not apply to extinguish the sale on a first mortgage on redemption by a junior mortgagee holding but the equitable title under a certificate issued on a second sale under such junior mortgage, since in such case the junior mortgagee redeems from the previous sale in his own interest and adversely to the mortgagor.

6. SAME—ORAL AGREEMENT TO EXTEND TIME OF REDEMPTION—VALIDITY.

An oral agreement to extend the time of redemption from a mortgage foreclosure sale is valid, and needs no consideration in its support, if the debtor is lulled into a false security, and thereby permits the time for redemption to expire.

7. SAME.

A mortgagee agreed to extend the time of redemption beyond the statutory period, on condition that the mortgagor pay a specified amount per month, or a sum equal to interest on all sums due the mortgagee under the sale. The mortgagor did not claim to have paid the monthly installments, or to have tendered payment thereof; the nearest approach to an allegation in reference thereto being a statement that she was prepared to make the first payment, which fact did not appear to have been communicated to the mortgagee, nor any tender to have been made in connection therewith. During the en-

suuing 22 months, there was no offer or tender to pay any of these monthly payments, between which dates there was a great increase in the value of the property; nor was there any allegation of any fact which would excuse performance on the mortgagor's part. Civ. Code, § 1439, requires one who seeks to enforce a contract to show that he has complied with the conditions on his part to be performed. *Held*, that the mortgagor was not entitled to enforce the agreement to extend the time for redemption.

8. SAME.

The fact that, long after the mortgagor's default, the mortgagee paid the mortgagor a thousand dollars, with a statement that the property "was growing more valuable and in time I shall doubtless dispose of it, and I am willing that you should share in advance in what it may produce," in no event would have any effect to change or alter the rights of the parties theretofore attaching.

9. SAME.

The receipt of a sheriff's deed by the mortgagee could not be construed as a notification on the mortgagee's part that she would not carry out her agreement with the mortgagor to extend the time of redemption from the mortgage sale, so as to excuse performance by the mortgagor of her agreement to make payments of interest.

10. SAME.

Taking possession of a part of the mortgaged premises by the mortgagee did not have the effect to excuse performance by the mortgagor of her agreement to make payments of interest, if the time for redemption from the sale under the mortgage was extended, where at the time the mortgagee took possession the mortgagor was already in default.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Jennie Bristol against Mira Hershey. Judgment for defendant, and plaintiff appeals. Affirmed.

Noleman & Smyser, for appellant. Lynn Helm, and E. S. Williams, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment of the superior court of Los Angeles county in favor of defendant rendered upon a hearing sustaining the demurrer to the second amended complaint without leave to amend.

It appears from the second amended complaint that on August 1, 1902, defendant, Hershey, obtained a decree foreclosing a first mortgage executed by plaintiff on certain real estate, in which proceeding one Wills, the holder of a junior mortgage was made a party, but to whom no affirmative relief was granted by the decree; that under this decree, on September 24, 1902, the premises were sold to Hershey for the full amount found due, together with accrued interest and costs; that the certificate of sale issued to Hershey was defective in that the premises sold were incorrectly described; that in such form the certificate was recorded in the recorder's office of Los Angeles county, but not indexed; that subsequently the certificate was corrected, but the record thereof was not altered; that afterwards, in December, 1902, Wills, the holder of the junior mortgage, brought an independent ac-

tion against plaintiff in foreclosure, and such proceedings were had that on February 12, 1903, the premises were sold under the Wills decree and a certificate in due form issued to her; that thereafter, on March 3, 1903, Wills redeemed the premises from the previous sale to Hershey by paying to the sheriff the full amount due Hershey; that in such redemption the said Wills presented with the other instruments required by law the certificate so issued to Hershey as altered and corrected; that a certificate of redemption in due form was issued by the sheriff to Wills, but not filed for record or recorded; that defendant, Hershey, on August 24, 1903, acquired by purchase from Wills the certificate so issued to her; that thereafter, on September 20, 1903, four days before the time for redemption had expired under the sale to Hershey, plaintiff entered into an oral agreement with Hershey, whereby it was agreed that plaintiff was to pay to Hershey \$50 per month, or a sum equal to interest upon all sums due Hershey under the sale, such payments to be made monthly, commencing January 1, 1904, in consideration of the prompt payment of which Hershey agreed that plaintiff might retain possession of the premises, and the right of redemption and the right to pay the full amount of the decree was to be extended two or three years; that if said monthly payments were promptly made plaintiff could pay to Hershey the full amount of all indebtedness, and all liens, decrees, and obligations in favor of Hershey and against said real estate would thereby be canceled and discharged; that plaintiff, relying upon said agreement, made no effort to redeem within such intervening four days; that afterwards, in December, 1903, defendant Hershey notified plaintiff to vacate the premises, and on or about January 1, 1904, took possession of a part thereof, but plaintiff has retained possession of the remainder; that on December 30, 1903, Hershey took out a sheriff's deed; that on November 2, 1905, plaintiff offered to pay Hershey the full amount of all claims due her, which she refused to accept, but thereafter, in 1906, paid into a bank for plaintiff's use a thousand dollars, upon a written statement that she was willing that plaintiff should share in the advance in the value of the property.

There is nothing in the point that the record of the original defective certificate was not altered, or that a correct certificate was not recorded. The statute does not require that the certificate issued by the sheriff shall be recorded, but simply that it be filed. Section 700, Code Civ. Proc. No reason is suggested why the clerical error of the sheriff in the issuance of the certificate might not be corrected, and a correct certificate refiled. The complaint does not negative the refileing of a corrected certificate. Wills, being a junior mortgagee, and having asked and received no affirmative relief in

the original action, was at liberty before the time of redemption expired to institute her original action in foreclosure and obtain an appropriate decree and a sale thereunder. Having exercised this right and having received a certificate of sale regularly issued to her on account thereof, as the holder and owner of such certificate, she became a successor in interest of plaintiff and entitled to redeem. *Pollard v. Harlow*, 138 Cal. 392, 71 Pac. 454, 648. When she as such holder of the certificate so exercised this right of redemption from the Hershey sale, she became subrogated to all of Hershey's rights to the same effect as though Hershey had assigned to her the certificate of sale. *White v. Costigan*, 134 Cal. 38, 66 Pac. 78. When Hershey took an assignment of the Wills certificate, she acquired all rights held by Wills thereunder, including the subrogated rights. Had a stranger purchased this certificate from Wills, no one would question the extent of the interest acquired by an assignment of the Wills certificate. No reason suggests itself why Hershey by a purchase of such certificate could not and did not acquire the same rights guaranteed to any other purchaser.

The contention that the redemption by Wills extinguished the sale theretofore made to Hershey cannot be maintained. The effect of a redemption by a successor in interest, holding the legal and equitable title, is a restoration to the original estate (section 703, Code Civ. Proc.), but this does not apply to one holding, but the equitable title under a certificate issued upon a second sale. In such cases the holder of the junior certificate redeems from the previous sale in his own interest and adverse to the debtor and holder of the legal title, and it is not a redemption in the interest of the judgment debtor or for the judgment debtor, and the effect of which is not to restore the estate to the judgment debtor, nor to extinguish the original sale from which the redemption is had. There being no extinguishment of the Hershey sale, it follows that at the expiration of 12 months from the date thereof, as against the judgment debtor, the complete legal and equitable title vested in Hershey as the owner and holder of the Wills certificate with its subrogated rights, unless her oral agreement was such as to estop her to claim the same. The oral contract to extend the time for redemption was valid, and needed no consideration in its support, if the debtor was lulled into a false security and thereby permitted the time for redemption to expire. *Schroeder v. Young*, 161 U. S. 342, 16 Sup. Ct. 512, 40 L. Ed. 721. This oral agreement conferred the right and privilege of redemption beyond the statutory period upon a condition precedent, namely, that the judgment debtor should pay the interest on all sums due Hershey, in any event to the extent of \$50 per month. Plaintiff does not claim to have

paid or tendered payment thereof. The nearest approach to an allegation in reference thereto is a statement that on January 1, 1904, she was prepared to make the first payment. This fact does not seem to have been communicated to defendant, nor any tender or offer to pay made in connection therewith. During the ensuing 22 months intervening between January 1, 1904, and November 2, 1905, there was no offer or tender to pay any of these monthly payments, between which dates a great increase in the value of the property ensued. Nor is there any allegation in the complaint of any fact which would excuse performance upon plaintiff's part. The receipt of a sheriff's deed cannot be construed as a notification upon defendant's part that she would not carry out her agreement. There was nothing in the agreement which prohibited her from taking out the deed at any time after the time redemption had expired. No new title was conveyed by the deed. It is evidentiary purely in its character, and whatever of title was acquired by Hershey was the result of failure to redeem within the statutory or agreed period, and not because of the issuance of the deed.

Construing the pleading most strongly against the pleader, as is our duty, she retained possession of all the premises until after January 1, 1904, after which date she was in default under her agreement in the payment of interest, and being thus in default the taking of possession by defendant of a portion thereof would not have the effect to excuse performance on plaintiff's part of her contract. While the tenor of all decisions, wherein has been involved the right of redemption after the statutory period based upon an agreement, has been extremely liberal in protecting the redemptioner's rights, yet in no case called to our attention has it been held that a redemptioner may violate the agreement under which he claims and still have a decree giving effect to the violated agreement. He who seeks to enforce a contract must show that he has complied with the agreements and conditions of the contract on his part to be performed. Section 1439, Civ. Code.; *Cameron v. Burnham*, 146 Cal. 534, 80 Pac. 929. This proceeding being one in equity to enforce a right under an agreement violated by the plaintiff, we do not think that she is entitled to any relief under the allegations of the complaint.

We attach no importance to the fact that in July, 1906, long after the plaintiff's default, the defendant paid to plaintiff a thousand dollars, upon the statement that the property "was growing more valuable, and in time I shall doubtless dispose of it, and I am willing that you should share in advance in what it may produce." The only proper construction to be given to such statement is to the effect that this thousand dollars represented the amount which the de-

fendant was willing that the other party might share in the transaction, and its receipt and retention by the plaintiff, under the circumstances, would indicate plaintiff's acquiescence in the equitable character of defendant's offer. In no event, however, could it have any effect to change or alter the rights of the parties theretofore attaching. Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 727

OCCIDENTAL REAL ESTATE CO. v. GANTNER & MATTERN et al. (Civ. 443.)

(Court of Appeal, First District, California. March 18, 1908. Rehearing Denied April 15, 1908.)

1. APPEAL AND ERROR—RECORD—SETTLED STATEMENT—CONCLUSIVENESS.

A settled statement, on appeal from an order vacating a verdict and granting a new trial, which, after reciting the rendition of the verdict, states that the same was vacated and a new trial granted by the court on its own motion, is conclusive that the order was made by the court on its own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2850-2855.]

2. NEW TRIAL—PROCEEDINGS TO PROCURE—MOTION.

A colloquy between an attorney and the court immediately on the return of the verdict, wherein the attorney asked the court to vacate the verdict and grant a new trial and called its attention to Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been a plain disregard of the instructions or of the evidence, cannot be taken as a formal motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 250-253.]

3. APPEAL AND ERROR—REVIEW—GROUNDS OF DECISION—GRANT OF NEW TRIAL.

Where an order by the court, on its own motion, vacating a verdict and granting a new trial, can be sustained on either ground allowed under Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been a plain disregard of the instructions or a plain disregard of the evidence, the order must be upheld on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408-3430.]

4. LANDLORD AND TENANT—RENT—PAYMENT—WHAT CONSTITUTES—"UNLAWFUL DETAINER."

The fact that a tenant each month tendered one month's rent, which was refused, there being no pretense that the tenant deposited the rent in any bank for the landlord, as provided by Civ. Code, § 1500, did not entitle him to refuse payment and to retain possession of the premises after the landlord served him with the notice authorized by Code Civ. Proc. § 1161, subd. 2, providing that a tenant is guilty of unlawful detainer where he continues in possession, after default in payment of rent, and three days' notice requiring its payment or possession of the property shall have been served on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 855, 1076.]

For other definitions, see Words and Phrases, vol. 8, pp. 7189, 7824.]

5. NEW TRIAL—GROUNDS—PASSION OR PREJUDICE OF JURORS.

Where plaintiff, in unlawful detainer, on the undisputed facts was entitled to a verdict for the possession of the premises and for rent, and the court might properly have directed a verdict for plaintiff, and a verdict for defendant could only be rendered in plain disregard of the evidence, the court was justified in assuming that a verdict for defendant was rendered under the influence of prejudice within Code Civ. Proc. § 662, authorizing the court, on its own motion, to vacate a verdict and grant a new trial where there has been such a plain disregard of the evidence as to satisfy the court that the verdict was rendered under the influence of passion or prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 135-149.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Occidental Real Estate Company against Morris Levy and Gantner & Mattern. From an order vacating a verdict for defendants and granting a new trial, Levy appeals. Affirmed.

Devoto & Richardson, for appellant. Hiller, Mann & O'Brien, for respondent Real Estate Company. Edmund Tauszky, for respondent Gantner & Mattern.

HALL, J. This is an action for unlawful detainer, brought against defendant Morris Levy after default in the payment of rent and three days' notice in writing demanding its payment and possession of the premises, under subdivision 2, § 1161, Code Civ. Proc. Gantner & Mattern (a corporation) was made defendant because in possession of a portion of the premises as a subtenant of defendant Levy. The jury rendered a verdict in favor of defendant and against plaintiff, which the court at once upon its own motion vacated, and granted a new trial, and from this order defendant Levy has appealed to this court.

We say the court upon its own motion vacated the verdict and granted a new trial advisedly, for although the statement of the case upon appeal shows that the attorney for the plaintiff asked the court to make such order, and called its attention to the provisions of section 662, Code Civ. Proc., under which such power is granted to the court, the settled statement, after reciting the fact of the rendition of the verdict by the jury in favor of defendant and against plaintiff, concludes as follows: "Thereupon the court vacated the verdict and granted a new trial, on its own motion, on the ground that there had been such a plain disregard by the jury of the instructions of the court and the evidence in the case, as to satisfy the court that the verdict was ordered [rendered] under a misapprehension of such instructions under the premises of section 662 of the Code of Civil Procedure of this state." This is conclusive upon us that the order was made by the court upon its own motion, and the contention of appellant that the order was made upon the motion of plaintiff cannot be sustained. The

colloquy that took place between the attorney for the plaintiff and the court immediately upon the return of the verdict cannot be regarded as a formal motion for a new trial on the part of plaintiff, but was simply the calling of the court's attention to its power under section 662, Code Civ. Proc. *Anglo-Nevada Assurance Corporation v. Ross*, 123 Cal. 520, 56 Pac. 335.

It is also contended by appellant that the court erred in vacating the verdict upon its own motion. The facts of the case as shown by admissions and uncontradicted evidence are as follows: On the 1st day of November, 1905, appellant leased the premises in suit from one Dana for a period of two years from said date at a rental of \$100 per month, payable in advance each month, and took possession under said lease. Dana subsequently granted the premises to plaintiff. For each of the ten months beginning May, 1906, and ending with February, 1907, defendant sent a check for the sum of \$100 to the landlord or his or its agent, which was in each instance refused and returned to defendant. On the 21st day of February, 1907, there being ten months' rent due and unpaid, plaintiff gave three days' notice in writing to defendant, requiring its payment or possession of the premises, and served a copy thereof on the subtenant as well. This notice was in all respects correct in form and correctly stated the amount then due and unpaid. Defendant did not pay such rent or any part thereof, or surrender possession, and on the 26th day of February, 1907, this action was brought. Upon this state of the case the court might properly have directed the jury to find a verdict in favor of plaintiff for the possession of the premises and the sum of \$1,000, unpaid rent. The court, however, submitted the case to the jury under some general instructions, and, upon the return of a verdict against plaintiff and in favor of defendant, on its own motion vacated the verdict. In this the court committed no error. Section 662 of the Code of Civil Procedure gives power to the court on its own motion to vacate a verdict and grant a new trial "where there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice." In other words, there are two sets of circumstances under which the court of its own motion may vacate a verdict: (1) Where there has been a plain and palpable disregard of the instructions; and (2) where there has been a plain and palpable disregard of the evidence. *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550; *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928; *Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714. By the terms of the order entered by the court it would seem that the learned judge of the trial court based the order upon the theory that the jury had

plainly disregarded the instructions of the court. But because of the vagueness of the instructions it is very doubtful if it can be said that the jury was guilty of a "plain disregard of the instructions." The court simply read a portion of subdivision 2, § 1161, Code Civ. Proc., erroneously omitting the part requiring a three days' notice in writing to pay the rent or to surrender possession, and section 1500, Civ. Code, relating to the extinguishing of a pecuniary obligation where an offer of payment is not accepted. The court did not, however, clearly tell the jury under what circumstances or conditions the plaintiff would be entitled to recover.

Nevertheless, if the order of the court can be sustained upon either ground allowed under section 662, the order of the court must be upheld. *Townley v. Adams*, supra. See, also, *Miller v. Wade*, 87 Cal. 412, 25 Pac. 487; *Estate of Yoakam*, 103 Cal. 503, 37 Pac. 485. The jury brought in a general verdict for the defendant. This necessarily carried with it an implied finding that some fact essential to plaintiff's recovery did not exist. Yet upon the record before us every fact essential to a recovery by plaintiff was admitted or proven without contradiction. Indeed, the only contention of defendant seems to be that because he had each month tendered the rent for that month this action will not lie. But the tender each month did not pay the rent. There is no pretense that defendant deposited the rent in any bank for plaintiff as provided in section 1500, Civ. Code. On the 21st day of February, 1907, defendant was in possession of the premises in suit as a tenant of plaintiff, and there was then due and unpaid from defendant to plaintiff for the rental of said premises the sum of \$1,000. It was admitted that on this day plaintiff made written demand on defendant, requiring him within three days to pay such \$1,000, or to surrender possession of the premises. This demand was in all respects sufficient in form, and was duly served, both on defendant and his subtenant, on the 21st day of February, 1907. Defendant in no respect complied with the demand, but without the consent of the plaintiff retained the possession of the premises, and five days later this action was brought. About the foregoing facts there is no dispute or contradiction. Upon the facts above stated plaintiff was clearly entitled to a verdict for the possession of the premises and for \$1,000 as rent money. The court might properly have directed the jury to find such a verdict. A verdict for the defendant could only be rendered in plain and palpable disregard of the evidence. The fact that defendant each month tendered one month's rent did not entitle him to refuse payment and to retain possession of the premises after plaintiff served him with the written notice authorized by subdivision 2, § 1161, Code Civ. Proc. "Notwithstanding the refusal of a valid tender, if the creditor subsequently demands payment, and the debtor fails to pay,

the tender has not been kept good, and the debtor loses the benefit of the tender." 28 Am. & Eng. Ency. of Law, 41, citing many cases.

The jury plainly and palpably disregarded the evidence, and the court for this reason was justified in assuming that the verdict was rendered under the influence of prejudice.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

153 Cal. 300

SWANSTON et al. v. CLARK. (Sac. 1,505.)
(Supreme Court of California. March 28, 1908.
On Rehearing, April 27, 1908.)

1. APPEAL AND ERROR—DISCRETION OF TRIAL
COURT — ALLOWANCE OF AMENDMENTS TO
PLEADINGS—REVIEW.

The propriety of allowing amendments to pleadings is for the trial court, and its rulings will not be disturbed, except for an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

2. SAME — REVIEW—HARMLESS ERROR—RULINGS ON DEMURRER.

Where plaintiff amends his complaint, rulings as to its sufficiency before amendment become immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4104.]

3. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE.

A complaint in a suit to enforce specific performance of a contract, which alleges the execution of the contract as set out, consisting of a lease and an option to the lessee to purchase during the term at a fixed price, and which avers that the lessee elected to purchase, that the contract was fair and reasonable, that the price agreed on was in fair proportion to the value of the property, and prays for the reformation of the contract relating to the rights of the parties in the event the lessee does not purchase under the option, shows a contract sufficiently certain on its face to support a suit for performance, especially after the contract has been reformed as prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-85, 357-360.]

4. SAME.

Where, in a suit to enforce specific performance of a contract, consisting of a lease for a specified term, and of an option to the lessee to purchase during the term at a fixed price, the complaint alleges the making of valuable improvements by the lessee on the faith of the option to purchase, an answer attempting to allege a rescission by the lessor of the contract, prior to the election by the lessee to purchase, which does not offer to repay the lessee the moneys expended by him in improvements on the land, but only to repay the moneys "paid" the lessor by the lessee, and "to restore everything received" by the lessor under the agreement, is insufficient on demurrer.

5. CONTRACTS—RESCISSION—GROUNDS.

A party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in Civ. Code, § 1689, authorizing a party to rescind a contract for enumerated grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1152-1180.]

6. CANCELLATION OF INSTRUMENTS—PLEADING—ALLEGATIONS—CROSS-COMPLAINT.

The rule that one, seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided by Civ. Code, § 1691, prescribing how a rescission may be effected, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent, controls, where a rescission is averred as a defense; and a defense, not averring any facts in regard to defendant's right to rescind, and not showing a rescission by consent, is insufficient.

7. VENDOR AND PURCHASER — CONTRACTS — PERFORMANCE.

Where a contract bound a lessor to convey the premises to the lessee, on exercise of his option to purchase at a fixed price, free from all liens and incumbrances, "except such as may be created by" the lease, a conveyance in fee to the lessee, on his electing to purchase, effected a merger of the two estates, and the lease was not an incumbrance.

8. APPEAL AND ERROR—ORDERS—REVIEW.

An order denying a motion to amend a judgment awarding specific performance of a contract is an order made after a final judgment, and is not reviewable on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3522.]

9. SAME—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE—IMMATERIAL ISSUES.

Where there was no ground for rescinding a contract, erroneous rulings, on the admission of evidence relating to service of notice of rescission, were immaterial.

10. SPECIFIC PERFORMANCE—DEFENSES.

The attempt of a party to a contract to rescind the contract without having any grounds therefor did not affect the right of the adverse party to specifically enforce the contract.

11. LANDLORD AND TENANT—LESSEE'S OPTION TO PURCHASE—EXERCISE—TIME.

A lessee was in possession of the premises under a lease expiring January 1, 1903. A new lease, for a term of five years, from October 1, 1902, which gave the lessee the option to purchase the premises at a fixed price at any time during the term, was executed. No cause for a rescission of the contract, contained in the new lease, existed. The new lease provided that the lessee should have immediate possession, and could make any use of the land he saw fit, while the prior lease prohibited any waste or alterations without the consent of the lessor. *Held*, that the lessee had the right, under the new lease, to exercise his option to purchase at any time during the term thereof, and the question whether he was in possession of the premises under the new lease immediately on its execution, or whether he continued to hold under the old lease until the new term began, was immaterial.

12. CANCELLATION OF INSTRUMENTS — CONDITIONS PRECEDENT.

Where a lessee has an option to purchase the premises at a fixed price during the term, and the right to make any use of the premises he sees fit, made improvements in reliance on the contract, the lessor, if he would rescind, must compensate the lessee for the improvements made.

13. PLEADING—EVIDENCE—ISSUES.

It is not error to exclude evidence relating to issues not made by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1237-1251.]

14. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—CONSIDERATION.

A lease gave the lessee an option to purchase the premises for a fixed price at any time during the term. The lessee agreed to pay a higher rent than he considered the premises worth, because he was obtaining an option. The rent was paid for one year in advance, the rent under a prior lease accruing after the beginning of the new lease was canceled, and rent accruing under the prior lease, prior to the new term, was paid in advance. *Held*, that the option to purchase was supported by a sufficient consideration, and the lessee, on electing to purchase, could compel specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 140-152.]

On Rehearing.

15. SPECIFIC PERFORMANCE—RELIEF.

A lessee, having the right to purchase the premises during the term at a fixed price, elected to purchase, and tendered the price, but the lessor refused to convey. The lessee remained in possession of the premises, and sued for specific performance. *Held*, that since the lessee received the use of the premises after the tender, and was not liable for rent, it would be inequitable to compel the lessor to pay taxes and other incumbrances thereafter created, and not made or suffered by him or at his instance, or for his benefit.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Charles Swanston and another against Anna E. Clark. From a judgment

for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

William M. Sims, Albert M. Johnson, and Hiram W. Johnson, for appellant. L. T. Hatfield and A. L. Shinn, for respondents.

SHAW, J. The record presents appeals from the judgment, and from an order denying defendant's motion for a new trial. The action is to enforce specific performance of a written contract to sell real estate. The complaint was amended four times, and there were subsequently two specific amendments allowed to the fourth amended complaint. There is some contention by appellant that the court erred in allowing these amendments, and that there was error in overruling demurrers to the several complaints as they existed prior to the last amendment. The propriety of allowing amendments is a question for the trial court, and its ruling can be attacked on appeal only for an abuse of discretion. No abuse of discretion appears. The result is that the sufficiency of the several complaints, before it was finally perfected by the last amendment, is immaterial.

The complaint, as finally amended, states facts sufficient to constitute a cause of action. It alleges the execution of the contract, which is set out in full. The contract consists of a lease for five years, beginning October 1, 1902, and of an option allowing the lessees to purchase at any time during the term of the lease at a fixed price per acre. It further shows that the plaintiffs, being the lessees, had elected to buy the land in pursuance of the option, had made due tender of the price, and demanded the execution of a deed, which the defendant refused; that the contract was just, fair, and reasonable as to the defendant, and that the price agreed upon was in fair proportion to the value of the property; that two clauses, to which the parties had agreed, to the effect that the plaintiffs were to allow improvements made by them during their possession to remain on the premises, in case they failed to exercise the option and buy, and that plaintiffs should pay the rent for the five years, if they did not sooner exercise the option, were, by mutual mistake, omitted from the contract, and that by like mistake a clause was inserted, giving plaintiffs the right to remove such improvements if they did not purchase. The prayer was for the reformation of the contract, and the enforcement of the defendant's agreement to sell. The mistakes alleged related entirely to the rights of the parties in the event that the plaintiffs did not buy under the option, but chose to occupy for the five-year term under the lease. If material to the case at all, it was only for the purpose of showing that the real contract made was fair, just, and reasonable, and, so far as the option was concerned, supported by a valuable consideration. The facts alleged show the occurrence of a

mutual mistake. We do not think there is any ambiguity or uncertainty in the complaint as amended. The contract, as written, was sufficiently certain on its face to support a suit for performance. The ambiguity as to the two repugnant clauses, the one allowing the removal of the improvements, the other requiring that they remain if the option was not exercised, did not make the contract uncertain as an agreement to sell. Furthermore, if it was uncertain in the condition in which it stood as originally executed, the uncertainties were all removed by the reformation which the court directed. The defendant, in her answer, attempted to allege that the contract had been rescinded by her prior to the tender by the plaintiffs. The demurrer was properly sustained to this part of the answer. It did not aver an offer to repay the plaintiffs the moneys expended by them in improvements on the land, but only to repay the moneys "paid her by them" and "to restore everything received by her under that agreement." The complaint alleges the making of valuable improvements by the plaintiffs, on the faith of the option to purchase. This special answer did not deny the making of these improvements, and it cannot be said that the improvements had been "received" by the defendant. Hence the offer to restore, as alleged in the answer, did not include an offer to compensate the plaintiffs for the moneys expended by them in improving the property, and was insufficient to accomplish a rescission. Again, a party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code. One seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided in section 1691 of the Civil Code, must allege facts showing that he had good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent. 18 Ency. Pl. & Pr. 802, 803, 804. The same rule controls where a rescission is averred as a defense. 18 Ency. Pl. & Pr. 844; *Bruck v. Tucker*, 42 Cal. 353; *Miller v. Fulton*, 47 Cal. 146; *Dorris v. Sullivan*, 90 Cal. 286, 27 Pac. 216; *Kentfield v. Hayes*, 57 Cal. 411; *Arguello v. Bours*, 67 Cal. 450, 8 Pac. 449; *Swasey v. Adair*, 88 Cal. 182, 25 Pac. 1119. The special defense does not aver any facts in regard to defendant's right to rescind, and does not show a rescission by consent. It is therefore insufficient.

The court did not err in adjudging that the defendant should convey the land free from all liens and incumbrances. The contract provided that she should convey it free from all liens and incumbrances, "except such as may be created by the terms of this instrument as a lease of said premises." The conveyance of the property to the plaintiffs in fee would effect a complete merger of the two estates, and the lease would not thereafter

be an incumbrance. The execution of the deed by the defendant would be a complete performance so far as the lease was concerned. The contract, as reformed, did not contemplate or provide that she should retain any right or interest under the lease after she had conveyed in pursuance of the option, even if it did not have that effect before reformation. The lease, therefore, did not constitute an incumbrance within the scope of the covenants in a grant deed. We cannot, upon these appeals, take notice of any liens for reclamation district taxes that may have accrued after the trial. The defendant, it may be observed, could have escaped that liability at any time by performing before the liens accrued. The statement in the record relating to the motion made by defendant to amend the judgment, so as to except such liens and the order denying the same, show that the judgment was entered before the motion and order were made. It was therefore an order made after final judgment, and it cannot be reviewed on appeal from the judgment itself. The defendant did not appeal from the order. As to the liens for ordinary taxes, which may be presumed to have accrued between the time of plaintiffs' tender in January, 1903, and the date of the entry of the judgment in January, 1905, it is sufficient to say that the defendant, having refused to accept the money and make the deed as the judgment declares she should have done, is in no position to complain of the consequence of her own breach of contract.

After the last amendment of the complaint defendant filed a cross-complaint to rescind and cancel the contract as signed, on the ground that it was executed under a mistake as to its contents, induced by fraudulent representations of the plaintiffs. The mistakes so alleged were not the same as those alleged in the amended complaint. Certain other conditions, it was alleged, were intended to have been inserted in the contract, but were omitted because of the fraudulent misrepresentations of the plaintiffs, and the mistake of the defendant caused thereby. The court found that these allegations of the cross-complaint as to fraud and mistake were untrue, and the finding is sustained by the evidence. As it thus appears that there was no just ground for the rescission asked for, it is immaterial whether the court was right or wrong in its rulings concerning the admission of evidence relating to the circumstances attending the service of the notice of rescission. The notice itself was introduced in evidence, and the time of its service was shown, without conflict. This also disposes of the objection that the plaintiffs' offer of performance was made after the notice of rescission was served. As the cause of rescission as alleged did not exist, the defendant had no right to rescind, and her attempt to do so did not affect the right of the plaintiffs to have specific performance.

Prior to the execution of the contract the

plaintiffs were occupying the lands under a previous lease which, by its terms, did not expire until January 1, 1903. Inasmuch as there was no cause shown for a rescission, the plaintiffs had the whole of the term in which to exercise their option, and the question whether they were technically in possession of the premises under the new lease immediately upon its execution, or whether they continued to hold under the old lease until October 1, 1902, when the new term was to begin, is entirely immaterial. The new lease provided that the plaintiffs should have immediate possession, and could make any use of the land they saw fit. The prior lease forbids any waste or alterations without the lessor's consent. The plaintiffs, immediately after the execution of the new lease, and because of their having procured the option to purchase, began certain improvements, which they would not have made under the old lease. They had the right to do this in reliance on the contract, and if the defendant desired to rescind the contract, and had the right to do so, she would have been required to compensate them for the improvements thus made.

In October, 1903, while the case was on trial, and before the last amendment to the complaint was proposed or filed, the court refused to allow the defendant to introduce evidence relating to a mistake in the terms of the agreement. This was not error. At that time, so far as the record shows, there was no issue upon the subject of mistake, and the evidence was irrelevant.

The claim that there was no sufficient consideration to support the option as a contract is not sustainable. There was evidence to the effect that the plaintiffs agreed to pay rent at a higher rate than they considered it worth, because of the fact that they were obtaining an option. This rent was paid for one year in advance, the rent for the last three months of the old lease was canceled, and the rent accruing under the old lease from July to October 1, 1902, although not due until January 1, 1903, was paid at the time of the execution of the new lease. All this constituted a sufficient consideration for the option.

Many other assignments of error are made by the appellant, which are included in and disposed of by the foregoing conclusions. Other errors are urged, but they are of so trivial a nature that we do not think it necessary to discuss them. They could not, under any circumstances, have been injurious to the defendant.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

On Rehearing.

PER CURIAM. Upon further consideration of this cause, pending an application

for rehearing, we are of the opinion that, inasmuch as the plaintiffs, ever since January 14, 1903, have been in possession of the land, receiving all income, use, and profit thereof, and being under no obligation to pay rent to the defendant after that date, it would not be equitable to compel the defendant to pay the taxes and other incumbrances created since that date, and not made or suffered by her, or at her instance, or for her benefit. See *Miller v. Corey*, 15 Iowa, 166; *Farber v. Purdy*, 69 Mo. 601; *Hall v. Denckla*, 28 Ark. 515; *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683; *Miller v. Waddingham*, 91 Cal. 381, 27 Pac. 750, 13 L. R. A. 680. The opinion hereinbefore rendered, so far as it is contrary to this conclusion, is, to that extent, modified.

The judgment of the court below is modified by altering the clause providing for the execution of a deed by the defendant so that said clause shall read as follows: "Within fifteen days after notice of the entry of this decree make, execute and deliver to the plaintiffs, or to the clerk of the superior court for the plaintiffs, a deed conveying to the plaintiffs, their heirs and assigns, the premises hereinafter described, free from all liens and incumbrances existing upon or against the same on January 14, 1903, or created thereafter by the defendant, or at her instance, or for her benefit." As thus modified, and in all other respects, the judgment is affirmed. The appellant shall not recover costs of appeal herein.

153 Cal. 597

DIEPENBROCK v. SUPERIOR COURT OF SACRAMENTO COUNTY. (S. F. 4,929.)

(Supreme Court of California. May 15, 1908.
Rehearing Denied June 11, 1908.)

1. HOLIDAYS—JUDICIAL PROCEEDINGS.

Const. art. 6, § 5, declaring that the superior courts shall always be open, legal holidays and nonjudicial days excepted, but that injunctions and writs of prohibition may be issued and served on such days, does not prohibit all business in the superior courts on a legal holiday or nonjudicial day except the issuance of injunctions and writs of prohibition, but leaves the Legislature at liberty to allow or disallow the transaction of all judicial business on such days.

2. CONSTITUTIONAL LAW—CLASS LEGISLATION.

Act Nov. 27, 1907 (Laws 1907, p. 561, c. 287), amends Code Civ. Proc. § 10, declaring what days shall be deemed holidays, by adding thereto that holidays besides those enumerated shall be such days as the Governor may declare such, and provides that the Governor may declare special holidays on which no public duty shall be suspended or prohibited except such as affects the administration of justice in the courts of the state, as prescribed by Code Civ. Proc. § 135, which section is amended by adding thereto that on all special holidays the courts shall be open for the transaction of all judicial business, except the trial of an action based on a contract for the direct payment of money. *Held*, that such exception is special legislation, in violation of the Constitution, and void, since such class does not owe its existence to any con-

stitutional, rational, legal distinctions, which alone justify such classification.

3. STATUTES—EFFECT OF PARTIAL INVALIDITY.

Act Nov. 27, 1907 (Laws 1907, p. 561, c. 287), amends Code Civ. Proc. § 10, declaring what days shall be deemed holidays, and providing that the Governor may declare special holidays on which the courts shall be open for the transaction of all judicial business, except the trial of an action based on a contract for the direct payment of money. *Held*, that the exception of the trial of an action based on such contracts was so integral a part of the act that, being void because special legislation, the whole act must fall.

In Bank. Application by M. H. Diepenbrock for a writ of prohibition against the superior court of the county of Sacramento and Hon. Peter J. Shields, judge thereof. Writ denied.

L. T. Hatfield, V. L. Hatfield, and W. H. Hatfield, amici curiæ. R. Platnauer (Grove L. Johnson, of counsel), for petitioner. C. E. McLaughlin, A. L. Shinn, C. B. Harris, and C. O. Busick, for respondent.

HENSHAW, J. This is an application for a writ of prohibition, the purpose of which is to have determined the validity of section 135 of the Code of Civil Procedure as amended on November 27, 1907. Laws 1907, p. 681, c. 358.

Article 6, § 5, of the Constitution, declares that the superior courts of this state "shall be always open (legal holidays and nonjudicial days excepted)," but "injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." Holidays were defined by the Codes, and were declared, besides certain enumerated days, to be "every day appointed by the President of the United States or by the Governor of this state for a public fast, thanksgiving or holiday." It was then declared by section 133, Code Civ. Proc., that courts of justice may be held and judicial business transacted on any day excepting as provided in the next section. Section 134, Code Civ. Proc., then provided as follows: "No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes: (1) To give, upon their request, instructions to jury when deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Injunctions and writs of prohibition may be issued and served on any day."

It will be noted that the language above quoted empowers the courts to transact business other than that designated by the Constitution. But, to the objection that the Constitution prohibited all business in the superior court on a legal holiday or nonjudicial day, except the issuance of injunctions and writs of prohibition, this court long since answered that the Constitution did not contemplate such a result, but "leaves the Legislature at liberty to allow or disallow the transaction

of all or any class of judicial business upon legal holidays." *People v. Soto*, 65 Cal. 621, 4 Pac. 664; *Ex parte Smith* (Cal. Sup.) 93 Pac. 191.

Such was the condition of the law when the Legislature was called together in extraordinary session in the autumn of 1907. The Legislature was convened principally for the purpose of devising some measure of relief from the effects of the financial panic which the state was then undergoing. A year and a half previously, in the spring of 1906, following the San Francisco disaster, it had seemed necessary to the Governor to declare holidays until such time as affairs again resumed something of their normal condition. Necessary and beneficial upon the whole, it was universally recognized that the state at large suffered no little inconvenience from the interruption to judicial business enforced under the law by the declaration of these holidays. Again, in the autumn of 1907, owing to the financial crisis through which the state was passing, it had been deemed necessary by the Governor to declare a series of holidays. And, again, as against the compensating good, it was recognized that hardship resulted from the general suspension of the judicial business of the superior courts. It was under these circumstances that the Legislature undertook the commendable task of preserving the benefits and advantages of such holidays, while minimizing their evils. To accomplish this result, it amended section 10 of the Code of Civil Procedure relating to holidays, adding to the language of section 10 above quoted that holidays, besides those enumerated in the section as it originally stood, should be "such days as the Governor may declare as special holidays." Then proceeding with the consideration of these special holidays, the section declared "that the Governor of the state may declare special holidays, and he may in one proclamation designate one or any number of consecutive days as special holidays, and during any such special holidays no public duty shall be suspended or prohibited except such as affect the administration of justice in the courts of this state as prescribed by section 135 of this Code for the control of such courts." Section 135 of the Code of Civil Procedure was then amended by adding to it this new matter: "On all special holidays the courts of this state shall be open for the transaction of any and all judicial business except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money."

In the briefs of counsel much consideration is paid to the question as to whether or not it is within the power of the Legislature, by calling a holiday a "special" holiday, to clothe it with characteristics, privileges, and immunities which do not pertain to a "general" holiday. It is argued that to permit this is to permit an evasion of the Constitution which speaks of holidays, and which, so speak-

ing, must mean all holidays, special as well as general; that the essential distinction, and the only essential distinction, which can exist between a special holiday and a general holiday, is found in the nature of their creation, but that when once created both stand upon the same plane with equal footing. A general holiday, it is thus said, is a day set apart and declared to be such by the Legislature itself, notice being carried to all the world by the statute that such particular day has been set apart for rest, recreation, fasting, thanksgiving, public rejoicing, public mourning, or any of the other legitimate purposes for which such a day may be decreed; upon the other hand, that a special holiday is special only in the sense that it is not a recurring anniversary, but is created from time to time by the declaration of the chief executive when occasion seems to call for it. But we need not here determine this question upon the broad lines of its presentation, for we think that, conceding that the Legislature has the power to make a distinction in some of their attributes and characteristics between a general holiday and that which they have designated a special holiday, nevertheless the particular difference, distinction, and limitation which they have here made affecting the courts of justice and the administration of justice is special legislation which cannot be upheld. When this court in *People v. Soto*, supra, declared that the Legislature was at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays, it meant no more, and could have meant no more, than that the Legislature could authorize the transaction of any class of business which was not in itself obnoxious to the dictates of the Constitution. Up to that time the exceptions as to writs of prohibition and injunctions, while special in their nature, were classes designated by the Constitution itself, and therefore not to be questioned. In all other respects the purposes enumerated in section 134, Code Civ. Proc., for which judicial business could be transacted upon a holiday, were purposes which, while falling into classes, fell into classes carrying, from the very reading of their designation, the reason for their existence and the generality and uniformity of their operations. To give instructions to a jury when deliberating on their verdict meant instructions to any jury so deliberating to facilitate their deliberations and bring their labors to a close. To receive a verdict or discharge a jury was to receive the verdict of and discharge any jury that the members composing it might not be unnecessarily and unduly restrained and confined. To exercise the powers of a magistrate in a criminal action or proceeding of a criminal nature are general provisions tending to the speedy administration of the criminal laws in the interest of the commonwealth.

But for the first time by the amendment of section 135 is the effort made to designate one

class of litigants, and to say to them that, "While the courts of this state are open to all other suitors, its doors are closed to you." It matters not whether the Legislature should attempt to do this directly by virtue of its own statutory enactment, or indirectly by empowering the chief executive to accomplish the same result through the medium of special holidays. If the Legislature could not do this directly, it certainly could not accomplish the same result by indirection, and the proposition thus stated is: Can the Legislature say that the courts of justice, for 30 days or 60 days, or for any other period of time, while open to every other litigant in every kind and class of litigation, shall be closed to him who seeks the collection of money due upon a contract, or to him who seeks to recover damages for tort, or to him who seeks equitable as distinguished from legal relief, or, indeed, to any class as distinguished from another? Assuredly it will not be said that this may be done, unless there be some valid, legal reason for the class distinction and for the putting of the class so distinguished under this prohibitory ban. As to the exception under consideration it is of course apparent, recognized, and admitted that the law was designed to protect the debtor class in times of great financial stringency. But can such extraordinary privilege to a debtor be justified under our law? It is to be noted that in thus favoring the debtor from the legal enforcement of his creditor's demand, read from the other and equally important point of view, it is a denial to the creditor of the right to enforce such demand. It cannot be a favor to one class without inflicting a corresponding injury upon the rights of another. The creditor of one man is frequently the debtor of another. In the multiplicity of the transactions of modern business the creditor of a debtor residing in San Francisco may himself be the debtor of a resident of New York. Unable to enforce his collections from the local debtor, he stands liable to business disaster at the hands of his New York creditor. The class thus created by law is not a class owing its existence to any constitutional, rational, legal distinctions, which alone justify such classification, but the reason for its creation is personal as distinguished from governmental, and the plain object of the law is unduly to favor the debtor to the hardship of the creditor in times of financial stringency. Commendable as was the motive which prompted such legislation, it cannot be upheld.

We have stated that it is unnecessary to determine whether or not the Legislature has the power to make a distinction in characteristics between a legal holiday and a special holiday; but we are brought to the question as to whether this determination which forbids closing the courts to the trial of an action based on contract for the direct payment of money does or does not render the whole amendment void. In other words, is

the exception so integral a part of the statute as to lead to the conclusion that, if the Legislature had known it was void, it would not have enacted the amendment, or is it to be concluded that the exception may fall and the amendment stand, to the effect that the Legislature has declared that upon special holidays the courts of the state shall be open for the transaction of any and all judicial business? Clearly the first view must obtain. The purpose of the enactment was to allow the judicial business of the state to proceed in all matters saving one. In deciding that that one may not be excluded, if it should be held that the section may still stand, is to declare that the Legislature had enacted that on all special holidays the courts of this state shall be open for the transaction of any and all judicial business without exception, an interpretation of a statute which it did not enact, and which is in irreconcilable variance with the result which it attempted to accomplish. For which reasons it is held that the amendment to section 135 of the Code of Civil Procedure, approved November 23, 1907, is void.

In conclusion, then, we repeat that it is not decided that the Legislature may not make certain distinctions between general holidays and special holidays; but the distinction which here they sought to make being abortive and void, the law for the creation of special holidays itself fails. By this failure the days designated as special holidays were not transformed into general holidays, and were not holidays at all, with the result that they became judicial days, upon which the functions of the courts of the state were in no respect suspended. *Risser v. Superior Court* (Cal. Sup.) 93 Pac. 85.

It follows from the foregoing that petitioner is not entitled to his writ of prohibition, and his application therefor is denied.

We concur: BEATTY, C. J.; ANGEL-LOTTI, J.; SLOSS, J.; LORIGAN, J.

8 Cal. App. 7

ROUSSIN v. KIRKPATRICK et al.

(Civ. 393.)

(Court of Appeal, Third District, California.
March 27, 1908.)

1. APPEAL AND ERROR—BRIEFS—INCORPORATION OF PORTION OF RECORD INVOLVED—PHONOGRAPHIC REPORT OF PROCEEDINGS INSTEAD OF BILL OF EXCEPTIONS.

Under Code Civ. Proc. §§ 941a, 941b, 941c (St. 1907, p. 753, c. 410), providing an alternative method of taking appeals, and sections 953a, 953b, 953c (St. 1907, p. 750, c. 408), providing an alternative method of preparing records on appeals by making and filing in lieu of a bill of exceptions a transcript of the phonographic report of the proceedings, which need not be printed, but requiring in said section 953c that the parties print in their briefs or in a supplement thereto such portions of the record as they desire to call to the attention of the court, it is not sufficient to indicate in the briefs the portions of the record relied on by simply citing the page of the transcript where such portions

may be found, since such transcript was not intended as a substitute for the printed record previously required.

2. SAME—REVIEW—FINDINGS OF COURT ON CONFLICTING EVIDENCE.

In an action for services as a school teacher, plaintiff, who was discharged after the fall term of four months, contending that he had been employed to teach the school year of eight months, where there was evidence from which the court could have inferred that the engagement was for the fall term, and that plaintiff so understood it, although he testified otherwise, the court's finding that plaintiff was employed for the fall term only cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

3. TRIAL—TRIAL BY COURT—FINDINGS.

Where the allegations set forth in certain paragraphs of a verified complaint were admitted by insufficient denials, no finding was necessary thereon.

4. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—ACTION FOR COMPENSATION—TRIAL—FINDINGS.

In an action for services as a school teacher, the complaint alleged employment for the period of nine months. The allegation was denied by the answer, which alleged that plaintiff was employed to teach for only four months. The court found that plaintiff was employed to teach for four months only, and also that the contract for four months had been paid in full. *Held*, that this was a sufficient finding on that issue.

5. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In an action for services as a school teacher, plaintiff, who was discharged after the fall term of four months, contending that he was employed to teach the school year of nine months, testimony relating to certain declarations made by plaintiff in the presence of witness which tended to dispute plaintiff's testimony as to the period for which he had been employed was admissible for that purpose.

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by A. C. Roussin against O. D. Kirkpatrick and others, as trustees of Redwood school district, Del Norte county. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Frank W. Taft, for appellant. G. W. Howe, for respondents.

CHIPMAN, P. J. Action for services alleged to have been performed by plaintiff for defendants as a school teacher. The cause was tried by the court without a jury, and defendants had judgment, from which and from the order denying his motion for a new trial plaintiff appeals.

The record purports to have been made up under new sections 953a, 953b, and 953c of the Code of Civil Procedure. St. 1907, p. 750, c. 408. The appeal is taken under new sections 941a, 941b, and 941c. St. 1907, p. 753, c. 410. Some interesting questions of practice arising under these sections are presented by respondents in their objections to the review of alleged errors, which we prefer not at this time to take up. We invite attention, however, to the closing paragraph of

section 953c, which reads: "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Whatever motive of utility or economy suggested these new sections to the Codes, it is quite clear to our minds that the Legislature did not intend to require the reviewing court to grope through an unprinted transcription of the phonographic report of the trial to find the testimony and documents relied upon by the parties, or that it would be sufficient compliance with the statute for the parties to indicate in their briefs the portions of the record relied on by simply citing the page of this transcription where such portions may be found. If the Legislature had intended to substitute such a record for the printed record hitherto required, no such provision as we have quoted would have been placed in the section. Appellant has in a measure complied with the statute, but respondents not at all, and we might with propriety refuse to examine the transcript in aid of respondents. As the record is not of much length, and the issues are by no means complicated, we have in this instance undertaken to follow the directions of the briefs to find the evidence relied upon.

The court made the following findings: (1) That in the month of July, 1906, defendants employed plaintiff to teach the grammar school in Redwood district for the period of four months of the school year ending December 21, 1906, at the agreed price of \$60 per month; (2) that plaintiff received \$240 "as payment for said teaching for said four months of school in said district"; (3) that plaintiff has not been damaged in any sum. As conclusion of law the court found that defendants are entitled to judgment.

Plaintiff claimed in his complaint that he was employed to teach "for the period of nine months, the school year ending June 30 1907," and his contention now is that the evidence "discloses a contract * * * whereby plaintiff was employed to teach Redwood school for a period of eight months." He further contends that the court failed to find upon all the material issues. The principal question is whether plaintiff was employed for a period of four months or of eight months. Plaintiff testified that in July, 1906, defendant trustee Kirkpatrick called upon him and stated that he was directed by the trustees to find some one to teach their school, and thought he would come and talk with plaintiff about it. Plaintiff was at the time temporarily disabled physically. He testified: "Well, he said, supposing you agree to teach our school, and if you can't take—open the school early enough you can get some one in your place to start it. * * * I asked him how long a term of school there would be in that district. He said 8½ months last year, and we had a little money left over, and we thought that we would put

it nine months this year. Well, I said, under these conditions I will undertake it, although I am pretty sure I will have to get a substitute for a while, but for a short time I will not accept it, for I might not be able to teach until after Christmas time, so if we can put in four months this fall and finish up in the spring all right. Then he said very well, if that suit you, it will suit me, or us rather. Try to get along as fast as you can do so, and in the meantime I will be down again or send some one to see you." It appeared that plaintiff hired a substitute to open the school and she taught for two months in his place, and following her plaintiff taught for two months, closing what was understood to be the fall term of the school on December 21, 1906, and was fully paid for this time. He testified that he was to take up the spring term in the February following. On February 9th plaintiff called upon trustee Watkins, "ready to open school on the 11th," and was informed that another teacher had been employed for the spring term. There was evidence that Kirkpatrick was not directed to employ a teacher for any definite time; that no records of the proceedings of the trustees were kept showing the employment of plaintiff; that the trustees other than Kirkpatrick understood plaintiff's employment to have been for the fall term; that plaintiff had made statements to the effect that he was hired to teach the fall term, to teach the school for four months; and that he had stated that he would not teach the spring term unless his wages were increased and the trustees and children of the school desired it. A witness testified: "He told me that he was only hired for four months, and that he should not teach unless the children and trustees wanted him." During the vacation plaintiff had taken a private class, and early in February returned to learn as to the spring term of the school. There had meantime been a change in the personnel of the board of trustees, one having died, and his successor having been appointed. Another witness met plaintiff just before the spring term of the school opened. She was asked what plaintiff said to her at that time, and answered: "I asked Mr. Roussin if he was going to take the school for the spring term for four months, and I thought he said he was not sure he would take it or not. They offered him a raise of wages to take the school, but he didn't know whether he would or not. He said he hated to refuse to take it, because Mr. Watkins and Mr. Kirkpatrick had been so good to him." There was some evidence tending to show that the teachers had previously been hired for the term, and that there were two terms, fall and spring terms. The evidence showed that there was a difference of understanding among the trustees as to the time for which plaintiff was engaged, Kirkpatrick holding that it was for the school year, and the others that it was

for a single term as they understood the meaning of a term. There was evidence from which the court could have inferred that the engagement was for the fall term, and that plaintiff so understood it though he testified that the fact was otherwise, and hence the finding of the court cannot be disturbed.

Appellant complains that the court failed to find upon the issues stated in paragraphs 1, 2, 4, and 5 of the verified complaint. The allegations set forth in paragraphs 1, 4, and 5 were admitted by insufficient denials, and no finding was necessary thereon. Paragraph 2 alleged employment for the period of nine months. This was denied by the answer, which alleged as the fact that plaintiff was employed to teach for the period of four months and no longer. The court not only found that plaintiff was employed to teach for the period only of four months ending December 21, 1906, but it found that the only contract entered into between plaintiff and defendants "has been paid in full, for teaching the Redwood school for the term of four months ending December 21, 1906." This was sufficient.

Appellant claims error "in overruling the objections of plaintiff to the introduction of the testimony of the witness Margaret Watkins as shown on page 30 of the transcript." The objection is not directed to any particular portion of the testimony, some of which was undoubtedly admissible, and was not objected to. The testimony objected to related to certain declarations made by plaintiff in the presence of witness which tended to dispute plaintiff's testimony as to the period for which he had been employed, and was admissible for that purpose. The same may be said of the testimony of the witness Alice Hussey.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 41

WOODS v. POTTER, Auditor of City of San Diego. (Civ. 467.)

(Court of Appeal, Second District, California.
April 3, 1908. Rehearing Denied by
Supreme Court June 2, 1908.)

1. MUNICIPAL CORPORATIONS—CITY COUNCILS —DUTIES OF MEMBERS.

Members of city councils occupy a position of trust, and are bound to the same measure of good faith towards their constituents that a trustee is to his *cestui que trust*, and the mere fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction.

2. OFFICERS—PUBLIC OFFICERS—RIGHT TO COMPENSATION.

No contractual relations arise between an officer and the state by reason of the election or appointment of the former. There is no implied obligation to pay him for his services, and to recover he must show a right by law to compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 132.]

3. MUNICIPAL CORPORATIONS—CHARTER OFFICERS—RIGHT TO COMPENSATION.

In order that a charter officer shall be entitled to compensation for his services, the burden is on him to show that either the charter which created the office, or the legislative or constitutional authority under which the charter was framed, attached to that office the right to receive pay for his services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 357.]

4. SAME—MEMBERS OF COMMON COUNCIL.

The freeholders' charter under which the city of San Diego was organized (St. 1889, pp. 643-729, c. 22) took effect in May, 1889, and contains provisions relating to the compensation of all the charter officers of the city, except the members of the common council, as to whom it is silent. Article 2, c. 2, § 1, subd. 38, authorizes the council to make rules for the government of all employés, officers, etc., and to fix salaries and wages not otherwise provided by general laws or by the charter. Article 3, c. 9, § 1, reads: "The annual salaries of the officers and the compensation of the employés of the city shall be as follows: (Salary for mayor and other officers as to whom the amount to be received is fixed.) And all other officers and employés as may be fixed by the common council, and all salaries shall be payable monthly." In 1905 by an amendment of the charter the number of members of the council was changed from 27 to 9, but no change was made in the provisions of the charter relating to official salaries. *Held*, that the council had no power to create salaries for its members.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 369.]

Appeal from Superior Court, San Diego County; Benjamin F. Bledsoe, Judge.

Petition by Percival E. Woods for writ of mandate against Daniel Potter, as auditor of the city of San Diego. From a judgment denying the writ, petitioner appeals. Affirmed.

A. A. Haines and Haines & Haines, for appellant. George Puterbaugh, City Atty., for respondent.

TAGGART, J. Appeal from a judgment denying a writ of mandate to compel the issuance of a salary warrant.

Defendant is auditor of the city of San Diego, and plaintiff was elected a member of the common council of that city at an election held April 2, 1907, the term of his office to commence May 6, 1907. The claim of plaintiff to salary is based upon Ordinance No. 2,814 of the city of San Diego, passed and adopted by the common council by a two-thirds vote after its disapproval by the mayor of the city. The ordinance was originally passed February 25th, disapproved by the mayor March 7th, and adopted by a two-thirds vote of the council on April 3, 1907, one day after the election of plaintiff, and by its terms was to take effect and be in force from and after May 6, 1907.

The freeholders' charter under which the city of San Diego is organized took effect the first Monday in May, 1889 (St. 1889, pp. 643-729, c. 20). It contains provisions relating to the compensation of all the charter officers of the city, except the members of

the common council, as to whom the charter is silent. Ten officers are given fixed annual salaries, the salaries of two and the deputies of one are to be fixed by the common council, and the members of five boards are to serve without compensation. The right to create the salary in question is assumed to depend upon an exercise of a power vested in the common council by either one or both of two clauses of the charter, to wit: Subdivision 38 of section 1 of chapter 2 of article 2, which reads, "To make rules and regulations for the government of all servants, employés, officers, and departments, and to fix the fees and charges for all official services, and to fix salaries and wages not otherwise provided by general laws or by this charter"; or a clause in section 1, chapter 9 of article 3, which reads, "The annual salaries of the officers, and the compensation of the employés of the city shall be as follows: (Salary for mayor and other officers as to whom the amount to be received is fixed.) And all other officers and employés as may be fixed by the common council, and all salaries shall be payable monthly."

The petition alleges that prior to the passage of Ordinance No. 2,814 (from 1889 to 1907) "there has been no exercise of power by the common council of said city for or against providing, fixing, or establishing any salary or compensation for members of said common council." From this allegation it clearly appears that prior to the passage of Ordinance No. 2,814 there was not only no salary fixed which could be increased, but there was no salary or compensation attached to the office at all. The presumption arising from the absence of express authorization of compensation by the charter is strengthened by the rule of contemporaneous construction, and the presumption from 18 years acquiescence that it was not intended by the makers of the charter that the members of the common council should have any compensation for services. It further appears that in 1905 by an amendment of the charter the number of members of the council was changed from 27 to 9, but no change was made in the provisions of the charter relating to official salaries. This failure is significant, as this omission should have been supplied by an amendment to the charter. The propriety of this is apparent, when it is observed that the general clause under which the present ordinance is justified places the authority to create and fix such salaries in the hands of that body itself. The intention of the makers of the charter, as expressed by the original charter, cannot be affected by the mere reduction in the number of members of the council by the amendment of 1905.

To meet the effect of the clause in the charter requiring that "all official salaries provided for in this charter" shall be re-

adjusted and fixed anew in the month of January, 1891, and every four years thereafter, appellant contends that as this is the first and original fixing of his compensation, and not a readjustment, or fixing again or anew, this clause has no application. If we accept this argument as having any weight, then it logically follows that the common council would (the first time) have the power to fix their compensation at any amount they desired, and the members of the council so fixing such salary might thereby become the recipients of their own bounty bestowed without limitation from the public treasury. The same line of reasoning is used in meeting respondent's claim that the ordinance is in violation of section 9 of article 11 of the Constitution. None of the cases cited by appellant to support this view consider the question whether or not the power which creates the office should also determine the right of the officer to compensation. In none was it held or contended that a subordinate body was authorized to create a salary for an office which owed its existence to a superior authority, nor do we think such authority could be implied. The two clauses of the charter relied upon here as granting the power relate generally to servants and employes, as well as officers of the corporation. The salary of no other charter officer of the city is dependent upon the existence of this power. The use of the word "officer" in the sense in which it is used in these clauses or either of them does not necessarily imply that a charter officer is intended. *Patton v. Board of Health*, 127 Cal. 395, 59 Pac. 702, 78 Am. St. Rep. 66.

Members of city councils occupy a position of trust, and are bound to the same measure of good faith toward their constituents that a trustee is to his cestui que trust. *Andrews v. Pratt*, 44 Cal. 309. The mere fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction. *Finch v. Riverside*, 87 Cal. 597, 25 Pac. 765. It will be presumed that under such circumstances self-interest prevents the individual member from protecting the rights of the public against his own. *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463. The charter here in question prohibits members of the common council from being directly or indirectly interested in contracts whereby they may receive any money or profit from their own action taken in behalf of the city.

No contractual relations arise between an officer and the state by reason of the election or appointment of the former. There is no implied obligation to pay him for his services rendered. To recover he must show a right by law to compensation. *Abbott on Municipal Corporations*, § 685; *Irwin v. Yuba Co.*, 119 Cal. 686, 52 Pac. 35. If the act authorizing the making of the city charter pro-

vides that the latter shall fix the compensation of the officers of a city, a provision in the charter fixing a maximum will not authorize the council to fix such a salary even within such maximum. *Taylor v. City of Tacoma*, 8 Wash. 174, 35 Pac. 584. If the officer is not satisfied with the compensation, he is not bound to hold the office or perform the duties thereof. *Coyne v. Rennie*, 97 Cal. 593, 32 Pac. 578.

In order, then, that a charter officer shall be entitled to compensation for his services, the burden is upon him to show that either the charter which created the office, or the legislative or constitutional authority under which the charter was framed, attached to that office the right to receive pay for his services. Such showing has not been made here. The power to "make rules and regulations for the government of all servants," etc., * * * "and to fix salaries and wages not otherwise provided by general law or by this charter," or the recital that "all other officers and employes as may be fixed by the common council," cannot be held to be a sufficient showing for this purpose. We have not overlooked the fact that in the section relating to official bonds there appears the clause "all salaried officers of this city, other than the mayor and members of the common council, must," etc. Conceding that in the interpretation of a charter containing an ambiguous statement as to the right of the members of the city council to a salary this clause might be considered in determining the intentions of the charter makers, it can have no application where the charter is devoid of any authorization whatever. Our conclusion in this regard rests upon the fact that it nowhere appears that the charter makers intended that the members of the common council should be compensated for their services.

While this view disposes of the case, there are other reasons which appear to us to justify the trial court in denying the writ asked for. The question of increase of compensation has been presented by both parties as if the time of the change or increase should be determined by the date of the passage of the ordinance. Our own Supreme Court has expressly said that the test of the time of increase is, "When did the law take effect?" *Harrison v. Colgan*, 148 Cal. 76, 82 Pac. 674. Those cases which construe constitutional inhibitions against an increase of salary similar to section 9 of article 11, upon the theory that its purpose is solely to prevent the possibility of an officer using his official position to obtain an increase of compensation after his election or his term begins, are distinguished by the opinion of the court in that case. The constitutional provision it is said was intended as well to avoid and prevent the abuses which may arise by reason of arrangements between candidates who are reasonably assured of

election or appointment and the legislative power, if such arrangements be made to take effect after the election of such candidates, regardless of the time of the enactment. The date of the increase in this case according to this rule was May 6, 1907, and the discussions as to when the ordinance was enacted become unimportant.

If we were to accept the view of petitioner that he was entitled receive a salary which was not fixed or expressly provided for by the charter, such a claim against the city would have to be presented to and allowed by the auditing committee of the city before a warrant for it could issue. Sections 1 and 2, chap. 2, art. 6. Only monthly salaries fixed by the charter are excepted from the rule provided in these sections. The complaint does not allege any such presentation and allowance or rejection, and therefore, upon that theory, does not state a cause of action.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 35

PERRY v. J. NOONAN FURNITURE CO.
(Civ. 415.)

(Court of Appeal, First District, California.
April 3, 1908.)

1. APPEAL AND ERROR—RECORD—REQUISITES—INSTRUCTIONS.

Where it did not appear from the statement of case that a particular instruction which defendant assigned as error on appeal was not given at defendant's request, it would not be reviewed.

2. MASTER AND SERVANT—ORIGINAL HIRING—EXPIRATION OF TERM—CONTINUANCE OF EMPLOYMENT—PRESUMPTION.

Where an employé, hired at a fixed salary continues in the same employment after the expiration of the term of the original hiring without any new contract as to compensation, it is presumed that the parties intend the same compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 11.]

3. SAME—QUANTUM MERUIT.

Where an employé at a fixed salary continues in the same employment after the expiration of the term, the original contract controls as to the compensation the employé is entitled to receive, so that he cannot recover on a quantum meruit.

4. SAME—EVIDENCE.

Plaintiff for a considerable time had been employed by N. in his furniture business at a weekly salary of \$27.50 and \$32.50. N. having formed a corporation to continue the business, in which he owned nearly all the stock, plaintiff continued without a new contract to work as manager of the corporation, and drew from it \$32.50 per week until he was discharged. Plaintiff having been appointed manager by the board of directors for a year, and discharged before the year expired, sued for the value of his services, and testified that they were reasonably worth \$500 per month, and that the amount that he drew was only to cover living expenses. Held, that evidence that the services he performed as manager of the corporation were the same as those previously performed for N. was admissible to show that it was intended that he should be employed by the corporation

on the same terms as those prescribed by the original contract.

5. CONTRACTS—PROOF—CONDUCT.

Under Civ. Code, § 1621, the terms of a contract may be manifested by conduct when not stated in words.

6. CORPORATIONS—ACTION FOR SERVICES—EVIDENCE.

In an action on quantum meruit against a corporation by an officer, evidence of the situation of the parties at the time, the relations, if any, in which they stood, of a business character or otherwise, is admissible to establish the understanding and intention of the parties.

7. WITNESSES—CROSS-EXAMINATION.

Where, in an action against a corporation for breach of an employment contract, plaintiff testified that his services were worth \$500 per month, evidence that he had performed the same services for N. prior to the organization of a corporation for \$32.50 per week was proper cross-examination.

8. CORPORATIONS—OFFICER'S SERVICES—ACTIONS—EVIDENCE.

In an action against a corporation for breach of a general manager's contract of employment, a by-law of the corporation defining the duties of the general manager was admissible to show the nature of plaintiff's position.

9. EVIDENCE—VALUE OF SERVICES—EXPERTS—DISCRETION.

Determination of the qualification of a witness offered as an expert as to the value of services is largely within the discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2363.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Donald E. Perry against the J. Noonan Furniture Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

See 1 Cal. App. 609, 82 Pac. 623.

R. M. Fitzgerald (Campbell, Fitzgerald, Abbott & Fowler, of counsel), for appellant. F. W. Sawyer and Curtis Hillyer, for respondent.

HALL, J. This is an appeal by defendant from a judgment entered against it upon the verdict of a jury and the order of the court denying its motion for a new trial. The complaint is in two counts. In the first count plaintiff sought to recover a balance of \$10,021.91 upon quantum meruit for services rendered by plaintiff to defendant, as its general manager, from November 18, 1898, to March 25, 1901. The second count alleges that plaintiff was duly elected general manager of defendant by its board of directors on the 18th day of February, 1901, for the term of one year from said day, and performed the duties of said position until the 25th day of March, 1901, from which last day defendant has refused to permit plaintiff to perform such duties. Upon this count plaintiff sought to recover the sum of \$5,385 as the reasonable value of the services that would have been performed but for the prevention by defendant. The jury rendered a general verdict in favor of plain-

tiff for the sum of \$2,500, for which judgment was accordingly entered for plaintiff.

Appellant objects to certain instructions given to the jury as misleading. Respondent insists that we cannot review the action of the court in this regard, for the reason that it does not appear from the record that the instructions now complained of were not given at the request of the defendant, and we think that this contention must be sustained. The statement of the case recites that at the conclusion of the testimony, and after argument by the respective counsel for each party, it was stipulated "that all instructions given by the court on its own motion were excepted to by both parties; that all instructions requested by plaintiff and given by the court were excepted to by the defendant; that all instructions requested by defendant and given by the court were excepted to by plaintiff." The statement sets forth about 20 folios of instructions, but nowhere is it shown which were given at the request of the plaintiff, which were given at the request of defendant, or which were given upon the court's own motion. As was said in *Gray v. Eschen*, 125 Cal. 1, 57 Pac. 664: "It is presumed that the proceedings in the court below were regular, and where error is claimed it is incumbent upon appellant to show it affirmatively." For this reason we cannot say that the court erred in the giving of the instructions. *Gray v. Eschen*, supra.

We think the court, in excluding certain testimony, erred to the prejudice of defendant. It was the contention of defendant that plaintiff had been employed by defendant during the period he worked for defendant at a stated salary, to wit, at the weekly salary of \$27.50 per week, from November 18, 1898, to January 1, 1899, and at the weekly salary of \$32.50 per week during the balance of the time, which had been fully paid him up to the time of his discharge, which occurred shortly after the death of Mr. Noonan. Plaintiff testified that his compensation had never been agreed upon or fixed, but that each week he had drawn \$32.50 to cover his living expenses. He testified that the reasonable value of his services was \$500 per month, and he sought to recover for his services at that rate. The J. Noonan Furniture Company was incorporated November 18, 1898. In this connection plaintiff, upon cross-examination, testified: "It was Mr. Noonan's idea and my idea to incorporate the J. Noonan Furniture Company. Prior to the time of the incorporation of the J. Noonan Furniture Company I worked for Mr. Noonan I think 10 or 11 years. I was an employé there." Thereupon he was asked by defendant's attorney, "What were your duties as an employé there?" Whereupon the attorney for the plaintiff said: "To this line of questions we will object to all of them, and take a ruling of the court and exception." The court sus-

tained the objection, and defendant excepted. After plaintiff had testified that he had drawn \$32.50 each week from the time of the incorporation, he was asked by defendant, "Isn't that the amount you received before incorporation?" Plaintiff objected, and the objection was sustained. Defendant excepted. Plaintiff testified that the assets of the J. Noonan Furniture Company came from J. Noonan. After plaintiff had testified that his duties did not change in character during the period covered by the action, he was asked on cross-examination, "On the 17th day of November, 1898, were not your duties just the same as they were on the 18th day of November, 1898?" To this question the court sustained the objection of plaintiff. In these rulings the court erred. It is manifest from the record that defendant sought to prove by the questions ruled out that plaintiff had, before the incorporation of the business of J. Noonan into the J. Noonan Furniture Company, worked for J. Noonan in the same capacity that he worked for the corporation thereafter, and at the same wages that he drew, and was paid after the incorporation of the business. This was proper cross-examination of the plaintiff upon his testimony that his compensation had never been fixed, and that the sums that he drew weekly were not in payment of a fixed salary, but simply for his living expenses.

Where an employé, hired at a fixed salary, continues in the same employment after the expiration of the term of the original hiring, without any new contract as to compensation, it is presumed that the parties intend the same compensation. *Nicholson v. Patchin*, 5 Cal. 475; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; 20 Am. & Eng. Ency. of Law, 16, and cases cited under note 3 on said page. In such a case there can be no recovery on a quantum meruit, as the terms of the original contract control. *Nicholson v. Patchin*, supra; *Hermann v. Littlefield*, supra; *Grover & Baker Sewing Machine Co. v. Bulkley*, 48 Ill. 189; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Weise v. Milwaukee County*, 51 Wis. 564, 8 N. W. 295; *Ranck v. Albright*, 36 Pa. 367; *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. 1026. True, in the case at bar, after the 18th of November, 1898, plaintiff worked for a corporation, while before that date he worked for J. Noonan; but the record shows that the business of J. Noonan was on said day incorporated, and out of 1,000 shares of the capital stock 996 were issued to and owned by Mr. Noonan, while the remaining 4 shares were issued, one to plaintiff, one to J. E. Skelley, another employé of Mr. Noonan, one to D. E. Doyle, another employé of Mr. Noonan, and one to Frances Noonan, the wife of Mr. Noonan. And this was the corporation for which he worked, a corporation evidently formed as a convenient instrument for conducting the business of J. Noon-

an. If he had continued to work in the same employment for Mr. Noonan without a new agreement, it would be presumed as a matter of law that he continued to work for the compensation previously agreed upon. If it be conceded that this presumption would not obtain in this case as a matter of law, because of the change of the employer from an individual to a corporation practically owned by that individual, yet the circumstances were such as to make it proper to lay before the jury the conditions of the previous employment of plaintiff by Mr. Noonan. For if, notwithstanding the incorporation of the business under the name of the J. Noonan Furniture Company, plaintiff continued to work for the corporation in the same capacity in which he had previously worked for Mr. Noonan, and to draw weekly for over two years the same amount without objection and without asking for an increase, it might fairly be inferred that this was because the parties understood and intended that the original contract was in force. It was therefore competent to show what the original contract of employment was. The terms of a contract may be manifested by conduct when not stated in words. Civ. Code, § 1621. In action upon quantum meruit against corporations by an officer thereof, "the situation of the parties at the time, the relations, if any, in which they stood, of a business character or otherwise, are important to be known and considered, in order to arrive at a correct solution of the ultimate question involved." *Barstow v. City R. R. Co.*, 42 Cal. 465; *McCarthy v. Mt. Tecate L. & W. Co.*, 111 Cal. 328, 43 Pac. 956. Evidence as to the employment of plaintiff by Mr. Noonan, and the compensation paid, would have thrown light upon the conduct of plaintiff in taking a weekly payment of a fixed amount, and would have tended to make clear the understanding of the parties interested as to the compensation to be received by plaintiff for his services rendered to the corporation, which was the successor to the business of Mr. Noonan.

The questions ruled out were proper for another reason. Plaintiff had testified as an expert that the services performed by him were worth \$500 per month. Upon this phase of his direct examination it was proper to show upon cross-examination that he had performed the same services for practically the same concern for a much less compensation than \$500 per month.

The court did not err in admitting in evidence the by-law defining the duties of the general manager. Plaintiff had been appointed to the position of general manager, and it was proper to show what the duties of such position were, so that it could be determined from the evidence as to what he did do; whether he had properly and fully performed the duties of his position.

We cannot say that the court erred in overruling the objection to the testimony

of plaintiff and Bartlett as to the value of plaintiff's services. Plaintiff showed himself sufficiently qualified to give an opinion as to the value of his services. While the qualifications of Bartlett were so meager that the court might well have ruled out his opinion, and such we think would have been the better practice, yet we cannot say that there was an abuse of discretion in allowing the testimony to go to the jury. The determination of the qualification of a witness offered as an expert must be left largely to the discretion of the trial judge. *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983.

For errors in ruling out testimony above noted the judgment and order must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

CALIFORNIA REPORTER

96 PACIFIC REPORTER

153 Cal. 183

ENGWICHT v. PACIFIC STATES LIFE
ASSUR. CO. et al. (WATKINSON,
Intervener). (S. F. 4,642.)

(Supreme Court of California. March 9, 1908.
Rehearing Denied April 7, 1908.)

1. INSURANCE—MUTUAL ASSESSMENT COMPANIES—DEPOSIT WITH STATE TREASURER—RIGHT OF PARTICIPATION—“CONTRACT HOLDERS.”

Laws 1891, p. 126, c. 116, § 1, provides that every contract whereby a benefit may accrue to a party named therein on the death of a person insured thereunder, or for the payment of any sum dependent on the collection of assessments from persons holding similar contracts, shall be deemed a contract of mutual insurance on the assessment plan, and that such contracts must show that the liability of the insured thereunder are not limited to fixed premiums. Section 2 provides corporations may be formed to carry on the business of mutual insurance on the assessment plan, that no such corporation shall issue contracts of insurance till 200 persons have paid in \$5,000, which sum shall be paid to the State Treasurer, and held in trust for the “contract holders” of such corporation. *Held*, the “contract holders” included only the holders of insurance contracts issued by the company within the scope of its authority under such law, and that a debenture issued by the company, in substance merely a promise of the company to pay at its office a certain sum, two years after date, with interest, and making reference to insurance only by a concluding provision giving the owner the option at its maturity to take a policy in lieu of the money, was not such an insurance contract.

2. SAME—PROCEDURE FOR REACHING FUND.

The money required by Laws 1891, p. 126, c. 116, § 2, to be deposited by a mutual assessment insurance company with the State Treasurer as a trust fund for holders of insurance contracts, can, on the company becoming insolvent, be reached only by an action in the nature of a creditor's bill, on the hearing of which, and with all the parties interested before the court, it may make an equitable distribution, and appoint a receiver to carry out the same; and an action at law in which the prayer is merely that the amount found due plaintiff from the company be declared a lien on and payable out of such fund, and that the treasurer be ordered to pay it, together with the appointment of a receiver by the court, with the command to all persons claiming any interest in the fund to appear and show cause within 60 days, it not a proper substitute procedure.

Department 2. Appeal from Superior Court, City and County of San Francisco; John A. Hosmer, Judge.

Action by George Engwicht against the Pacific States Life Assurance Company and Truman Reeves, Treasurer of the state, J. T. Watkinson intervening. From the judgment, said Treasurer of the state appeals. Reversed and remanded.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., for appellant. Aitken & Aitken, Jellett & Meyerstein, and M. B. Kellogg, for respondents.

PER CURIAM. Plaintiff brought his action as a policy holder against the defendant Life Assurance Company to have determined the amount due him under his policy, to have that amount declared a lien upon the fund of \$5,000 on deposit with the defendant Reeves

as State Treasurer of the state of California, and to have judgment that the State Treasurer pay the same out of the trust fund of \$5,000 in his possession. The defendant assurance company is one of those organized under the provisions of the statutes of 1891 (page, 126, c. 116), and, following the life history of most of the companies of its kind, became, as is alleged, insolvent; its only assets being the \$5,000 trust fund in the hands of the treasurer. J. H. T. Watkinson filed his complaint in intervention, alleging that he was the owner and holder of a certain debenture issued to him by the company. He alleged the failure of the life assurance company to comply with the conditions of its contract as evidenced by the debenture, further averred the assurance company was insolvent and had no surplus to be apportioned, that its only asset was the trust fund of \$5,000 in the possession of the State Treasurer, and that he was entitled to resort to this fund for the payment of his demand. He, in turn, sought judgment for the amount due him under his debenture, and prayed that a receiver be appointed to take possession of the fund in the hands of the State Treasurer and to dispose of it under the directions of the court. The court found in accordance with the allegations of plaintiff's complaint and of the complaint in intervention, adjudged plaintiff to be entitled to the sum of \$236, and the intervenor to be entitled to the sum of \$848, decreed that these sums be first and preferred charges against the trust fund of \$5,000 held by the treasurer, appointed a receiver, directed the treasurer to pay the \$5,000 to the receiver, and directed that the receiver, after receiving the fund, give due and proper notice requiring all persons having or claiming any interest in the fund to be and appear herein within 60 days, and show what right, title, or interest they or each of them have or claim to have in and to said fund. From this judgment the Treasurer of the state appeals.

The rights of the intervenor may, with advantage, first be considered and disposed of. The law of 1891, under which this corporation was organized, received detailed consideration at the hands of this court in *San Francisco Savings Union v. Long*, 123 Cal. 107, 55 Pac. 708. So far as concerns the right of this intervenor, the following extracts from that law are made:

"Section 1. Every contract whereby a benefit may accrue to a party or parties therein named upon the death or physical disability of a person insured thereunder, or for the payment of any sums of money dependent in any degree upon the collection of assessments or dues from persons holding similar contracts, shall be deemed a contract of mutual insurance upon the assessment plan. Such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums.

"Sec. 2. Corporations may be formed

* * * to carry on the business of mutual insurance upon the assessment plan. * * * No such corporation shall issue contracts of insurance until at least 200 persons * * * have paid to the Treasurer * * * the sum of \$5,000. This sum shall be invested in bonds or securities. * * * Said bonds or securities * * * shall be placed * * * with the State Treasurer, and the principal sum shall be held in trust for the contract holders of such corporation. * * *

Section 1, above quoted, contemplates a scheme of insurance against accident, disability, or death, whereby the insured shall pay no fixed annual premium, but shall be liable in the proportion which his insurance bears to the insurance of his fellows holding like insurance. Hence the provision that these contracts of insurance must show that the liabilities of the insured are not limited to fixed premiums, but will be as much or as little as may be necessary to make good the insurer's outlay whenever the insurer is called upon to pay a claim. The provision of section 2 that the \$5,000 fund deposited with the State Treasurer shall be held in trust for the contract holders of such corporation means, first, that when the contingency arises whereby resort may equitably be had, to this fund, all contract holders will be entitled to share ratably in it; and, second, that "contract holders" within the meaning of the section are not the general creditors of the company, though the company's debts to them may be evidenced by contract, but are the holders of insurance contracts issued by the company within the scope of its authority under this law.

The first and determinative question to be answered as to this intervenor is whether or not he is such a contract holder. The reading of his contract compels an answer in the negative. The debenture, which is his contract with the company and upon which he bases his right to share in the fund as a contract holder, provided that the assurance company promised to pay at its office \$800 two years after date, with interest at the rate of 6 per cent. per annum. This in its essence was the contract. True, the contract was confused, clouded, and befogged by other provisions usually found in the contracts of companies such as this, but none the less, stripped of these obscuring veils, such, and such only, was the contract. To illustrate, the debenture provided that the purchaser (called the subscriber) should at the maturity of the obligation be entitled, besides principal and interest, to a surplus then to be apportioned. But it is impossible that there could be a surplus in any true sense to an assurance corporation operating upon the mutual assessment plan. Attached to this so-called debenture are two interest coupons, reciting that the assurance company will pay the beneficiary under this debenture \$48 (the amount of the annual interest) at its office, subject to the provisions of the contract.

Hereby, as well as by the title "debenture," there is an attempt to clothe the transaction with something of the characteristics of a bond. Yet, as a bond, it lacks the essentials of carrying a lien or mortgage upon any of the property of the promisor. Numerous other provisions are supposed to be added to this contract by reference. Thus it is declared that "the privilege and provisions placed by the company on the next page and in the interest coupons hereto attached are conditions precedent to and are part of this contract as fully as if they were recited at length over the seal and signature hereto affixed." A consideration of these provisions and conditions demonstrate that, touching this contract, they are but for purposes of confusion only. There is, for example, a nonforfeiture clause. But there can be no possible forfeiture against a man who has fulfilled every obligation in his contract by lending to another a given amount of money payable with interest at a specified time. There is a provision also for reinstatement which declares that after this debenture has been in force one year it may be reinstated within six months after first default in the payment of any installment. But there were no installments to be paid. There could be no default, and this clause also serves but to "darken counsel by words without knowledge." Again, in the "subscription" which is made a part of this contract, it is provided that the debenture subscribed for is to be issued on the mutual plan of participation in profits and the installment payments are not limited to fixed premiums. Here is an attempt to comply with, and, in the same sentence, an evasion of, the provision of section 1 of the act of 1891, to the effect that such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums. In the first place, the holder of such a debenture is not an insured at all, and, in the second place, having simply loaned his money to the company, he is not liable for any premiums whatsoever, whether fixed or to be determined by assessment. Only in the last clause at the end of this contract is there the slightest reference to insurance, and that is found in the following sentence: "At maturity, if the subscriber be then living and if the proceeds of the debenture are not withdrawn in cash, the entire value of the debenture and surplus may be converted into an annuity for life or may (subject to a satisfactory certificate of good health) be converted into a paid-up policy of life insurance." But this may not, by the most liberal construction, be distorted into a life insurance policy. It is merely an option extended to the owner of the debenture to take a policy in lieu of the money if he shall so desire. It follows herefrom that the intervener has no claim upon the fund until the claims, of all the contract creditors have been satisfied.

Coming now to the complaint of plaintiff, it will be remembered that the appointment of

a receiver is not sought, the prayer of the complaint being merely that the amount found due to plaintiff be declared a lien upon and payable out of the \$5,000 fund, and that Truman Reeves, as treasurer of the state, be ordered to pay the judgment out of such fund. This form of action draws support from the case of *Kruger v. Life and Annuity Association*, 106 Cal. 98, 39 Pac. 213. But the views expressed in that case are in irreconcilable conflict with those set forth in the later case of *Savings Union v. Long*, supra. It is there held, in brief, that the \$5,000 fund is a trust fund to be ratably distributed amongst all the claimants entitled to share in it. Such a distribution cannot be had except in an action in the nature of a creditors' bill, upon the hearing of which, and with all the parties interested in the fund before it, the court may make equitable distribution of the fund, and appoint a receiver to carry that distribution into effect. The method adopted by the court in this instance, of appointing a receiver with the command to all persons claiming any interest in the fund to appear and show cause within 60 days, is not a permissible substitute for the procedure prescribed in *Savings Union v. Long*. No doubt may be entertained of the right of the plaintiff under these circumstances to invoke the aid of equity in enforcing his demand, but it will be a simple matter for the court, with the corporation defendant and its books before it, to cause a determination to be made of any and all other persons entitled to share in the trust fund, and invite or compel their presence and participation by interpleader in the action.

For which reasons, the judgment and order appealed from are reversed, and the cause remanded for further proceedings in conformity with the foregoing views.

153 Cal. 578

HIBERNIA SAVINGS & LOAN SOCIETY v. FARNHAM et al. (S. F. 4,427.)

(Supreme Court of California. May 15, 1908.

Rehearing Denied June 11, 1908.)

1. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD—DEATH OF PARTY LIABLE.

A cause of action against a mortgagor having arisen after her death, and when no administration on her estate existed, limitations did not begin to run until letters of administration were issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 431-438.]

2. SAME.

Under Code Civ. Proc. § 337, requiring an action on a written contract to be brought within four years from the accrual of the cause of action, an action to foreclose a mortgage given by decedent and her husband was barred as to his liability as joint maker of the note and co-mortgagee after four years after the maturity of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 118-127.]

3. SAME—SUBSEQUENT GRANTEES.

After decedent conveyed land to her husband they mortgaged it to plaintiff, and subse-

quently the husband conveyed to defendant, both deeds being recorded after plaintiff's mortgage. *Held*, that defendant is entitled to whatever protection the statute of limitations would have afforded the husband, purely as subsequent grantee, but nothing more.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 657, 658.]

4. SAME—IGNORANCE OF CAUSE OF ACTION.

Under the express terms of Civ. Code, § 1214, a conveyance by decedent to her husband, made before they mortgaged the land to plaintiff, was void as to the mortgage, the mortgage being recorded first and the mortgagee being such in good faith and for a valuable consideration, such invalidity continuing until the mortgagee acquired notice of the conveyance; and hence an action to foreclose the mortgage, brought within four years after the date when the deed was recorded, the mortgagee not having had previous actual notice of the conveyance, was not barred under Code Civ. Proc. § 337, requiring an action on a written contract to be brought within four years from the accrual of the cause of action.

5. APPEAL AND ERROR — REVIEW — SUBSEQUENT APPEALS—LAW OF CASE.

After decedent deeded land to her husband they mortgaged it to plaintiff, and subsequently he deeded it to defendant, the deeds being recorded after the mortgage. Plaintiff sued to foreclose, and judgment against defendant was reversed because there was no finding upon his plea of limitations nor of facts from which such finding might be inferred. On a subsequent appeal from a judgment for plaintiff, there were findings based upon appropriate allegations of the amended complaint of want of notice to plaintiff of the conveyance to decedent's husband, until the deed was recorded, which was within three months of the bringing of this action. *Held*, that the doctrine of the law of the case does not apply to the question of limitations, entitling defendant to judgment, since the element of want of notice of the conveyance was essential, to meet the plea of limitations, under Civ. Code, § 1214, making conveyances, excepting certain leases, void against a subsequent mortgagee in good faith and for a valuable consideration, whose mortgage is first duly recorded, and was lacking in the facts found on the former trial.

6. SAME—WAIVER OF OBJECTIONS—QUESTION NOT RAISED IN OPENING BRIEF.

Points made by appellant for the first time in his closing brief will not be considered, unless good reason appears for the failure to make them in the opening brief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3097.]

7. MORTGAGES—NOTICE OF PRIOR DEED—BURDEN OF PROOF.

In an action to foreclose a mortgage, defended by a subsequent grantee claiming under a deed executed before, but recorded after the mortgage, the burden was on plaintiff to show his want of notice of the deed.

Department 1. Appeal from Superior Court, and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Hibernia Savings & Loan Society against John Farnham, substituted for P. Boland, as Annie F. Lennon's administrator, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

James H. Boyer, for appellants. Tobin & Tobin, for respondent.

ANGELLOTTI, J. This is an action to foreclose the lien of a mortgage executed on

February 21, 1893, by Annie F. Lennon and her husband, James H. Lennon, to plaintiff, to secure the payment of a promissory note of the same date for \$400, and the interest that accrued thereon. The appeal is from the decree of foreclosure, which fixes the amount due, directs the sale of the mortgaged premises to pay such amount, costs, and expenses of sale, orders judgment against the administrator for any deficiency remaining after such sale, and bars and forecloses the defendants, from the delivery of the commissioner's deed, of and from all equity of redemption and claim in said mortgaged premises. Boland having died, John Farnham has been appointed administrator of said estate, and substituted in place of Boland as defendant.

The note was due and payable, by its terms, one year after its date, that is, on February 21, 1894. The mortgage was acknowledged and certified so as to entitle it to be recorded, and it was recorded on February 23, 1893. Prior to the maturity of the note, and on or about March 29, 1893, said Annie F. Lennon died intestate. No proceeding for administration of her estate was commenced until the year 1900, when, on March 1, 1900, letters of administration of such estate were issued to P. Boland. Thereupon plaintiff presented for allowance the claim based on said mortgage, and the administrator, having rejected the same, commenced this action for foreclosure on May 10, 1900. Prior to the execution of said note and mortgage, viz., on January 9, 1892, said Annie F. Lennon had executed and delivered to said James H. Lennon a deed conveying to him the property covered by the mortgage, and on January 27, 1900, said J. H. Lennon executed and delivered to defendant James H. Boyer a deed of the same property. Neither of these deeds was recorded until January 31, 1900, when they were placed on record. Plaintiff had no knowledge or notice whatever of such deed from Annie F. Lennon to James H. Lennon or the deed from James H. Lennon to James H. Boyer, or that either of them ever claimed any interest in the property, until the date of such recordation. The record in this action establishes that at the time of the execution of the note and mortgage, the mortgaged property was, except for the deed of January 9, 1892, the separate property of Annie F. Lennon, and the title stood of record in her name until January 31, 1900. J. H. Lennon's only interest in such property was such as he acquired by said deed of January 9, 1892. The foregoing facts were alleged in the amended complaint, and are established by the findings of the trial court. The defendants demurred to such complaint on the ground that the alleged cause of action was barred by the provisions of section 337, of the Code of Civil Procedure, and, their demurrer having been overruled, pleaded such section as a defense in their answer. The trial court further found that said action is not barred by the provisions of any

statute of limitation. No claim is made by defendants that the action is barred as to the estate of Annie F. Lennon; the rule being well settled in this state that the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. *Smith v. Hall*, 19 Cal. 85; *In re Bullard*, 116 Cal. 355, 48 Pac. 219. As against the estate the statute of limitations did not begin to run until the issuance of letters of administration. March 1, 1900, and this action was commenced May 10, 1900. So far as the estate was concerned, therefore, the judgment was clearly correct.

1. It is insisted that on the admitted facts plaintiff's cause of action is barred by the statute of limitations as to defendant Boyer, whose rights in the property are based solely on the deed of conveyance made by J. H. Lennon to him in January, 1900. The statute providing that an action upon any contract in writing executed in this state must be brought within four years from the time the cause of action accrues (Code Civ. Proc. § 337), there can be no doubt that defendants claim that plaintiff's cause of action against J. H. Lennon as a joint maker of the note and a co-mortgagor with Annie F. Lennon became barred on February 21, 1898, is well founded. But this is an immaterial matter in this case. No recovery was sought or given against J. H. Lennon or his grantee, Boyer, based upon any liability of said Lennon as a maker of the note or mortgage. They were made parties defendant solely upon the theory that they were subsequent grantees, claiming under a conveyance from the mortgagor, Annie F. Lennon, recorded subsequent to the recording of plaintiff's mortgage and prior to the commencement of action to foreclose the same; the sole object being to foreclose their rights under such conveyance. At the trial the action was dismissed as to said J. H. Lennon, because of his conveyance to Boyer, and the fact that he no longer claimed any interest in the property. If he had not conveyed the property and had remained a party defendant, the effect of the statute of limitations, if pleaded by him, would have been simply to protect him against personal judgment for any deficiency remaining due after sale of the premises, unless the plaintiff's cause of action against him as a subsequent grantee was barred by the statute. And whatever protection the statute of limitations would have afforded him purely as a subsequent grantee his successors in interest are also entitled to. But they are entitled to nothing more. Section 1214, Civ. Code, provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly

recorded prior to the record of notice of the action." The term "conveyance," as used in this section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered. Civ. Code, § 1215. Under the plain terms of section 1214, Civ. Code, the conveyance of January 9, 1892, by Annie F. Lennon to James H. Lennon, which was not recorded until the year 1900, was void as against plaintiff's mortgage, recorded February 23, 1893; plaintiff being, as the findings establish, a mortgagee in good faith and for a valuable consideration. Such invalidity of the conveyance as to plaintiff continued certainly until it had notice thereof, which was not until the date of its record, January 31, 1900. In view of the explicit language of section 1214, Civ. Code, the utmost that Boyer can reasonably claim is that the conveyance to James H. Lennon became effectual so far as plaintiff's mortgage was concerned on the day when such conveyance was recorded; plaintiff not having acquired actual knowledge thereof before such record. Then, if at all, he became a subsequent grantee, and the statute of limitations commenced to run in his favor as such. A conclusion that would import validity to such a conveyance, as against such mortgagee, prior to actual knowledge by the mortgagee thereof, and prior to recordation would be in the very teeth of the statute. The case of *Filipini v. Trobock*, 134 Cal. 441, 66 Pac. 587, is authority for the proposition that the recording of such conveyance from Annie F. Lennon on January 31, 1900, gave to it, as against the mortgagee, who had no prior actual notice thereof, the effect of a conveyance executed by the grantor on that day. Speaking of a deed executed prior to the mortgage, and recorded thereafter, the court said: "But we think there can be as little doubt that, after she had recorded the deed from Antonio to her deceased husband, her position as successor to her husband became, and continued to be, no better and no worse than if the deed had been made the day it was recorded. By recording the deed she gave the same notice to the mortgagee of her rights that would have been given by the record of a deed of that date to her, or to any other person, and whatever rights accrue to any purchaser of mortgaged premises by the recording of his deed accrued to her." The opinion in this case clearly indicates the conclusion compelled by the express terms of section 1214, Civ. Code, viz., that the statute of limitations cannot begin to run in favor of one claiming under an unrecorded conveyance as against a mortgage given subsequent to the execution and delivery of the conveyance, for a valuable consideration, which is first duly recorded, in the absence of actual notice of such conveyance to the holder of the mortgage until such conveyance is recorded. We are, of course, not speaking of a case where the cause of action for the debt secured is barred as to the debtor, but only of a case where the

cause of action is not barred as to the debtor, in this case Annie F. Lennon, and the protection of the statute is sought by one whose only claim is ownership of the land subject to the mortgage, under a conveyance executed by such debtor prior to the mortgage. In such a case, actual notice of his claim or the constructive notice afforded by the recording of his conveyance or other instrument forming the basis thereof is essential to bring him within the rule of *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 63 Cal. 202, 5 Pac. 91; *Filipini v. Trobeck*, supra; *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744; *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35; Cal. Title Ins., etc., Co. v. *Miller*, 3 Cal. App. 54, 84 Pac. 453. We are satisfied that the action was not barred by the statute as against Boyer. We have discussed this question upon the assumption that the general finding that the cause of action was not barred is a mere conclusion based on the specific facts found, which fully dispose of the issues as to the statute, raised by defendants' answer.

2. Defendant Boyer contends that the doctrine of the law of the case is applicable on the question of the statute of limitations, and requires a ruling in his favor thereon. This contention is based on a decision of this court on a former appeal in this case from a judgment against him. 145 Cal. 626, 79 Pac. 305. The judgment against Boyer was there reversed, for the reason that there was no finding upon his plea of the statute of limitations, "nor of facts from which such finding may be inferred." It was said that a finding in plaintiff's favor on sufficient evidence upon the issue of the statute would have been sufficient to support the judgment. The all-important distinction between that appeal and this is that we now have findings, based on appropriate allegations of the amended complaint, of want of notice on the part of plaintiff of the conveyance from Annie F. Lennon to James H. Lennon until the date of its recordation, January 31, 1900, a date within three months of the commencement of this action. This was essential under section 1214, Civ. Code, to meet the plea of the statute, and this element was lacking in the facts found by the trial court on the former trial. The former decision, therefore, does not assist Boyer on this appeal.

These are the only points made for reversal in the opening brief of defendants. Some additional points are made for the first time in their closing brief. We are not disposed to look with favor upon a point so made, unless good reason appears for the failure to make it in the opening brief. This practice is not fair to a respondent, and tends to delay the final disposition of appeals. This court has heretofore said that while it is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, an appellant should, under the rules, make the points on which he relies in his opening brief,

and not reserve them for his reply, and that the court may properly consider them as waived unless so made. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Pheps v. Mayers*, 126 Cal. 549, 58 Pac. 1048. This should undoubtedly be the rule where no good reason appears for the omission to make the point in the opening brief, and it does not appear that the appellant would be unjustly affected by a refusal to consider it. We think that it is properly applicable here. One of the points so made is that the evidence is insufficient to support the finding that the plaintiff was without notice of the prior deed from Annie F. Lennon to J. H. Lennon at the time it took the mortgage and loaned the money secured thereby, and that the trial court improperly refused to strike out certain evidence given on behalf of plaintiff on that issue. It is true, as contended by defendants, that the burden of proof was on plaintiff to show the negative fact of want of notice (*Bell v. Pleasant*, 145 Cal. 410, 413, 78 Pac. 957, 104 Am. St. Rep. 61, and cases there cited), and it is also true that the evidence on this point is not as full and complete as it might have been. But there was competent evidence showing want of notice on the part of officers of plaintiff having to do with the passing of the title and the paying to the mortgagors of the money loaned, and there was no pretense of an attempt on the part of the defendants to show knowledge by or notice to any officer or employee of plaintiff of the unrecorded conveyance. The record is such as to make it practically certain that there was no knowledge by plaintiff of the unrecorded conveyance until it was placed of record, and this is so even if the incompetent evidence quoted in the closing brief be disregarded. Under these circumstances, we believe the objections should be considered as waived by the failure of defendants to make them in their opening brief. The other point so made was that the court failed to specifically find on the issue raised by the denial of the allegations that James H. Lennon "joined in the execution of said note and mortgage as the husband of said Annie F. Lennon solely, and not as the owner of any interest in said real property." It is sufficient to say that findings on other issues fully cover this matter.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(153 Cal. 537)

In re BAKER'S ESTATE. (S. F. 4,793.)
(Supreme Court of California. May 12, 1908.
Rehearing Denied June 11, 1908.)

1. GUARDIAN AND WARD—APPOINTMENT BY WILL — STATUTORY PROVISIONS — CONSENT AFTER TESTATOR'S DEATH—SUFFICIENCY.

Under Civ. Code, § 241, providing that a guardian of the person or estate, or of both, of a child, may be appointed by a father by will or by deed to take effect upon the death of the parent, with the written consent of the mother, the consent given by a mother after the father's

death to a testamentary appointment by the father is sufficient.

2. JUDGMENT—FINDINGS OF JURISDICTIONAL FACTS—COLLATERAL ATTACK.

A finding of a court as to the residence of a minor in guardianship proceedings is conclusive as a jurisdictional fact, unless it was obtained by fraud or mistake, and, where the state of the record on appeal is not such as to permit a review of the evidence, a finding as to the residence of the minor cannot be questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 912-915, 937-939.]

3. APPEAL AND ERROR—OBJECTION NOT TAKEN BELOW — SPECIFIC OBJECTION — NECESSITY.

Under Code Civ. Proc. § 648, requiring an exception to a decision because of the insufficiency of the evidence to specify the particulars of the insufficiency, where the bill of exceptions on appeal from guardianship proceedings contains no specifications of particulars wherein the evidence is insufficient to justify a finding as to the jurisdictional question of the minor's residence, the evidence on that question cannot be reviewed nor its sufficiency considered.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Petition by Page E. T. Baker to revoke letters of guardianship, dismiss the guardianship proceedings, and set aside an order fixing the amount of the guardian's bond. From an adverse order, petitioner appeals. Affirmed.

W. T. Kearney, for appellant. M. K. Harris, for respondents.

SHAW, J. This is an appeal from an order refusing to revoke letters of guardianship and set aside an order fixing the amount of guardian's bond. It involves the validity of the appointment and qualification of a testamentary guardian.

The ward is the son of the appellant and her former husband, Westwood J. Baker. The parents were divorced on April 1, 1898, and thereafter lived apart; the father residing in Fresno county and the mother in San Francisco. The father died on July 4, 1905, leaving a considerable estate, which he disposed of by will. The will, which was admitted to probate on August 14, 1905, in the superior court of Fresno county, contained this provision: "I hereby appoint L. O. Stephens of the city of Fresno, guardian of the person and estate of my said son, Joseph Westwood Baker." The estate of the child consisted entirely of property held in trust by the said Stephens, part of it derived from the father, which was to remain in trust until the child became 25 years of age, and the remainder by devise from one Sarah W. Garrett to remain in trust until he was of age. All of it was situated in Fresno county and a considerable portion of it was real estate. The fact that the will purported to appoint Stephens the guardian of her son coming to the knowledge of the appellant, she employed an attorney in Fresno to represent her in the matter, and instructed him that she desired to retain the

custody and guardianship of the person of her son. Thereupon it was agreed between her attorney and the attorney for Stephens that Stephens should waive the guardianship of the person and yield to her the custody and control of the child, but that he should be the guardian of the estate. Stephens then filed his application in the superior court of Fresno county, reciting the testamentary appointment aforesaid, and declining the guardianship of the person of the child, alleging that the minor was a resident of Fresno county, and asking the court to fix the amount of his bond as guardian and trustee of said estate, and to direct the clerk to issue letters of guardianship to him. The court made an order that this application be heard on September 11, 1905. This application and order were served on the appellant's attorney and by him delivered to her. She then signed and filed a writing as follows: "I hereby consent and agree that L. O. Stephens may be the trustee and guardian of the estate of said minor, but not of his person." Upon the hearing the court made an order fixing the amount of the bond of Stephens as guardian and trustee, and directing the issuance of letters of guardianship of the estate to him. Stephens filed the required bond, took the oath, and received the letters accordingly. Afterwards, on March 8, 1906, the mother filed in the said court a petition to revoke the order and the letters so issued and to dismiss the guardianship proceedings. The appeal is from the order denying this petition.

The provisions of the statute, applicable herein, relating to testamentary guardians are as follows: "A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing: (1) If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent. (2) If the child be illegitimate, by the mother." Civ. Code, § 241. "The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or by deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county." Code Civ. Proc. § 1747. "Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed and except that such guardian need not give bond unless directed to do so by the court from which the letters of guardianship issue." Code Civ. Proc. § 1758.

The appellant contends that the testamentary appointment of Stephens was ineffectual because she did not consent thereto during the lifetime of the father, and that the proceedings in the superior court of Fresno county are void, for the reason, as alleged, that the minor was not at that time or afterwards a resident or inhabitant of Fresno county, but lived and resided in San Francisco, and that, therefore, the superior court of Fresno county was without jurisdiction. A deed may be made, to take effect immediately upon its execution, or, within certain limitations, at any time afterwards, even after the death of the grantor. A will can have no effect whatever until the testator is dead. Hence it is probable that the phrase "to take effect upon the death of the parent appointing," added as a qualification to the introductory paragraph of section 241 of the Civil Code, was intended to refer only to appointments made by deed. We do not, however, regard this clause as important. By the first subdivision of the section, the mother's consent in writing is required in all cases, if she is living. This implies that her consent is to be given at some time after the appointment has become otherwise effectual—that is, after the death of the father—since, until that time, it could not be known that she would survive, and it cannot be doubted that an appointment by the father either by will or by deed, to which the mother had not in her lifetime consented, would be effectual without such consent, if he survived her. Her consent is essential only in case she survives. The father's appointment is ineffective before his death; is, in fact, no appointment at all until his death. It is therefore only upon his death that her consent becomes of any importance. Furthermore, the will not only does not speak, as it is said, until the death of the testator, but it is wholly inoperative before it is probated, and the appointment of a guardian by will cannot be said to have been made until the validity of the will making it has been thus established. Hence, if she survives, but dies before probate, without executing any consent to the appointment, or making an appointment herself, the father's testamentary appointment would obviously be valid, although not confirmed by the consent of the mother. In view of these contingencies, it is the most reasonable construction of the statute to hold that her consent to a testamentary appointment may be effectually given after the father's death as well as before. There can be no hardship in this result. The appointment, if she survive, is of no effect if she dissents, and by the same subdivision which gives her this power of veto, she being the survivor, may withhold her consent and may appoint whom she chooses, or may herself apply to the court for appointment under section 1747, of the Code of Civil Procedure. She is then in control of the entire matter. We are

therefore of the opinion that the appointment was valid and became effectual upon the death of the father and the subsequent written consent of the mother manifested by the writing above mentioned.

The argument that the superior court of Fresno county was without jurisdiction to make the order directing Stephens to give a bond as testamentary guardian is based on the assumption that at the time that order was made and the proceeding therefor instituted the minor was not a resident of Fresno county. In the original proceeding the petition of Stephens alleged that the minor was then a resident of Fresno county. Upon the hearing of that petition, the court found this allegation to be true and so recited in the order directing and fixing the amount of the bond. This finding as to the jurisdictional fact is conclusive unless it was obtained by fraud or mistake. In the present proceeding to set aside that order there is an attempt to allege that this finding as to the residence of the minor was obtained by fraud upon the court and upon the present petitioner, Page E. T. Baker, the mother of the minor. The court finds that this allegation is untrue, and that there was no fraud in obtaining the former order. It is contended that this finding is contrary to the evidence. The record before us, however, does not enable us to review the finding of the court below on that subject and it is therefore conclusive. The bill of exceptions contains no specifications of particulars wherein the evidence is insufficient to justify the findings. Such specification is necessary in order to authorize this court to review the evidence and consider its sufficiency to support the order. Code Civ. Proc. § 648; *Winterburn v. Chambers*, 91 Cal. 185, 27 Pac. 658; *Meades v. Lasar*, 92 Cal. 227, 28 Pac. 935; *Estate of Depeaux*, 118 Cal. 290, 50 Pac. 387; *Estate of Behrens*, 130 Cal. 418, 62 Pac. 603. The finding is therefore conclusive as to the residence of the minor, and establishes jurisdiction upon any theory of the law as to the place of jurisdiction. Section 1758 of the Code of Civil Procedure, which authorizes the court to make the order in question, is silent as to the county in which the proceeding must be instituted. Whether jurisdiction would lie in the county where the minor resided, the county where the will was probated, the county where the property was situated, the county where the guardian resided, or in that one of these counties first acquiring jurisdiction, or whether section 1747, providing by its terms only for jurisdiction in cases of guardians appointed by the court (*Estate of Taylor*, 131 Cal. 180, 63 Pac. 345) can be construed to apply to testamentary guardians, and place the jurisdiction in the county where the minor resides or is an inhabitant, are questions not here present-

ed, since Fresno county upon the record before us answers to all the descriptions. We express no opinion upon the subject. In view of the conclusions we have reached upon the merits, we think that the alleged errors of law occurring at the trial and so very briefly discussed by counsel are unimportant. It is unnecessary to consider them.

There are some indications that this petition was intended as an application, under section 473, Code of Civil Procedure, to set aside the previous order as a proceeding taken against the appellant through her surprise, inadvertence, and excusable neglect. Although there is no specification of the insufficiency of the evidence, we have examined the bill of exceptions on this point, and find the evidence wholly insufficient to establish any abuse of discretion on the part of the court below in denying her application, or to show that she was not fully advised of the facts and of her rights, assuming the application to be for relief under that section.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

153 Cal. 533

AMERICAN DE FOREST WIRELESS TELEGRAPH CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,511.)

(Supreme Court of California. May 11, 1908.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—"PERSON."

A corporation, though organized under the laws of another state, is a "person" within Const. U. S. Amend. 14, providing that no state shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 730.]

For other definitions, see Words and Phrases, vol. 6, pp. 5322, 5335; vol. 8, p. 7752.]

2. CORPORATIONS — FOREIGN CORPORATIONS—EXTENT OF LEGAL EXISTENCE—COMITY.

Foreign corporations have no legal existence beyond the bounds of the state or sovereignty by which they are created, and can exercise none of the functions and privileges conferred by their charters in any other state or country, except by its comity and consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2487-2505.]

3. SAME—RIGHT TO MAINTAIN ACTIONS IN FOREIGN STATE.

There is no rule of common law which forbids a corporation organized to do business in one state from doing business in another, and, in the absence of statutory inhibition, the general comity existing among the states will permit a foreign corporation which has entered California and done business therein to maintain and defend actions arising out of such business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2487-2505.]

4. SAME—STATUTES CURTAILING RIGHTS OF FOREIGN CORPORATIONS.

A statute which purports to curtail the privilege of foreign corporations to maintain or defend actions in the state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms, considered in connection with its object and purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2510-2519.]

5. CONSTITUTIONAL LAW—FOREIGN CORPORATION—RIGHT TO DEFEND ACTIONS IN STATE.

Civ. Code, § 408, provides that every foreign corporation doing business in the state shall file with the Secretary of State a certified copy of its articles of incorporation, etc. Section 410 declares that no foreign corporation which shall fail to comply with section 408 can maintain any action in the courts of the state until it has complied therewith. *Held*, that the sections do not forbid a foreign corporation which has failed to comply with their provisions from defending an action brought against it in the courts of this state, and in such an action where a foreign corporation's answer is stricken out for failure to comply with section 408, and judgment rendered against it on default for that cause alone, the judgment is void as denying it the equal protection of the laws, and depriving it of its property without due process of law.

Certiorari by the American De Forest Wireless Telegraph Company to review a decision of the superior court of the city and county of San Francisco. Judgment of the superior court and its order striking out the answer in the case annulled, and petitioner granted leave to defend.

C. M. Fickert, for petitioner. G. H. Perry, for respondent.

SHAW, J. This is a proceeding in certiorari to review a judgment of the superior court of the city and county of San Francisco for the sum of \$257.75 and costs, in favor of the San Francisco Commercial Agency, a corporation. The action in which the judgment was rendered was originally begun in the justice court, and the judgment sought to be reviewed was rendered in the superior court on appeal.

The defendant in the action, petitioner here, is a corporation organized under the laws of the state of New Jersey. The complaint stated a cause of action to recover money due on contract. Summons was duly issued and the defendant appeared and filed an answer. The plaintiff therein then moved the court to strike the answer from the files, the motion was granted, and thereupon judgment was given in favor of the plaintiff therein against the petitioner as above mentioned. The motion to strike the answer from the files was made upon the ground that the defendant was a corporation of another state, that the demand sued on arose out of business transactions in this state, and that said defendant corporation had failed and neglected to comply with the statute of this state requiring a foreign corporation doing business in this state to file a

certified copy of its articles of incorporation with the Secretary of State. No other ground was assigned as cause for the motion, and it appears to have been granted upon the ground that a corporation so failing cannot be allowed to defend an action brought against it in the courts of this state. The statutory provisions in question are found in sections 408 and 410 of the Civil Code. Section 408 provides that "every corporation organized under the laws of another state, territory, or of a foreign country, * * * which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the Secretary of State of the state of California, a certified copy of its articles of incorporation, * * * and a certified copy thereof, duly certified by the Secretary of State of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property." Section 10 declares that "no foreign corporation which shall fail to comply with section four hundred and eight * * * of this Code can maintain any suit or action in any of the courts of this state until it has complied with said section."

It will not be disputed that a corporation, although organized under the laws of another state, is a "person" within the meaning of the fourteenth amendment of the Constitution of the United States, providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. *Gulf, etc., Ry. v. Ellis*, 165 U. S. 154, 17 Sup. Ct. 255, 41 L. Ed. 666; *Railway Tax Cases*, 118 U. S. 396, 6 Sup. Ct. 1132, 30 L. Ed. 118. It may also be conceded, as contended by counsel for respondent, that foreign corporations have no legal existence beyond the bounds of the state or sovereignty by which they are created, and can exercise none of the functions and privileges conferred by their charters in any other state or country except by comity and consent of the latter (19 Cyc. 1222), and that one of the privileges which a corporation receives by its charter is the privilege of maintaining or defending actions in its corporate name and as a body corporate; in other words, the privilege of being a "person" within the cognizance of the law. There is, however, no rule of the common law which forbids a corporation organized and empowered to do business in one state from doing such business in another state. In the absence of any statutory inhibition, there can be no doubt that the general comity existing between the states would permit a foreign corporation which had entered this state and done business therein to maintain and defend actions arising out of such business. 19 Cyc. 1211, 1212. A statute of this state which purports to curtail the privi-

lege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. The sections above quoted do not purport to forbid a foreign corporation which has failed to comply with its provisions from defending an action brought against it in the courts of this state. They are only forbidden to maintain actions. The order of the court, striking out the answer because of the failure of the defendant to comply with the provisions of section 408, was not authorized by the statute. Notwithstanding the provisions of that section and of section 410 imposing a penalty for a violation thereof, the foreign corporation doing business in this state was entitled to defend any action brought against it. To prevent it from doing so would be to deny it the equal protection of the laws and to deprive it of its property without due process of law. It appearing from the record that the judgment was rendered upon default and that the default was entered for this cause alone, it follows that the judgment is void.

Sections 405 and 406 of the Civil Code purport to declare that any corporation of another state doing business within this state must file in the office of the Secretary of State a designation of some person residing within the state who may be served with process issued in this state against such corporation, and that such foreign corporation cannot maintain or defend any action or proceeding in any court of this state until it has complied with this provision. The motion in the case before us was not based upon the ground that the corporation had failed to comply with this provision, and hence no authority for the action taken can be predicated upon this statute.

It is ordered that the judgment of the superior court in the action above mentioned, and the order striking out the answer therein, be annulled, and that the petitioner be allowed to defend the said action.

We concur: ANGELLOTTI, J.; SLOSS, J.

7 Cal. App. 755

In re RIVIERE'S ESTATE. (Civ. 489.)
(Court of Appeal, Second District, California,
March 24, 1908.)

1. EXECUTORS AND ADMINISTRATORS—ATTORNEYS' SERVICES—ALLOWANCE—APPLICATION.
Code Civ. Proc. § 1616, provides that an executor or administrator shall be allowed all necessary expenses in the settlement of the estate, and that any attorney who has rendered services to the executor or administrator may apply for an allowance which it shall be the duty of the executor or administrator to pay out of the estate, for which he shall be entitled to credit. Section 1619 declares that executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings the same amounts as are al-

lowed by the preceding section as compensation to executors and administrators for their own services, together with a further allowance for additional and extraordinary service. *Held*, that an application both by an executor's attorney and by the executor for an order making an allowance for the services of the attorney, though in a dual character, would be regarded as an application under section 1616, and not under section 1619.

2. APPEAL AND ERROR—ALLOWANCE TO ATTORNEY FOR EXECUTOR—PERSONS ENTITLED TO APPEAL.

Since Code Civ. Proc. § 1616, expressly authorizes an appeal from an order making an allowance for the services of an executor's attorney, such appeal may be taken not only by the attorney, but by any person having an interest in the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 939.]

3. SAME—DISMISSAL—GROUNDS.

It was no ground for the dismissal of an appeal from an order making an allowance to an executor's attorney that the appellate court could grant appellants no relief.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by Charles H. Mattingly, as attorney for the executor and special administrator of the estate of Louis Riviere, deceased, and by Fritz Bachmann, as such executor and special administrator, for an order making an allowance to petitioner for attorney's fees. From an order granting such relief, the distributees appeal. On motion to dismiss appeal. Denied.

Edgar E. Lefebvre, McNutt & Hannon, Edward G. Kuster, and Edward L. Hutchinson, for appellants. Charles H. Mattingly, for respondent.

SHAW, J. Motion to dismiss appeal. Charles H. Mattingly, as attorney for the executor and special administrator of the estate of Louis Riviere, and Fritz Bachmann, as such executor and special administrator, upon notice given pursuant to an order of court therein made, applied to the court for an order under the provisions of sections 1616 and 1619 of the Code of Civil Procedure for an allowance to said executor and special administrator out of the assets of the estate for compensation on account of extraordinary services rendered by Charles H. Mattingly as such attorney, and for an order directing said executor and special administrator to pay such allowance to said attorney. Upon a hearing the court made an order whereby it fixed the attorney's fees of said Charles H. Mattingly for services rendered, and further ordered Fritz Bachmann, as such executor and special administrator, to pay the sum so fixed to said Charles H. Mattingly as such attorney out of the assets of said estate. The appeal is by parties interested in the estate, and is from that portion of the order allowing said Mattingly the sums of \$1,000 and \$500, respectively.

Notwithstanding the fact that the proceeding is of a dual character, on behalf of both attorney and executor, and alleged to be taken

under the provisions of both of said sections 1616 and 1619, we nevertheless construe it as an application by the attorney for the executor and special administrator, made under the provisions of section 1616 of the Code of Civil Procedure, for an order requiring said executor and special administrator to pay said attorney out of the assets of the state such compensation for services rendered as to the court may seem just and proper. Since under the express provisions of this section the order is a subject of appeal, not only by the attorney who makes the application, but by any other interested party, it is unnecessary to consider the objection that appellants are not parties aggrieved by the order. Having an interest in the estate, they have the right to appeal.

There is nothing in the contention that no notice of appeal has been filed or undertaking or deposit on appeal filed or made.

A further ground for the motion is that the record does not present a case upon which this court can grant the relief for which appellants contend, nor any relief. Even if this be true, they are nevertheless entitled to a hearing upon presentation of their appeal. The fact that there is no merit in an appeal is no ground for its dismissal without a hearing.

The motion to dismiss is denied.

We concur: ALLEN, P. J.; TAGGART, J.

PER CURIAM. Upon a further examination of the questions involved upon the motion to dismiss the appeal in this case, we adhere to the original opinion filed herein, which is hereby ordered refiled as the judgment of this court.

8 Cal. App. 30

FLEISCHHAUER v. FABENS et al.
(Civ. 454.)

(Court of Appeal, First District, California.
April 2, 1908.)

1. APPEAL AND ERROR—QUESTIONS FOR REVIEW—INSTRUCTIONS.

Instructions given will not be reviewed on appeal, where no exceptions thereto were taken in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1516-1532.]

2. MALICIOUS PROSECUTIONS—INSTRUCTIONS.

In an action for malicious prosecution, it is error to instruct the jury that such actions have never been favored by law.

3. SAME—MALICE.

While it is essential in actions for malicious prosecution that malice must be proved, still it is not necessary that there exist, in the mind of the prosecutor, any hostility or any feeling of "personal grudge" or "ill will" against the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 59, 60.]

4. SAME—DEFENSE—"PROBABLE CAUSE."

"Probable cause," justifying the institution of a criminal prosecution so as to constitute a defense in an action for malicious prosecution, embodies the element that defendant at the time

of instituting the criminal prosecution believed plaintiff guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 26.

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765.]

5. TRIAL — INSTRUCTIONS — REQUESTS — REFUSAL—INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Refusal of requested instructions, covered by instructions given, is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

6. MALICIOUS PROSECUTION — ACTION — INSTRUCTIONS.

In an action for malicious prosecution in causing the arrest of plaintiff for stealing a horse, where plaintiff claimed to have taken it up as an estray, a requested instruction as to what constituted an estray, and as to the law governing the taking up and impounding of such animals, was properly refused, since if plaintiff was not entitled to detain the animal, defendant had her remedy in a civil action, but the detention did not justify her in having plaintiff arrested for stealing the horse.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Charles H. Fleischhauer against Lena C. Fabens and another. From a judgment for plaintiff, defendant Lena C. Fabens appeals. Affirmed.

Jas. P. Sex and Wm. A. Bowden, for appellant. Rogers, Bloomingdale & Free, for respondent.

KERRIGAN, J. This is an action for malicious prosecution. The plaintiff was arrested on a charge of grand larceny, preferred by the defendant, and at the hearing before a justice of the peace he was discharged. He thereupon brought this action for damages for malicious prosecution, and after a trial by a jury recovered judgment against the defendant for the sum of \$377, and costs. This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

Very briefly the facts of the case are that plaintiff and defendant lived in the same neighborhood in San Jose; that defendant was engaged in the business of selling milk, and owned a mare, which she drove in a wagon in making deliveries; that on the evening of March 6, 1905, the mare was put in pasture; she was missing the next morning, and, after considerable search, was found in the barn of plaintiff. One of defendant's witnesses testified that, the morning after the mare had been placed in the field, he examined the fences, gates, and bars of the inclosure, and found them all in good repair; that the gates were closed, and the bars up; that no other animal was missing. The evidence introduced on behalf of the plaintiff shows that on the morning of March 7, 1905, the day on which the criminal prosecution was instituted, the plaintiff found the animal in question in his garden; that he did not know to whom she belonged, and that he took her up, and tied her in his barn; that

defendant, upon learning the whereabouts of the animal, demanded her possession, and was told that she could have the mare upon paying \$2.50, the amount of damage claimed to have been done by the animal to plaintiff's garden. Thereupon defendant immediately caused the arrest of the plaintiff upon the charge of grand larceny in stealing her horse.

Appellant complains of six of the instructions given by the court, apparently of its own motion. No exception was taken by appellant to any of these instructions, and we cannot therefore consider them. *Garoutte v. Williamson*, 108 Cal. 141, 41 Pac. 35, 413. This case was tried before the adoption of the amendment, in 1907, to section 647, Code Civ. Proc., providing that instructions to juries are deemed excepted to.

Appellant also contends that the court erroneously refused to give her requested instructions Nos. 3, 4, 5, 6, 9, 10, 14, and 15, in that it thereby refused to group the facts, and tell the jury that if they found the facts a certain way, there was or was not probable cause, as the case might be, and that they should find accordingly. *Ball v. Rawles*, 93 Cal. 227, 28 Pac. 937, 27 Am. St. Rep. 174. Most of such requested instructions are not in harmony with appellant's contention. Proposed instructions Nos. 3 and 10 are mere statements of the testimony. No. 4 does not appear in the transcript, and was doubtless adopted and given by the court in its general instructions. Nos. 5 and 9 are mere statements of abstract propositions of law, the first of which was properly refused, and the latter of which was given, in substance, by the court's own instructions, except that part of it which states that "actions for malicious prosecution have never been favored in law." It would have been error to so have instructed the jury. *Reynolds v. Dunlap*, 73 Kan. 759, 84 Pac. 720. No. 6 is an attempted definition and application of the term "malice." The court, in its instructions, gave a definition of the term "malice," which for the purpose of this case was entirely sufficient. The proposed instruction, after giving an apt illustration of the application of the term "personal malice," directs the jury that if the appellant acted without any personal feeling against the respondent, they should find for the appellant. It is elementary that in actions of this nature malice must be proved, but it is not true that there must necessarily exist in the mind of the prosecutor any hostility or any feeling of "personal grudge" or "ill will" against the accused. 19 Am. & Eng. Ency. of Law, 675, 676; *Wild v. Odell*, 56 Cal. 136. No. 12 is the first of the proposed instructions at all in keeping with the theory upon which it is claimed all of these instructions were offered; that in refusing to give it the court, we think, committed no error. The instruction sets forth certain enumerated facts, and, in effect, tells the jury that if it finds these facts to be true,

appellant acted with probable cause, and would be entitled to a verdict. The instruction reads: "I instruct you, gentlemen of the jury, that if you believe that said animal was so placed in pasture by said employé of defendants, and on the morning in question was missing, and that no means of said animal escaping or estraying from said pasture field appears from the evidence, and that the said animal was thereafter found in the possession of the plaintiff, and that no reasonable explanation was given as to how said animal came into the possession of said plaintiff, then that said Lena C. Fabens was, if these facts had been communicated to her, justified in making complaint against said plaintiff, charging him with grand larceny." This proposed instruction leaves out of consideration whether, at the time of instituting the criminal prosecution, the appellant herself did in fact believe the respondent guilty of the crime charged. The facts stated in this instruction, it may be conceded, are sufficient to warrant a reasonable person in believing the crime charged was true, and still the appellant here may not, in fact, have believed the charge, and unless she did so believe, she acted without probable cause.

The point is expressly ruled on in the case of *Harkrader v. Moore*, 44 Cal. 151, and it was there held that a request for an instruction upon the question of probable cause, not embodying this element as to the actual belief of the prosecutor in the guilt of the accused, was properly refused. The court said: "The gravamen of the action is that the defendant instituted the proceedings without probable cause; that is, without having at the time such knowledge or information of the circumstances as would superinduce, in the mind of an ingenuous and unprejudiced person of ordinary capacity, a reasonable belief that the plaintiff was guilty of the charge. The defense must be that he did believe, and had reasonable grounds to believe, at the time that the accusation he made was well founded. 'Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of those facts, which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute. 2 Greenleaf, Ev. § 455.'" And in the case of *Ball v. Rawles*, 93 Cal. 233, 234, 28 Pac. 937, 27 Am. St. Rep. 174, it was held that an instruction, given by the court upon this question of probable cause, which omitted this element as to the actual belief of the defendant in the guilt of the accused, was error.

Proposed instruction No. 14, which was re-

fused, was covered by the fourth instruction given by the court.

Proposed instructions from 16 to 24, the refusal to give which is also complained of as error, were requested upon the theory that respondent claimed to have taken up the animal in question as an estray, and that the jury was entitled to be informed as to what constituted an estray, and as to the law governing the taking up and impounding of such animals. We think the court committed no error in refusing to give these instructions. Whether the respondent claimed more than he was entitled to under the estray law, or whether he was entitled to detain the animal, were not questions at issue in this case. If he was not entitled to detain the animal appellant had her remedy in a civil action, but these matters afforded no justification, in any sense whatever, for demanding the issuance of a warrant on the charge of stealing the horse.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 56

FALCONER v. HUGHES et al. (Civ. 429.)
(Court of Appeal, Third District, California.
April 7, 1908.)

COURTS—PLACE FOR HOLDING COURT—HOW PROVIDED — STATUTORY PROVISION—CONSTRUCTION.

Code Civ. Proc. § 144, providing that, if suitable rooms for holding the superior courts and chambers for the judges of said courts are not provided, the courts or the judge or judges thereof may direct the sheriff to provide such rooms, etc., was intended to authorize the securing of suitable rooms where the supervisors had failed or refused to provide them, and the power given is restricted to directing the sheriff to make the provisions, and while the power might be extended in cases of necessity, if the sheriff should neglect or refuse to execute the court's directions, the court cannot disregard the statute, and legally give its directions to a person other than the sheriff before calling on him to execute its directions.

Application by David Falconer for a writ of mandate against J. W. Hughes and others, judges of the superior court. On demurrer to the petition. Demurrer sustained.

S. Solon Holl, for plaintiff and petitioner. El. S. Wachorst, Dist. Atty., and J. W. S. Butler, Asst. Dist. Atty., for respondents.

PREWETT, J. Application for a mandate to the judges of the superior court of the county of Sacramento requiring them to audit a demand of petitioner for certain expenses incurred in repairing the courtroom of one of the judges of said court.

The only serious criticism preferred against the demand lies in the fact that the judge directed the petitioner, instead of the sheriff, to make the repairs. Section 144 of the Code of Civil Procedure provides as follows: "If suitable rooms for holding the

superior courts and chambers for the judges of said courts be not provided * * * the courts, or the judge or judges thereof may direct the sheriff to provide such rooms," etc. The grant of this power is limited, by the express language of its own terms, to a direction to the sheriff. This power cannot be extended by implication. *Los Angeles Co. v. Superior Court*, 93 Cal. 380, 28 Pac. 1062. In this case the court says: "The power conferred by section 144 is justified only by the necessity which may sometimes demand its exercise, and ought not to be enlarged by construction. All that it authorizes is an order requiring the sheriff to provide quarters or furniture or lights, etc., which the court presently requires for the transaction of its business." The power of the court or judge is measured by the section. *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733. These are the only cases called to our attention that seem to be in point. It was the intention of the Legislature to authorize the court to provide suitable rooms, etc., where the supervisors have failed or refused to provide them; and the power given to the court is restricted to directing the sheriff to do the work or make the purchases. If the sheriff should neglect or refuse to execute the directions of the court, it may be that the power should be extended so as to authorize the court in cases of necessity to cause the work to be done, or the purchases to be made by some other person; but we do not think that the court can disregard the statute and give its directions to persons other than the sheriff, without first having called upon him to execute its directions. As we said in *Ex parte Widber*, supra: "This power vested in the judge or court is not an unlimited power, and therefore not a dangerous power. This section does not open wide the doors of the treasury and place the keys of the treasury vaults in the hands of the judiciary, with an invitation to enter and partake ad libitum as petitioner would insist; but the power is measured by the section, and expenditures made in excess of the limitation of the statute would be made without authority of law."

It follows that the demurrer should be sustained, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(8 Cal. App. 47)

TINGLEY et al. v. SUPERIOR COURT OF SHASTA COUNTY et al. (Civ. 470.)

(Court of Appeal, Third District, California. April 6, 1908.)

1. MANDAMUS—ALTERNATIVE WRIT—PETITION FOR—ISSUANCE.

Ordinarily the alternative writ of mandamus will and should issue where, upon the showing made, any doubt arises as to the rights of the parties, but, where it is clear from the peti-

tion that the peremptory writ ought not to issue, the alternative writ should be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 325.]

2. CERTIORARI—EXISTENCE OF OTHER REMEDY—APPEAL.

Certiorari does not lie where the remedy of appeal is available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

3. SAME—PERSONS ENTITLED—STRANGERS TO RECORD.

Certiorari does not lie to review a judgment or order at the suit of a stranger to the record, his remedy being to have himself made a party by moving to set aside the judgment or order, and, if his motion is denied, he may on appeal from the order, if it is an appealable order, have the proceeding of which he complains reviewed, not only for excess of jurisdiction, but for error, and, in case it is not appealable, he may then resort to certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 44.]

4. SAME—EXISTENCE OF OTHER REMEDY—APPEAL—REVIEW IN MANDAMUS PROCEEDING.

Where a court had jurisdiction of a proceeding in mandamus, its decision, however erroneous it might be, was appealable, and hence certiorari would not lie for its correction or annulment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

Petition by Mrs. Nettie Tingley and another, copartners as Tingley & Elmore, against the superior court of Shasta county and Charles M. Head, judge thereof, for a writ of review. Writ denied.

T. W. H. Shanahan and Braynard & Kimball, for petitioners.

CHIPMAN, P. J. It appears from the petition, stated as briefly as may be, that petitioners made certain repairs on the "Anderson Free Bridge," in the county of Shasta, under contract with the board of supervisors, and the claim therefor was duly allowed and the county auditor duly notified to issue his warrants in payment of said claim; that some time prior thereto one Babcock had obtained a judgment in the superior court, for a sum in excess of said claim, against one J. M. Tingley, and that Babcock filed an authenticated transcript thereof with the auditor, after the latter had been notified to issue said warrants, in accordance with the provisions of section 710 of the Code of Civil Procedure, and demanded that the auditor draw warrants for the amount of said claim in favor of said superior court or the judge thereof and deposit the same in said superior court, so that the same might be applied by said court towards the satisfaction of the said judgment; that the auditor refused to draw his warrants to petitioners, and presumably also refused to issue his warrants to the court or judge. for, as appears, Babcock made application for writ of mandate in said court praying that said auditor be directed to issue said warrants to said court or the judge thereof; that the said court ordered the writ to issue command-

ing the auditor to deposit said warrants with said court or show cause, etc.; that thereafter said auditor complied with said writ, and without notice to petitioners, and without any showing in their behalf, drew two warrants covering the amount of said claim in favor of the said court and delivered the same to the judge thereof; that thereafter petitioners demanded of said auditor that he issue warrants in their favor in accordance with the order of said board of supervisors, and he then and there refused so to do, "stating in reply that he had been served with a writ of mandate directing him to draw said warrants in favor of Charles M. Head, judge of the superior court, to be applied to the satisfaction of the judgment which said J. L. Babcock obtained against said J. M. Tingley, and he had complied with the command of said writ"; thereupon petitioners "made an application and motion in said mandamus proceedings setting forth the contract between said county of Shasta and your petitioners herein with a full presentation of all of the proceedings of said county of Shasta, by and through its board of supervisors, with reference to said contract, setting forth the parties who were interested therein, as well as the order of said board of supervisors directing the said auditor of the county of Shasta to draw warrants for the money due upon said contract in favor of your petitioners, and then and there moved said court, Charles M. Head, judge thereof, to make an order that the writ of mandate so issued and served as aforesaid be dissolved, discharged, dismissed, vacated and set aside"; that thereafter said motion was denied. Hence these present proceedings.

Ordinarily the alternative writ will issue and should issue where, upon the showing made, any doubt arises as to the rights of the parties. Where, however, it is clear from the petition that the peremptory writ ought not to issue, the alternative writ should be denied, thus avoiding delay and expense to the parties. In the brief filed with the petition the power of the Legislature to enact the law is not called in question. The point made is that there was no privity of contract between the county and J. M. Tingley; that he was not a party to the contract under which the county became indebted to petitioners, and that there was no money due and owing to him as judgment debtor of said county; and that, therefore, the provisions of said section 710 did not apply. We do not know what facts were made to appear in the petition for mandamus. It may be that it there appeared that J. M. Tingley was a member of the firm of Tingley & Elmore or that in some other way it was made to appear he had a pecuniary interest in the contract and warrants which could be reached under this section of the Code. The court had jurisdiction to hear and determine the proceedings in mandamus, and hence any er-

ror committed by the court could be corrected on appeal. The only question, therefore, is whether petitioners can avail themselves of this right of appeal, for certiorari will not lie where an appeal is open to them. The question arose in *Elliott v. Superior Court*, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. Speaking of the case where the party is a stranger to the record and the judgment or order is appealable, the court, by Chief Justice Beatty, said: "We cannot find in the decisions of this court a single case in which certiorari to review a judgment or order of a court has been issued at the suit of a stranger to the record. There is in fact another plain, speedy, and adequate remedy allowed by our practice to one whose rights or interests are injuriously affected by the judgment or by any appealable order of a court given or made in an action or proceeding to which he is not a party. He may make himself a party by moving to set aside such judgment or order, and if his motion is denied may, on appeal from that order, have the proceeding of which he complains reviewed not only for excess of jurisdiction but for error"—citing cases. "It is true that in one respect this remedy is less efficacious than that by certiorari, for neither the motion nor the appeal stays the enforcement of a void order unless the court, in the exercise of its inherent power, should approve a stay bond. *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009. But while this is an inconvenience to the party compelled to appeal, there is always the opportunity of obtaining a stay in a proper case, and the possible injury from this cause is perhaps no greater or more to be apprehended than the injury to the party claiming the benefit of an order or judgment when its enforcement is stayed by certiorari without any undertaking to indemnify him." Then follows what was held to be the view of the court where the judgment or order is in excess of jurisdiction and is not appealable. Said the court: "In case of an order or judgment in excess of jurisdiction but not appealable, and therefore reviewable only upon certiorari, the remedy could be made available to any stranger to the record injuriously affected by a resort to the same method of moving to set aside, and thereby making himself a party." "And this is a practice," said the court, "to be commended and encouraged for its convenience; for it is presumed that, the attention of the court being drawn to its excess of jurisdiction, the order or judgment would be vacated on motion without the trouble and expense of certifying the record to a court of review." It appears that petitioners did precisely what is here recommended and hence they are in a position to obtain relief by appeal. The judgment or order of the court in the mandamus proceeding is appealable, as is the order refusing to vacate that order, and, as the court had undoubted jurisdiction to make the judgment or order, however erroneous his de-

cision may have been, certiorari will not lie for its correction or annulment. Such, it seems to us, is the inevitable result of the principles laid down in *Elliott v. Superior Court*.

Nothing can be gained by a further hearing of the matter now here and the writ is therefore denied.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 25

GRAND LODGE A. O. U. W. OF WASHINGTON v. MILLER et al. (Civ. 456.)

(Court of Appeal, First District, California. April 1, 1908.)

1. DEATH—SURVIVORSHIP—PRESUMPTIONS—"CALAMITY."

The earthquake of April 18, 1906, was a calamity within Code Civ. Proc. § 1963, subd. 40, providing a presumption of survivorship with reference to persons killed in the same calamity.

2. SAME—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 1963, subd. 40, provides that when two persons perish in the same calamity, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from strength, age, and sex, according to specified rules. *Held*, that the peculiar circumstances referred to should be construed to mean evidence relating to the death and calamity and particular facts which would justify a court or jury in finding the fact as to who died first, and not mere circumstances which would show or tend to show probably that one survived the other.

3. SAME—"INFERENCE."

Code Civ. Proc. § 1963, subd. 40, provides a presumption of survivorship of persons perishing in the same calamity, unless particular circumstances are shown from which it can be inferred which of the persons survived. *Held*, that an inference within such section is not limited to the definition prescribed by Code Civ. Proc. § 1958, as a deduction which the reason of the jury makes from the facts found without an express direction of law to that effect, but that it should be construed to mean a conclusion drawn by reason from premises established by proof, a deduction or conclusion from facts or propositions known to be true, under section 1960, declaring that an inference must be founded on a fact legally proved, or on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3579; vol. 8, p. 7687.]

4. SAME—EVIDENCE.

Insured and his wife having been killed at the same time in the earthquake of April 18, 1906, evidence *held* insufficient to show which survived, and, they both being over 15 and under 60 years of age, it would be presumed that the husband survived as prescribed by Code Civ. Proc. § 1963, subd. 40.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Interpleader by the Grand Lodge Ancient Order of United Workmen of Washington against Ida Miller and others, to determine the ownership of certain insurance certi-

cates on the life of William Peacock, deceased. From an order directing payment of one of the certificates to defendant Ida Miller, Ada Baptist, as executrix of Matilda F. Peacock, deceased, appeals. Affirmed.

W. F. Williamson, for appellant. Louis F. Hart and A. A. Sanderson, for respondent Grand Lodge A. O. U. W. of Washington. Miller, Bishop & Hoefler, for respondents Miller and others.

COOPER, P. J. This action was brought by plaintiff in interpleader to have the court determine as to who was entitled to \$1,000 due by it under a policy or beneficial certificate issued to William Peacock. The \$1,000 was deposited with the clerk of the court to abide the result, and plaintiff thereafter had no further connection with the case. The court filed findings, and caused judgment to be entered in favor of defendant Ida Miller. From the judgment so entered this appeal is taken.

The facts out of which this controversy arose may be briefly stated as follows: William Peacock held a beneficial certificate issued by plaintiff, by which it agreed to pay his beneficiaries the sum of \$2,000 upon his death. He nominated his wife, Matilda F. Peacock, his beneficiary. The constitution and by-laws of plaintiff provided that upon the death of a designated beneficiary, in default of a new appointment by the holder of a certificate, prior to his death, then, upon the death of the holder of such certificate, the amount should be paid to the children of such deceased, share and share alike. Both William Peacock and Matilda F. Peacock were killed at Santa Rosa in the great earthquake disaster on the morning of April 18, 1906. They left surviving them their daughter, Ada Baptist; and William Peacock left surviving him Ida Miller, a daughter by a former marriage. These two daughter are the only surviving children of William Peacock, deceased, and Ada Baptist is the only surviving child of Matilda F. Peacock, deceased. The plaintiff issued two drafts for \$1,000, one payable to Ada Baptist, the proceeds of which she has received; the other payable to Ida Miller. The draft which was made payable to Ida Miller was not delivered to her. The amount was and is claimed by Ada Baptist, as executrix of the estate of her mother, Matilda F. Peacock, deceased. In other words, Ada Baptist received \$1,000 of the amount due by reason of her father's death, and claims that her sister of the half-blood should receive nothing from the beneficial certificate, but that the other \$1,000 belongs to the estate of her mother. Her claim is based upon the contention that her mother survived her father, and hence that immediately upon the death of her father the amount became due by plaintiff to her mother. The court found that William Peacock survived his wife, Matilda F. Peacock,

and the appellant insists that the evidence is not sufficient to support the finding.

Our Code (Code Civ. Proc. § 1963, subd. 40) provides: "When two persons perish in the same calamity, such as a wreck, a battle or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to the following rules. * * *

Fourth. If both be over 15 and under 60, and the sex be different, the male is presumed to have survived. If the sexes be the same, then the older." The evidence shows beyond question that the earthquake of April 18, 1906, was a calamity within the meaning of the above section. With one or two exceptions all the brick buildings in the city of Santa Rosa were demolished. The wing of the Occidental Hotel, in which William Peacock and his wife were sleeping, was razed to the ground. The roof and walls fell in, and many people in the building were killed, and many others were killed by the falling of buildings in other portions of the city. In fact, there is no question but that William Peacock and his wife perished in the same calamity. It is admitted that they were both over 15 and under 60 years of age. It is not shown by any direct evidence who died first, and therefore the presumption must control unless there "are particular circumstances from which it (who died first) can be inferred." The meaning of the statute, in speaking of circumstances from which it can be inferred as to who died first, is that there must be evidence relating to the death and the calamity and the particular facts which would justify a court or a jury in finding the fact as to who died first. The statute does not mean circumstances which would show, or which would tend to show probably, that one died before the other. If the matter is left to probability, then the statute settles the presumption. If it is claimed that one of the parties died before the other, it must be shown that such was the fact, and the statute merely means that such fact may be proven like any other fact by circumstantial evidence. Circumstances from which the fact may be inferred must mean by inferences which are rational conclusions from the facts proven. An inference is indirect evidence. It is defined in our Code (Code Civ. Proc. § 1958) as "a deduction which the reason of the jury makes from the facts found without an express direction of law to that effect." The above definition, while correct as to an inference to be drawn by a jury, is not so broad or comprehensive as the usual definition of an inference as "a conclusion drawn by reason from premises established by proof; a deduction or conclusion from facts or propositions known to be true." Bouv. Law Dictionary, Rawles' Revision. The idea of

the broader definition is contained in section 1960, Code Civ. Proc., which reads as follows: "An inference must be founded: (1) On a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

The evidence here shows without contradiction that the bodies of both William Peacock and his wife were found by a rescuing party about 9 or 10 o'clock on the morning of the earthquake, after removing the débris, timbers, and mortar, on the same bed in the room in which they had retired the night before, cold in death, and that there was mortar and débris on the bed and over the bodies. There is evidence to the effect that William Peacock's body was lying flat in bed with one hand under the back of his head; that there was a cut near his temple; that his skull was crushed; that he had a wound in his stomach; that the bedclothes were off his shoulders and off part of one side of his body; that the bedclothes were off, or, rather, at the foot of the bed on the side where Mrs. Peacock lay; that one of her legs was out over the side of the bed; that her body was pretty badly bruised; that there was mortar through her hair, under her eyelids, and in her nostrils; that there was a watery substance or foam in her mouth; that her face and body were somewhat discolored. Ada Baptist and her husband, Joseph Baptist, each testified that when they saw Mrs. Peacock's body 10 days after death, when she was buried at Petaluma, her hair was grey from a quarter to half an inch from the scalp, extending from the forehead pretty much over the entire scalp. Ida Miller testified that about three weeks before the death of Mrs. Peacock she saw her sister, Ada Baptist, putting some hair restorer on Mrs. Peacock's hair. John Peacock, a brother of William Peacock, deceased, testified that he saw the body of Mrs. Peacock the next day after the earthquake, and that he noticed no difference in the color of her hair after death from what it was before. None of the witnesses who assisted in taking out the bodies on the morning of the earthquake testified as to any rim of grey hair near the scalp. It is sufficient to say that in our opinion it cannot be reasonably inferred that William Peacock died first. He may have been rendered perfectly unconscious and insensible by the crushing of his skull, and yet may have breathed for a considerable time afterwards. Mrs. Peacock may have made a muscular movement of her feet or thrown the covers from her side of the bed in her agony, and yet have expired the moment afterwards. She did not get off the bed where she lay. No one saw them, and no sound of distress reached from the room where they were dy-

ing to any living person. As to which one drew the last breath it is impossible to tell.

The evidence supports the finding of the trial court, and the judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

(7 Cal. App. 772)

In re YUNG. (Civ. 526.)

(Court of Appeal, Second District, California.
March 25, 1908.)

CRIMINAL LAW—CONTINUANCE—JURISDICTION.

Jurisdiction to determine what constitutes sufficient cause to justify a continuance not exceeding 60 days, as authorized by Pen. Code, § 1052, authorizing the court on sufficient cause to direct the postponement of the trial, is vested in the first instance in the trial court, and it cannot by the exercise of the discretion vested in it be deprived of jurisdiction to try the case so continued, and the remedy for an abuse of discretion in ordering the postponement of the trial without sufficient cause is by appeal from the judgment, accompanied by proper record.

Application by George Yung for a writ of prohibition to be directed to a justice's court. Writ denied.

See 94 Pac. 594.

C. W. Pendleton, for petitioner.

PER CURIAM. This is an application for a writ of prohibition to be directed to the justice court in and for Orange township, Orange county, Cal.

On November 14, 1907, petitioner was arrested under and by virtue of a warrant issued out of said justice court upon a complaint charging him with the violation of a certain ordinance prohibiting the sale of liquor as in said ordinance provided. On February 24, 1908, he was duly brought to trial, but, owing to the fact that the jury were unable to agree, a mistrial resulted. On the 27th of February following the case was, by an order of said justice court, set for trial on the 9th day of March, 1908, at 10 o'clock a. m. At said time petitioner, as defendant in said case, with his counsel, appeared in said court, and demanded that the trial of petitioner proceed. Said court, however, continued the trial of the case to March 10, 1908. Petitioner by his counsel thereupon moved the court for a dismissal of said charge against him, which motion was then and there denied. On March 10, 1908, the day to which the case had been continued, the same was called for trial, whereupon the justice of the court, assigning the absence of defendant's counsel as a reason for so doing, continued the trial of said charge against petitioner to March 26, 1908.

Petitioner contends that said postponements of the trial of said charge against him were by said court made without sufficient or any cause, and that by reason whereof said court has no jurisdiction to try said petitioner upon said charge. Under section 1052, Pen. Code, the court was authorized, upon sufficient cause, to direct the postponement of the trial

to another day. Jurisdiction to determine what constitutes sufficient cause to justify a continuance not to exceed 60 days is in the first instance vested in the sound discretion of the trial court. It cannot, by the exercise of the discretion thus vested in it, be deprived of jurisdiction to try the case so continued. By postponing the case the court did not lose jurisdiction to try it. The remedy, if there was an abuse of discretion in ordering the postponement of the trial without sufficient cause, is on appeal from the judgment, accompanied by a proper record. The question of the right to a dismissal under the provisions of section 1382, Pen. Code, is not involved herein, for the reason that the trial was not postponed a period of 60 days beyond the date of the mistrial. *Ex parte Ross*, 82 Cal. 109, 22 Pac. 1086; *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884. The question of abuse in this case cannot be reviewed upon an application for a writ of prohibition.

The writ is denied.

(7 Cal. App. 750)

Ex parte RUEF. (Cr. 136.)

(Court of Appeal, First District, California.
March 24, 1908.)

1. BAIL — APPLICATION — PRESUMPTION OF GUILT.

For the purposes of an application to admit to bail after indictment returned or information filed, the court must assume that defendant is guilty of the offense with which he is charged.

2. HABEAS CORPUS—DETERMINATION—REDUCTION OF BAIL.

The appellate court will not grant a reduction of bail on habeas corpus unless it clearly appears that the amount fixed by the trial court is excessive and an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 96.]

3. BAIL—REINDICTMENTS.

Where 116 indictments were filed against petitioner, each charging him with bribing a member of the board of supervisors, an order admitting petitioner to bail in the sum of \$10,000 on each charge, save as to certain reindictments for offenses charged in other of the indictments on which the bail was fixed at \$5,000 on each charge, was not excessive except as to the reindictments on which bail should only have been required in a nominal amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 209.]

Application by Abraham Ruef for a writ of habeas corpus sur bail. Writ granted in part.

See 89 Pac. 604, 605.

Frank J. Murphy, Henry Ach, and M. C. Chapman, for petitioner. Francis J. Heney, for respondent.

HALL, J. The petitioner, Abraham Ruef, asks the court to admit him to bail upon divers indictments now pending against him in the superior court of the city and county of San Francisco. Bail has been fixed upon each charge by order of the superior court, so that the proceeding before us is

in effect an application for a reduction of the bail heretofore fixed by the court in which the indictments are pending. There are now pending 116 indictments against petitioner, in each of which he is charged with bribing a member of the board of supervisors of the city and county of San Francisco. The bail was fixed by the superior court at the sum of \$10,000 upon each charge, save as to indictments designated as Nos. 1184 to 1192, inclusive, upon which the bail was fixed at \$5,000 upon each charge. In his affidavit petitioner sets up that 37 of the indictments are duplicates, or reindictments of petitioner for offenses charged in other of the indictments. The reindictments are those designated by the numbers 810 to 823, both numbers inclusive, 841 to 854, both numbers inclusive, and 1,184 to 1,192, both numbers inclusive. This was not denied by the district attorney, although his attention was specially called to the matter at the hearing before this court, and we have therefore accepted this statement as the truth. Petitioner claims that the bail is excessive, and alleges that he cannot give it.

By the express provision of the Constitution of this state all persons shall be bailable, except for capital offenses, when the proof is evident or the presumption great, and excessive bail shall not be required. Bail is not to be deemed excessive, however, simply because the particular person under indictment cannot give the bail required. Bail should not be exacted for the purpose of punishing a person charged with crime, for no man is punishable for a felony except on his plea of guilty, or upon conviction by a jury of his peers. Bail is exacted for the purpose of securing the attendance of the defendant upon court at all times when his attendance may be lawfully required, and his rendering himself in execution of any judgment that may be pronounced against him. Upon an application to admit to bail after indictment returned or information filed, the court must assume that the defendant is guilty of the offense with which he is charged. In an application to this court upon habeas corpus for a reduction of bail upon the ground that the amount fixed by the trial court is excessive, this court will not interfere unless it clearly appears that the amount fixed is excessive. It is not sufficient that this court might originally have deemed a lesser amount sufficient. It must clearly appear that the trial court has abused its discretion before this court will reduce the amount. *Ex parte Williams*, 82 Cal. 183, 23 Pac. 118; *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410; *Id.*, 54 Cal. 75.

We have not been cited to a single case in this state, nor have we found one, where, after bail had once been fixed by a trial court, the amount required has been re-

duced by the Supreme Court. Upon the contrary, it has been uniformly held that the appellate court will not interfere with the action of the trial court unless "the bail demanded be per se unreasonably great, and clearly disproportionate to the offense involved." *Ex parte Duncan*, 54 Cal. 75. In the *Duncan Case* it was distinctly laid down that it must be assumed that the defendant was guilty of each of the 10 distinct offenses charged against him (53 Cal. 410); and upon a second application after two trials had been had without a conviction it was held that this presumption still prevailed. In the *Duncan Case* the bail was in the aggregate \$112,000 upon 10 indictments, and the offense charged was embezzlement, for which the maximum penalty is 10 years upon each conviction. In the case at bar the maximum penalty is 14 years upon each conviction. And in the *Duncan Case* a reduction in bail was refused even after two trials without a conviction. It has been urged with much earnestness that the court should not exact as great bail upon each of a great number of indictments as it would upon each of a lesser number, for at most the imprisonment could not in any event exceed the term of the defendant's life. While this argument from one aspect of the case has some force, upon the other hand, the greater the number of indictments the greater the probability of conviction. The greater the probability of conviction the greater the inducement to a defendant to become a fugitive from justice. The petitioner shows by his affidavit that he is a man of means, and now engaged in improving his holdings in San Francisco. How much he is worth does not appear, but the greater the amount of his wealth the more readily he could give a large bail, and the more readily he could flee to some country where perhaps he could live in comfort on his possessions. The offense of bribery with which petitioner is charged is one that is justly regarded as particularly serious. It is, in its effect upon the public welfare, of the utmost gravity. The bribery of legislative officers corrupts the very foundation of government, and affects every citizen of the commonwealth. These are all proper matters to be considered in fixing bail after indictment found. As was said in *Ex parte Duncan*, supra: "We are not to assume in this case the functions of the court committing the prisoner, or substitute our own for its judgment in fixing the amount of bail. Before we are authorized to interfere, the bail demanded must be per se unreasonably great, and clearly disproportionate to the offense involved." After a careful consideration of the matters presented we do not think that this court is warranted in interfering with the matter of bail as fixed by the court to which the indictments were returned,

save as to the indictments that are reindictments for the same offense charged in prior indictments. These duplicate indictments present another phase of the question. No one will for one moment contend that any person should be twice punished for the same crime; and the Constitution of the state expressly provides that "No person shall be twice put in jeopardy for the same offense." Const. art. 1, § 13.

When the trial court fixed the bail at \$10,000 upon each of the original indictments, it necessarily determined that such sum was sufficient to secure the attendance of the defendant to answer to the offense charged in such indictment. We cannot see that the amount should be doubled because another indictment is filed for the same offense, which is the effect of requiring the same amount on the reindictment. If this were allowed, a defendant indicted five times for one offense could be required to give bail in an amount five times as great as the court should determine to be sufficient for the one offense. This we think would work a manifest injustice, and result in the exaction of clearly excessive bail. The court fixed the bail upon each charge of bribery at \$10,000, and thus determined that this was a sufficient sum to fix as bail for the offense charged. Any considerable bail required under these circumstances upon a second indictment for the same offense must be per se excessive, and clearly contrary to the spirit of our laws, and especially of the Constitution of this state. We are of the opinion that defendant should be admitted to bail upon the so-called reindictments, to wit, in cases designated as numbers 810 to 823, and 841 to 854, and 1184 to 1192, in a nominal amount. While the amount of the bail that will still be required of petitioner under the order which we make in this proceeding will be large in the aggregate, it must be remembered that under the law and the Constitution of the state he is entitled to a speedy trial. It must be assumed that the law will be complied with in this respect.

We have made an order in accordance with the views herein expressed simultaneously with the filing herewith.

We concur: COOPER, P. J.; KERRIGAN, J.

On Application for Reduction in Bail.

PER CURIAM. The application of Abraham Ruef, upon habeas corpus, for a reduction in the amount of bail required of him under certain indictments now pending against him in the superior court of the city and county of San Francisco, having been heretofore heard and duly considered, it is now ordered that as to the cases designated as Nos. 590 to 654, both inclusive, and numbers 827 to 840, both inclusive, said application be,

and the same is, denied, and as to said cases the said writ is discharged.

It is further ordered that, as to the cases designated in said superior court by the numbers 810 to 823, both inclusive, and 841 to 854, both inclusive, and 1184 to 1192, both inclusive, said Ruef be admitted to bail in the sum of five dollars upon each indictment, with two sufficient sureties, to be approved by a judge of the superior court of the city and county of San Francisco, provided that if the original or first indictment for any of the offenses charged against said Ruef shall be dismissed, leaving a second or reindictment for the same offense against said Ruef still pending, the said superior court may increase the amount of bail required upon such second or reindictment.

153 Cal. 615

WILLIAM EDE CO. v. HEYWOOD et al.
(S. F. 4,842.)

(Supreme Court of California. May 20, 1908
Rehearing Denied June 19, 1908.)

TAXATION—PAYMENT OF MORTGAGE TAX BY
PURCHASER FROM MORTGAGOR—RIGHTS
AGAINST MORTGAGEE.

A grantee of real estate who paid the tax assessed against the interest of the mortgagee of his grantor, which interest, for purposes of taxation, is an interest in land (Const. art. 13, § 4; Pol. Code, § 3627), and which tax is a lien on the interest of the mortgagee (Pol. Code, § 3718), cannot recover of mortgagee the sum so paid to discharge the tax, as there was no contractual relation between them.

Beatty, C. J., and Shaw and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the William Ede Company against William B. Heywood and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Powell & Dow, for respondents.

ANGELLOTTI, J. Plaintiff appeals upon the judgment roll alone from the judgment in favor of the defendants. The action is to recover money alleged to have been paid by the plaintiff to the use of the defendants. The facts are as follows: On the first Monday of March, 1905, the defendant William B. Heywood was the owner and holder of a duly recorded mortgage on certain land in San Francisco, and on that date the taxes for that year on his interest as such mortgagee became a lien on the said interest. Pol. Code, § 3718. This interest for purposes of taxation is an interest in the land. Const. art. 13, § 4; Pol. Code, § 3627. On April 19, 1905, this mortgage was fully paid and satisfaction thereof entered of record. On June 1, 1905, the land was conveyed by Louis Friedlander and Jennie Friedlander, his wife, and F. K. Houston and Mary F. Houston, his wife, the owners thereof, by their grant, bargain, and sale deed to plaintiff. The aforesaid taxes on the mortgage interest were duly assessed and levied. On November 1, 1905, plaintiff gave notice to said defendant that said taxes remained unpaid, and demanded that said defendant pay the same, which he then and ever since has refused to do. On November 27, 1905, being the last day for payment before delinquency, plaintiff paid the taxes. Said defendant, although requested so to do, has ever since refused to pay to plaintiff the amount so paid. Upon these facts, the trial court concluded that plaintiff was not entitled to recover, and gave judgment for defendants.

The case before us is simply that of one who has purchased real property with the title burdened by an incumbrance done, made, or suffered by the grantor, or some one claim-

ing under him, seeking to recover the sum that he has paid to discharge such incumbrance, not from his grantor or his heirs, but from a third person, with whom he has not and never had any contractual relation whatever. This was exactly the case of *McPike v. Heaton*, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335, where the plaintiffs had purchased land subject to a tax lien, which should have been paid by the defendant to whom the property was assessed, but who was not plaintiffs' immediate grantor and bore no contractual relation to them. It was held that the covenant against incumbrances done, made, or suffered by the grantor or any person claiming under him, implied from the use of the word "grant" in the conveyance made by plaintiffs' grantor (Civ. Code, § 1113), which included taxes (Civ. Code, § 1114), did not run with the land, or pass to the assignee, and that as plaintiffs had no contractual relation with defendant, no recovery against him could be had. That, without some contractual relation, there could be no obligation on the defendant so far as the plaintiffs were concerned. It was said: "They could have protected themselves against these taxes either by assuming their payment as a part of the consideration for the purchase, or by suitable covenants with Jackson [their grantor], but they have no right of action therefor against the defendants." In *Canadian, etc., Co. v. Boas*, 136 Cal. 419, 69 Pac. 18, it was held that a mortgagee who had obtained title to the property by foreclosure proceedings could not recover of a junior mortgagee whose interest in the property had been extinguished by the foreclosure proceedings the amount paid by it in redeeming the property from a sale to the state for taxes assessed against such junior mortgagee on such junior mortgage. This decision was based on the proposition that there was no contractual relation whatever between the plaintiff and defendant with respect to the moneys sued for, and it was said that the plaintiff was in no different position from that of any other purchaser of land who finds his title clouded. The case of *Henry v. Garden City Bank, etc.*, 145 Cal. 54, 78 Pac. 228, was substantially the same in facts and in result. See, also, *Bock v. Gallagher*, 114 Mass. 28. All of these cases proceed upon the theory that one who buys property from another takes it just as it is, regardless of the nature of the title, or the number or character of liens resting upon it, except in so far as he is protected by contract. Independent of contract, neither his immediate grantor nor any other person is under any obligation to make perfect the title for him, or discharge any incumbrance or lien on the property. By reason of section 1113 of the Civil Code, certain covenants on the part of the grantor for himself and his heirs are implied from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be pass-

ed, unless otherwise expressly provided in the conveyance, and the right of the grantee to reimbursement from the grantor and his heirs for money necessarily paid by him to discharge incumbrances so covenanted against thus rests on the terms of his contract. It is impossible to distinguish these cases from the case at bar, and, under the doctrine declared thereby, the conclusion of the learned judge of the trial court was correct. Appellant relies strongly upon the case of *San Gabriel Co. v. Witmer Company*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470. There can be no doubt that its contention finds support in the conclusion reached in that case, but that case, decided by a bare majority of this court, and the case of *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97, decided upon the authority of the former case, have been practically overruled by the later decisions already cited, so far as the same might be held applicable under the circumstances appearing in this case.

As to the defendant William B. Heywood the judgment would be right, even if the contention of appellant as to the law applicable were to be upheld. He was the original mortgagee, and the record shows that on April 24, 1904, he duly assigned and transferred the mortgage upon which the tax was assessed to the defendant William B. Heywood. As he was not the owner of the mortgage interest on the first Monday of March, 1905, he, of course, was never liable for the tax.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

SHAW, J. I dissent. The complaint in the case does not allege that the mortgage on which the tax was levied had been paid. The answer alleges that it was fully paid and satisfied on April 19, 1905, and the court so found. It is not claimed that the amount of the mortgage tax was deducted or retained by the mortgagor at the time this payment was made or at all. The case, therefore, presents the question of the rights of one who has purchased property burdened with a lien for the payment of an obligation of a third person with whom he has no direct contractual relations, and who has been compelled to pay money to discharge that lien, to recover of the person whose obligation he has thus been compelled to pay the money paid in discharge thereof. In my opinion the facts make a clear case, under the common law, in assumpsit for money paid. The subject is exhaustively treated and the cases at common law discussed by Prof. Keener in his work on *Quasi Contracts*, pp. 388, 400. He prefaces the discussion by this general statement of the rule: "No one officiously paying the debt of another can maintain an action either at law or in equity to recover the money so paid. * * * If, however,

the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor." Other authorities are of similar effect: "An action for money paid is maintainable in every case in which there has been a payment of money by plaintiff to a third party, at the request of defendant, express or implied, with an undertaking, express or implied, to repay the amount. * * * And whether the request be direct, as where the party is expressly desired by the plaintiff to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference." 27 Cyc. 833. And further: "Where, in order to protect his own property, real or personal, the owner pays off an outstanding incumbrance which another has undertaken or is legally liable to pay, he may recover from such other the amount so paid by him in an action for money paid." 27 Cyc. 834. "It is well settled that, where one person is compelled to pay money which another is under legal obligation to pay, the former is entitled to recover it back from the person legally bound. The request necessary will be implied as well as the promise, where the consideration consists in the plaintiff's having been compelled to do that, to perform which the defendant is legally compellable. Under these circumstances the person paying the money has the same right of action as if he had paid it at the other's express request." 15 Am. & Eng. Ency. of Law, 1108; 27 Cyc. 835, 837. As to the application of this rule, the instance of one who is compelled to pay money to prevent seizure or sale of his property for the debt of another is given. 15 Am. & Eng. Ency. of Law, 1110. The duty to pay taxes is not, for some purposes, regarded technically as a debt. Nevertheless the rule applies where the obligation to pay consists of taxes assessed against the defendant as well as in cases of ordinary debts. 27 Cyc. 835, citing many cases; *Hogg v. Longstreth*, 97 Pa. 255; *Graham v. Dunigan*, 6 Duer (N. Y.) 629. The decisions of the courts fully establish these propositions. Those of the courts of this country are very numerous. They are noted in detail in 35 Cent. Dig. at columns 44 to 53, inclusive. A number of the English cases are referred to by Prof. Keener in the chapter above cited. The rule has been followed in this state and the right to recover money paid for taxes on a mortgage interest, under facts similar to those here involved, sustained in *San Gabriel, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470, and *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97.

For the sake of clearness, it should be said that in cases of this character the request and promise said to be implied in law are mere fictions invented by the common-law

courts because, under the common-law system of procedure, no remedy was provided except an action of assumpsit, in which, according to the rule of pleading, the declaration was required to allege both a request and a promise, and it was therefore necessary to the ends of justice to presume a request and promise where none were made, in order to sustain the action and give the party a remedy to enforce a manifest right. In this state where forms of action are abolished, and a statement of the facts constituting the cause of action is all that is required of a plaintiff (Code Civ. Proc. § 426), it is unnecessary to allege either the request or the promise, if the facts show a liability of defendant to plaintiff. The liability really rests, not on the implied request and promise, but on the principles of justice and right which require the defendant to repay to plaintiff what plaintiff has been obliged to pay for his benefit. *Keener, Quasi Cont. 14; San Luis Obispo Co. v. Gage, 139 Cal. 407, 73 Pac. 174.* In equity, also, the recovery may be had upon the principle that the plaintiff is subrogated to the rights of the party to whom the money was paid. "Any person having an interest in property on which there is a lien or incumbrance may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of a holder thereof." 27 Am. & Eng. Ency. of Law, 235. The tax here involved was, when paid, a lien on the plaintiff's land. It was assessed upon an interest therein while that interest belonged to the defendant. It was therefore a personal obligation of the defendant, having "the effect of a judgment against the person." Pol. Code, § 3716. The statute of 1880 authorizes a county to sue in its own name to recover delinquent taxes. St. 1880, p. 136, c. 123; *Los Angeles v. Ballerino, 99 Cal. 595, 32 Pac. 581, 34 Pac. 329.* If not technically a debt due the state, it was at least a personal obligation of the defendant, upon which a civil suit could be maintained and a personal judgment recovered by the county. See, also, *Perry v. Washburn, 20 Cal. 351; People v. Seymour, 16 Cal. 343, 76 Am. Dec. 521; Moore v. Patch, 12 Cal. 270; Oakland, City of, v. Whipple, 39 Cal. 115; Couts v. Cornell, 147 Cal. 563, 82 Pac. 194, 109 Am. St. Rep. 168.* The plaintiff was compelled to pay the tax to avoid a sale of his property therefor, and in equity he is subrogated to the right of the city and county of San Francisco, and may maintain an action to recover the money paid. By the principles of the common law aforesaid the effect is the same. The said defendant owned the property—that is, the mortgage interest—at the time the lien for the taxes accrued. It was his duty, both in law and in morals, to pay the same. The plaintiff did not pay them officiously or voluntarily, but to protect his own property, and only after the defendant had expressly refused to pay. By the princi-

ples stated he was entitled to be reimbursed by the defendant.

It is contended that the decisions of this court in *McPike v. Heaton, 131 Cal. 110, 63 Pac. 179, 82 Am. St. Rep. 335, Canadian, etc., Co. v. Boas, 136 Cal. 420, 69 Pac. 18,* and *Henry v. Garden City Bank, 145 Cal. 54, 78 Pac. 228,* have overruled *San Gabriel Co. v. Witmer and Angus v. Plum, supra,* and have established a rule contrary to the principles above stated. *McPike v. Heaton* was not a case of mortgage taxes. Heaton, the owner of the land on the first Monday of March, conveyed by grant deed to one Jackson on March 27th, and on the next day Jackson conveyed to *McPike, the plaintiff.* The case was treated as an action upon the covenant implied from the grant, and it was held that the covenant of Heaton against the tax lien accruing during his ownership did not run with the land, nor pass to *McPike* with the grant by Jackson to him. The *Witmer Case* was distinguished, although incorrectly, but not overruled. The further statement in the opinion that the defendant was under no personal liability for the tax and that payment could be enforced only by a sale of the land, was manifestly incorrect in view of the statute of 1880 aforesaid and the decisions in *Los Angeles v. Ballerino, supra,* and the other cases above mentioned. It may be that the case involved the principles applied here and might have been decided differently if those principles had been recognized and enforced, but they were not in any way referred to, and I cannot presume that the court intended silently to overrule and set aside doctrines so well established. This is particularly true of a common-law rule which by statutory enactment is made the rule of decision in all the courts of this state. Pol. Code, § 4468. I cannot agree with the main opinion in holding that the case at bar is identical with *McPike v. Heaton*, as that action was considered in the opinion therein rendered. The conclusion there reached was manifestly based in large part upon the assertion which, as I have shown, was erroneously made, that the defendant was under no personal liability for the tax, and payment could be enforced only upon a sale of the land. If that was the case here, if there was no obligation on the part of the mortgagee to pay the tax assessed against the mortgaged interest, either as between himself and the state, or as between himself and the plaintiff, then no principle of equity and good conscience would give the plaintiff the right to ask of him the repayment thereof. But, when it is seen that the mortgagee was under both a moral and legal obligation to pay the tax and that such obligation was enforceable against him by suit, it should be perceived at once that the highest considerations of equity and good conscience demand that another should not be compelled to pay it gratuitously for his benefit without having a right of action against him. In *Canadian Co. v. Boas* the

defendant was a junior mortgagee, and the plaintiff a purchaser at a foreclosure sale, under a prior mortgage. The interest of Boas as mortgagee, on which the tax was assessed prior to the foreclosure, had been extinguished by the foreclosure and sale. In *Henry v. Garden City Bank*, the facts were substantially the same. There may be a serious question in such cases, especially if the mortgagor is insolvent, whether, under the principles of law and equity above mentioned, when the mortgagee's beneficial interest has been completely destroyed and the entire estate thus transferred to a purchaser, such mortgagee is "in equity and good conscience," as between him and the purchaser, bound to pay the taxes accrued on an interest which has become a mere shadow; its substance having passed to the purchaser. In actions for money paid by plaintiff to defendant's use, the existence of this element in plaintiff's grounds of recovery in each case, or class of cases, must depend upon the facts of the particular case. It may be conceded that, in this state these cases establish the rule that equity and good conscience do not demand that a junior mortgagee shall pay the tax on his former mortgage interest, for the benefit of a purchaser under a foreclosure which has demonstrated that that interest had no real value.

The present case is of a different character. There has been no foreclosure. The suit is practically by a mortgagor against a mortgagee for taxes paid on the mortgagee's interest, which has been made good by payment. The mortgagee was justly chargeable with the tax thereon. By his neglect it has devolved upon plaintiff's property, thereby forcing the plaintiff to pay the tax to relieve the property from the lien. The payment unquestionably was of benefit to the defendant. Therefore, even if those decisions are sound, the principles on which they rest should not be applied to this case. It is true that there is a long line of cases holding that where one who buys property by quitclaim deed and subsequently finds that property incumbered by liens of which he has taken no account in making his purchase, and which he is compelled to pay to protect his property, he has no right of action to recover the money thus paid from his grantor, and that no covenant not running with the land will protect him as against previous owners, or give him a right of action against them. But it is also true, and has been settled for many years by the authorities I have previously cited, that where such person is thus compelled to pay the debt of another which, as between himself and that other, the other, in equity and good conscience, should have paid, he may recover the amount paid without resort to any covenant and in the absence of any contractual relations between them. The right of action in such cases does not spring from the existence of contractual relations, but from principles of justice and equity which

do not require one person to pay the debt of another, under compulsion, and not officiously, which that other was in duty bound to pay himself.

We concur: BEATTY, C. J.; SLOSS, J.

153 Cal. 571

CAHILL v. E. B. & A. L. STONE & CO. et al.
(S. F. 4,378.)

(Supreme Court of California. May 15, 1908.)

1. NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER.

An owner of premises, over which there is a path used by the public with his knowledge and consent, who places a dangerous and concealed obstruction in the path, is liable for injuries sustained thereby to a person using the path.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 52-61.]

2. SAME—PLACES ATTRACTIVE TO CHILDREN.

One who places an attractive and dangerous contrivance in a place frequented by children, and who knows or has reason to believe that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injuries to them, but he is not held to the exercise of great care, and this rule applies to any attractive and dangerous machinery so placed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 52-61.]

3. PLEADING—DEMURRER—ADMISSIONS.

A demurrer to the complaint admits the truth of its allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525-534.]

4. NEGLIGENCE—PLACES DANGEROUS TO CHILDREN—DANGEROUS CONTRIVANCES.

One constructing a railroad track in a street in a populous residence district where many children lived left on the track a push car heavily loaded with steel rails. The car was left unguarded, uninclosed, and unfastened. Children from 5 to 14 years of age were, with his knowledge and consent, accustomed to congregate on and around the car, and he knew that because of the grade of the track there was danger of the car starting and injuring the children, and he knew that the car might easily be moved by the children. *Held*, that the car was a dangerous contrivance, and he owed the duty of exercising ordinary care to prevent injury to the children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 55-61.]

5. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

There is no precise age at which as a matter of law a child is held accountable for his actions to the extent of an adult, and there is no conclusive presumption that a boy 12 years old perceived the danger of playing on a push car loaded with steel rails left on a railroad track, especially in the face of an averment that he was too young and inexperienced to foresee the danger, and whether he is chargeable with negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 347, 348.]

6. SAME—AVAILABILITY AS DEFENSE.

Contributory negligence is a matter of defense, where it does not appear on the face of the complaint or by the evidence for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 221-234.]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by Sumner Cahill by P. Cahill, guardian ad litem, against E. B. & A. L. Stone & Co. and another. From a judgment for defendants rendered on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Haven & Haven and Robert C. Porter, for appellant. Reed & Nusbaumer and B. H. Griffins, for respondents.

SHAW, J. The defendants separately demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained without leave to amend. Judgment was given for the defendants thereon, and plaintiff appeals.

The action is to recover damages for injuries sustained, alleged to have been caused by the negligence of the defendants. The only questions presented are whether or not the facts show that the defendants were chargeable with neglect of any duty owing by them to plaintiff, and whether or not the facts stated show that the neglect of the plaintiff caused or contributed to his injury. The following is a statement of the facts alleged: The plaintiff at the time of the accident was 12 years of age. The defendants were constructing a railroad track in and upon one of the public streets in the city of Oakland. The track was laid to a point near the crossing of Fifty-Sixth street. It was placed in a trench some two feet deep, with sharp banks on each side situated about two feet distant from the rails. A push car heavily loaded with steel rails was, by the defendants negligently left standing on this track in the street, unguarded by any person, uninclosed, unlocked, and unfastened, without any brake or device for stopping it when started. It was of such weight that when put in motion even on a very slight grade it could not be readily stopped. The grade of the track at that point descended slightly toward Fifty-Sixth street. This was in the center of a populous residence district of the city where many children lived. The lots abutting the street opposite where the car stood were not inclosed, and children were accustomed to congregate there for play. On that day, and during all the time of the construction of the roadbed and track, children from 5 to 14 years of age, with the knowledge and consent of the defendants, were accustomed to congregate upon and around said push car and play upon said car, and defendants then well knew of the danger from said car and track to children in that vicinity. The plaintiff lived with his parents about 250 yards distant from the point where the car was left on the track. Other children at play on said push car had put it in motion.

"Plaintiff was then and there attracted to said car by its said condition and appearance and said surroundings as a place of play and said plaintiff was then and there too young and inexperienced to foresee the danger therefrom, and plaintiff then and there got upon said car with said other children," and in the course of his play upon the said car, and in an attempt to stop it as it was running down the rails upon which it had been left standing by the defendants, he was caught between the side of the car and the bank of said trench, and his foot was thereby thrown beneath the car wheel and badly crushed. He sues for the damage resulting from this injury.

The contrary not being alleged, it is to be assumed that the defendants had the lawful right, under permission from the proper public authorities, to lay its track in the streets and leave the push car standing thereon. The car being thus rightfully in the street, the plaintiff had no right to go upon it, or to interfere with it in any way, without the consent of the defendants. He would have been with respect to the car technically a trespasser, except for the allegation that children were accustomed to play upon it with the knowledge and consent of the defendants.

We cannot perceive wherein the case presented by the complaint, its absolute truth being unqualifiedly admitted by the demurrer, is to be distinguished from the line of decisions commonly known as the "turntable cases." These cases rest upon the same general principle as those which hold liable the owner of premises over which is a path which, with his knowledge and consent, is frequented by the public, and in which he places a dangerous and concealed obstruction which causes injury to a person passing along the path. See 37 Cent. Dig. cols. 390-393, for citations. For like reasons, one who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend, and avoid the danger into which he thus knowingly allures them. The leading case on this subject in this state is *Barrett v. S. P. Co.*, 91 Cal. 302, 27 Pac. 666, 25 Am. St. Rep. 186, where it was said: "If defendant ought reasonably to have anticipated that leaving this turntable unguarded and exposed an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. * * * A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to

knew this and required to govern his actions accordingly. * * * And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense"—citing cases. The same doctrine was affirmed in *Callahan v. Eel River, etc., R. Co.*, 92 Cal. 89, 28 Pac. 104. See 21 Am. & Eng. Ency. of Law, 474, for a full citation of cases. The rule of course is not to be confined to turntables, but applies to any attractive and dangerous machinery so placed. 1 *Kinthead on Torts*, § 26; 2 *Cooley on Torts* (3d Ed.) p. 1270.

It is true that in this state the rule has been strictly limited to the particular character of cases mentioned in the *Barrett Case*. In *Peters v. Bowman*, 115 Cal. 349, 47 Pac. 113, 598, 56 Am. St. Rep. 106, wherein it was held that the owner of a lot was not liable for the death of a boy drowned in a pond on his premises, Mr. Justice McFarland, speaking of the so-called "turntable cases," says: "The rule as thus applied rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that therefore the railroad company was liable for legal negligence in erecting it and leaving it exposed as an attraction to children, and a temptation to them to intermeddle with it." It is further stated that the principle of these "turntable cases," while well established in this state, is an exception to the general rule that the owner of land is under no legal duty to keep it in safe condition for others than those whom he invites there.

It is claimed by the respondents that later cases have practically repudiated the rule. An examination of the decisions, however, discloses the fact that in each case there was some feature by which it is distinguishable from cases similar to *Barrett v. S. P. Co.*, supra, and also from the case at bar. The case of *George v. Los Angeles Railway Co.*, 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184, is much relied upon as a case holding to the contrary. It is somewhat difficult to agree to the statement made in that case that the two instructions there considered were not contradictory of each other, but, conceding that they are not conflicting, it is apparent that the instruction chiefly relied on by respondents included some acts of due care on the part of the defendants in that case which do not appear to have been exercised by respondents here. In that case a boy was injured while playing upon trailer cars allowed by the defendant to stand on the railroad track in a street in the city of Pasadena. The jury were instructed that if they found that the cars were held by brakes

of the ordinary kind, set in a manner to hold them unless loosened by some one, and that the only danger connected with the car was one open to the observation, and which could be comprehended by a boy of plaintiff's age and of average intelligence, the plaintiff could not recover. One of the conditions of the instruction was that the jury should find as it did that the defendant had exercised care and set the brakes so that the car would be held in place. In the present case the allegation is that the car was negligently left unguarded, uninclosed, unlocked, and unfastened. The distinction is pointed out in *Lofthus v. Dehail*, 133 Cal. 217, 65 Pac. 379. It is that the "turntable cases" rest in part upon the proposition that the danger created by the act of the owner could be easily removed by the simple device of locking or fastening the dangerous machinery, and that, while the owner of such machinery is not held to the exercise of great care in protecting it against the trespasses of children, it is required to exercise ordinary care to that end. In *Studer v. S. P. Co.*, 121 Cal. 404, 53 Pac. 942, 66 Am. St. Rep. 39, the court was not considering the effect of the allegations of a complaint admitted to be true by a demurrer, and averring that the defendant was negligent, and that the child was too young and inexperienced to foresee the danger, but was considering the conceded fact that the boy was of ordinary capacity and intelligence and the undisputed evidence which the trial court had held sufficient to establish contributory negligence on his part. Many other cases are cited by the respondents in which similar questions arising upon the evidence were considered, and in which it was held that under the proof made the child was guilty of contributory negligence either in exposing himself to the danger or in failing to avoid it. *Tucker v. N. Y., etc., Co.*, 136 N. Y. 668, 33 N. E. 385; *Merryman v. Chicago, etc., Co.*, 85 Iowa, 634, 52 N. W. 545; *Carson v. Chicago, etc., Co.*, 96 Iowa, 583, 65 N. W. 831; *Brown v. European, etc., Co.*, 58 Me. 384; *Twist v. Winona, etc., Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626; *Kaumeier v. City Electric R. Co.*, 116 Mich. 306, 74 N. W. 481, 40 L. R. A. 385, 72 Am. St. Rep. 525. It is of course possible in any case that the evidence may show that a child of 12 years of age is guilty of contributory negligence. It is not at all improbable that the evidence in this case would be strongly to that effect. The defendants did not see fit to await the coming in of the evidence, but interposed a demurrer which admits the truth of the allegations of the complaint. The cases involving a consideration of the effect of undisputed evidence showing negligence on the part of the child or evidence upon which a jury has so decided are not applicable to the present case.

It is contended that the car was not in itself dangerous, and *Kaumeier v. City Electric R. Co.*, supra, is cited as holding this propo-

sition. It may be admitted that such a car would not be dangerous when not in motion. The same is generally true of any ordinary machinery. But we cannot agree to the proposition that a car set upon rails, upon which it may easily be moved by children, and of sufficient weight to crush a person over whose body it might pass, is not a dangerous thing for children to be allowed to play with. They have an instinctive desire to see machinery in motion, and take delight in riding, and, if they have access to anything upon wheels, they will usually set it going if able to do so, especially if they can ride upon it themselves. In the "turntable cases" the turntable would be harmless if left at rest. The danger arises from the propensity of children to set it in motion. The car in question was dangerous for the same reason.

It is claimed that as the boy was 12 years of age he must be considered capable of exercising care for his own protection, and chargeable with negligence to the same extent as a mature person. There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. *Railway v. Carlson*, 58 Kan. 66, 48 Pac. 635. In that case it is said: "The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of a jury to determine." The child there referred to was 10 years of age. In *Biggs v. Wire Co.*, 60 Kan. 223, 56 Pac. 4, 44 L. R. A. 655, the same rule was applied to a boy of 14 years, the court saying: "We cannot say as a matter of law at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence in a case like the present." In the case at bar the question of plaintiff's possession of sufficient intelligence and foresight is foreclosed, so far as the pleading is concerned, by the allegation that "he was too young and inexperienced to foresee the danger." It may be conceded that many boys of the age of 12 years would have perceived the danger attending the acts of the plaintiff which led to his injury. There is, however, no conclusive presumption that a 12 year old boy is able to foresee such danger, or that he has sufficient wisdom to avoid it. The question is one of fact to be shown by the evidence, and is not to be presumed in the face of an averment to the contrary. *Jenson v. Will & Finck Co.*, 150 Cal. 408, 89 Pac. 113; *Foley v. California H. Co.*, 115 Cal. 190, 194, 47 Pac. 42, 56 Am. St. Rep. 87. If the defendants had gone to trial and awaited the production of evidence upon the subject, it may be that contributory negligence would have been clearly shown. But by the allegations of the complaint, upon which they chose to rest their case, no such negligence appears. Contributory negligence is matter of defense,

where it does not appear upon the face of the complaint, or by the evidence for the plaintiff.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

152 Cal. 222

VAN LOENEN et al. v. GILLESPIE et al.
(L. A. 1,770.)

(Supreme Court of California. Oct. 22, 1907.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACTS—VALIDITY.

A contract for a street improvement, providing that damages from the nature of the work to be done, or from any unforeseen obstruction encountered, or from the action of the elements, or from any incumbrances on the lines of the work, or from any omission on the part of the contractor or any person employed by him not authorized by the agreement, shall be sustained by the contractor, though not in strictness a "specification" as designated in the contract and in the proposed work, is a part of the contract, and the contract is void authorizing the setting aside of assessments for the work.

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by William Van Loenen and others against Frank Gillespie and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The following was the opinion of HENSHAW, J. (with whom LORIGAN and McFARLAND, JJ., concurred), in Department No. 2:

"In this action, brought by plaintiffs to set aside assessments on their property, made by the street superintendent in proceedings under the street law, plaintiffs had judgment, and defendants appeal.

"Certain ordinances of the city of Los Angeles became incorporated as 'Specifications' in the proposed work, in conformity with which specifications bids were ordered, and the contract let. In particular, those specifications contained the following: 'All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any incumbrances on the lines of the work, or from any act or omission upon the part of the contractor, or any person or agent employed by him, not authorized by this agreement, shall be sustained by the contractor.' In *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, the specifications declare: 'All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor.' In the case at bar it will be seen that the language is in meaning identical with that condemned in *Blochman v. Spreckels*. The added clauses tend in no way to modify this conclusion, or to relieve the difficulty. *Blochman v. Spreckels* was decid-

ed by one department of this court, and in the other department was decided the case of *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091, where the same decision was reached. It must be concluded, therefore, that the trial court was correct in its determination. Nor can it matter that the provision thus condemned is not in strictness, a 'specification,' and would not be construed to be a 'specification' by an architect or builder. It is as much a specification as that condemned in *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, where the requirement was that the contractor should give a bond 'for keeping the street so improved in thorough repair for the term of five years from the completion of the contract.' Whether or not the language is, in strictness, a specification, it is certainly a binding term and condition of the contract.

"The judgment appealed from is therefore affirmed."

On rehearing, granted May 4, 1907, LORIGAN and SHAW, JJ., dissented for reasons stated in dissenting opinion in *Woollacott v. Meekins*, 91 Pac. 615.

Albert J. Sherer and J. Wiseman Macdonald, for appellants. O. B. Carter, for respondents.

PER CURIAM. Ordered that the opinion heretofore rendered by this court in Department 2 in this case is adopted as the opinion by the court in bank and the judgment affirmed accordingly.

SHAW and LORIGAN, JJ., dissent, for the reasons stated in the dissenting opinion in *Woollacott v. Meekins*, supra, heretofore rendered by the court in bank.

(153 Cal. 81)

DAVISSON v. EAST WHITTIER LAND & WATER CO. (L. A. 1,915.)

(Supreme Court of California. Feb. 15, 1908. Rehearing Denied March 16, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE—CONCLUSIVE-NESS.

Where there is a substantial conflict in the evidence, a finding of the trial court on such evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. ARBITRATION AND AWARD—AGREEMENTS TO ARBITRATE—CONDITION PRECEDENT TO ACTION.

Where a contract provided that, in case of a dispute between the contracting parties as to the value of extra work done or work omitted, the same should be valued by two competent persons, one employed by each of the parties, and, in case they could not agree, by an umpire selected by them, the submission of a controversy as to the value of extra work as stipulated for in the contract was a condition precedent to the maintenance of an action therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 30.]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by B. R. Davisson against the East Whittier Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, reversed in part, and remanded for new trial.

Hunsaker & Britt and Harris & Swanwick, for appellant. John E. Daly, E. W. Freeman, and A. D. Laughlin, for respondent.

PER CURIAM. This is an action to recover the sum of \$1,272.91, with interest, upon the first count, for labor done and materials furnished by plaintiff's assignor in constructing and laying pipe lines and building concrete boxes for the defendant corporation in the county of Los Angeles, for use in connection with its irrigating works, and, upon the second count, to recover the further sum of \$9,467.47, with interest, alleged to be due for similar work and materials furnished by plaintiff, principally in the construction of certain lateral pipe lines in said county of Los Angeles and the county of Orange, for the defendant corporation. Judgment was rendered in the superior court in favor of plaintiff for the sum of \$4,000, with interest and costs, and from the said judgment and an order refusing a new trial the defendant corporation appeals. The said sum of \$4,000, for which the trial court rendered judgment, comprises the full amount prayed for in the first count of the complaint, to wit, the sum of \$1,272.91, and the further sum of \$2,727.09, awarded by the court upon the second count of said complaint, which was for extra work.

Several questions are involved in this appeal, which will be considered seriatim, as follows:

1. Upon the first count in the complaint the finding of the trial court is as follows: "That between the 1st day of November, 1903, and the 11th day of March, 1904, plaintiff and J. F. Smith furnished materials and performed labor for the defendant at its special instance and request in constructing pipe lines, building concrete boxes, and in laying and completing certain pipe lines for the defendant in the county of Los Angeles, aforesaid, and that the defendant promised and agreed to pay to the plaintiff and said Smith therefor the sum of \$1,272.91. That no part of said sum has been paid. * * * That plaintiff is entitled to judgment against defendant for the amount of said sum of \$1,272.91," etc. In our opinion appellant's contention that the above finding is not supported by the evidence cannot be maintained. Appellant claims that the sum of \$1,272.91 awarded plaintiff by this finding was included in a payment of \$5,000 made to the plaintiff by Mr. Stowell, an officer of the defendant company, on May 14, 1904. The plaintiff testifies on cross-examination as to this matter as follows: "I received \$11,366.82, which has been paid on the second cause of action at various times. It was not received all in

one payment. The last payment of \$5,000 was on May 14, 1904. November 18, 1903, I received \$5,000. This payment was for the second cause of action. I received the money from Mr. Stowell." The plaintiff might have gone further in his testimony on this subject, but this clear cut and positive statement will at least bring the case within the rule of this court that a finding will not be disturbed when there is a substantial conflict in the evidence, and is sufficient to sustain the finding of which the appellant complains.

2. Counsel for appellant contends that the plaintiff is not entitled to maintain his action as far as the second count of his complaint is concerned, and in that connection invokes the following provision contained in the contract annexed to and made a part of the defendant's amended answer to the complaint, and found by the court: "Should any dispute arise respecting the true value of the extra work done, or works omitted, the same shall be valued by two competent persons, one employed by the owner and the other by the contractor, and, in case they cannot agree, these two to have power to name an umpire, whose decision shall be binding on all parties." In view of the conclusion at which we have arrived after a careful examination of the entire record, the effect of this provision becomes the most important matter remaining for consideration on this appeal. It becomes necessary, therefore, to determine the effect of the provision above set forth as to the valuation by arbitration of the extra work done. In *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54, the contract before the court was practically identical, word for word, with the one here involved. After a review of the authorities, Morrison, C. J., says: "In view of the foregoing authorities, and the principle they announce (which we believe to be correct), no right of action accrued to the contractor for the extra work done by him, until the same was valued, or some good and sufficient excuse for a failure to value the same in accordance with the agreement was shown. In this case no valuation was made, and no reason is shown for a failure to make such a valuation. We are therefore of the opinion that the contractor was not entitled to recover anything for extra work." The syllabus in *Holmes v. Richet*, supra, also contains a clear and concise statement of the legal principle contained in the opinion, which applies to the case at bar, as follows: "It now seems to be the settled law that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement. But when the agreement is that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action as if the parties had expressly so provided. So held, with reference to a contract for the construction

of a building in which it was agreed, that, should any dispute arise regarding the value of extra work, the same should be valued by arbitrators. * * * The distinction between the two classes of cases stated is that in the former the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences, to the exclusion of the courts, and in the latter they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication." See, also, *Loup v. Cal. Southern R. R. Co.*, 63 Cal. 103; *Scammon v. Denio*, 72 Cal. 398, 14 Pac. 98; *Tally v. Parsons*, 131 Cal. 516, 63 Pac. 833; *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903. It may be said that in the last case cited Mr. Justice Henshaw filed a dissenting opinion, and Mr. Justice McFarland also dissented; but it should be stated that the facts presented in *Roche v. Baldwin* were widely at variance with those in the case at bar. In the former case the making of the agreement as to compensation was squarely denied and absolutely repudiated by Mr. Highton, the plaintiff's assignor. In the case at bar the record contains no showing whatever of any attempt upon the part of plaintiff to procure an award in conformity with the terms of the contract, prior to the bringing of his action, or at any other time, nor do counsel for the plaintiff and respondent mention the matter in any way in their brief replying to the argument of appellant. We are of the opinion, therefore, that the judgment should be reversed as to the amount awarded on the second count of the complaint, to wit, the sum of \$2,727.09.

3. In view of the foregoing conclusions, it is not necessary to discuss the remaining points made by counsel. It may be proper to state, however, that the judgment in favor of plaintiff is too great by the sum of \$1,000, as shown by the judgment roll, the mistake having occurred in the subtraction of the amount which the trial court found had been paid by the defendant, to wit, the sum of \$11,366.82, from the amount found to be the reasonable value of materials furnished and labor done, to wit, the sum of \$13,093.91, which difference or balance the court found to be the sum of \$2,727.09, whereas it is plain that it should have been \$1,727.09. However, this matter becomes immaterial in view of the conclusions we have reached; and, for the purposes of the present appeal, the same may be said of the contention raised by counsel as to the divisible nature of the contracts involved in the action, and the question as to whether the evidence in the trial court was sufficient to warrant the findings. It is to be observed that this action was not brought to enforce a mechanic's lien, and that neither

the action nor the defense is based, in any respect, on the mechanic's lien law.

For the foregoing reasons, the judgment appealed from is affirmed as to the amount involved in the first count of the complaint, to wit, the sum of \$1,272.91, and interest thereon at the rate of 7 per cent. per annum from July 29, 1905, and reversed as to the sum of \$2,727.09, awarded to plaintiff upon the second count of the said complaint. The order refusing to grant a new trial is affirmed as to the first count of the complaint, and is reversed as to the second count. The cause is remanded for a new trial as to the last count, neither party to recover costs on this appeal.

153 Cal. 624

MERCED OIL MINING CO. et al. v. PATTERSON et al. (S. F. 4,640.)

(Supreme Court of California. May 20, 1908.)

1. MINES AND MINERALS—LOCATIONS—PLACER CLAIMS—CONVEYANCES—VALIDITY—EFFECT.

Where eight persons as associates make a location of 160 acres of mineral lands under the placer mining laws, and then, before making any discovery, convey a designated 40-acre part thereof to a grantee, with the expressed intent that the grantee shall have all the rights therein which the associates enjoyed, and there is no other agreement, the conveyance operates to sever the 40 acres from the balance, and make it a separate and independent claim, and a discovery made by the grantee thereon does not inure to the benefit of the associates.

2. SAME.

Where the conveyance was made under an agreement as a part of the consideration that a discovery made by the grantee shall inure to the benefit of the associates, a discovery made by the grantee inures to the benefit of the associates and subsequent grantees; the conveyance and agreement being valid.

3. EVIDENCE—PAROL EVIDENCE—CONVEYANCES—CONSIDERATION.

Where eight persons as associates made a location of 160 acres of mineral lands under the placer mining laws, and then, before making a discovery, made a conveyance to a grantee of a designated 40-acre part thereof, and the conveyance was silent as to any agreement of the parties with respect to the effect of any discovery made by the grantee, parol evidence that the conveyance was made under the agreement, as a part of the consideration, that work done and discovery made by the grantee should inure to the benefit of the associates and subsequent grantees, was admissible, under the rule that parol evidence is admissible to show the true consideration of a contract.

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Merced Oil Mining Company and C. H. Castle against R. L. Patterson and others. From a judgment for plaintiffs and an order denying a motion for a new trial, defendants appeal. Judgment in favor of plaintiff the Merced Oil Mining Company affirmed, and judgment in favor of plaintiff C. H. Castle reversed, and cause remanded.

N. C. Caldwell and E. A. Williams, for appellants. Frank H. Short and F. E. Cook, for respondents.

HENSHAW, J. In May, 1899, C. C. Spinks and his seven associates entered upon and located 160 acres of vacant, unoccupied mineral lands of the United States under the placer mining laws. The mineral for which the lands were thought to be valuable was oil. The boundaries of the consolidated claim were marked, and the locators proceeded with the work of development to make an oil discovery. On the 27th day of January, 1900, and before any discovery of oil had been made by the associates, they conveyed a certain 40 acres of their 160 acres to the Merced Oil Mining Company, and on the 20th day of February, 1900, they conveyed another 40 acres to C. H. Castle. The Merced Oil Mining Company prosecuted the work of discovery by drilling a well, and in the September or October following made a sufficient discovery of oil. The conveyance by Spinks and his associates of the 40 acres to the Merced Oil Mining Company, so far as appears from this record, was a conveyance of their rights to the specific 40 acres in severalty, and the same may be said of the 40 acres to Castle.

These two plaintiffs join in a single action as deriving title from a common source, alleging a trespass and interference by the defendants with their ownership and right of possession to these lands so conveyed to them, seeking a decree quieting their title against the defendants, and an injunction restraining the defendants from further trespass and interference with the freehold. The defendants, for their claim of title, set forth later locations made by them upon these same lands. The cause was tried before a jury, which returned special verdicts upon the issues propounded. These special verdicts were adopted and embodied in the judgment of the court. A motion for new trial was made and denied, and defendants appeal from the judgment and from the order so denying their motion for a new trial.

Upon the trial the court adopted, as the correct interpretation of the law, the theory of plaintiffs, namely, that the consolidated claim of Spinks and his associates to the 160 acres constituted a single claim, with the right of possession in Spinks, his associates, and their grantees as against attempted relocations, made while they were actually in the possession of the land and diligently prosecuting the work for the discovery of oil; that the expenditure of \$100 per year upon any part of the 160 acres was an expenditure for and on behalf of the whole claim of 160 acres, and that a discovery of oil upon any part of the 160 acres perfected the location of the whole 160-acre claim. Upon this appeal respondents contend that full support for this theory of the law is found in the case of *Miller v. Chrisman*, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. In *Miller v. Chrisman* this court was called upon to consider a situation where the associates had conveyed all their

interests in the 160-acre claim to one of the number. The contention advanced in that case was that, by these conveyances made before discovery of mineral, the whole location lapsed and became void, or, in the alternative, at least, the associates' rights to 140 acres lapsed, leaving Miller, the last associate and the grantee of the others, a location of only 20 acres in and about the situs of the oil discovery which he afterward had made. It was said in *Miller v. Chrisman* that when the eight citizens, who separately would have been entitled to locate each no more than 20 acres, consolidated and together located 160 acres, the location was not to be deemed eight separate locations of 20 acres each, but was, within the contemplation of the law, a single location of 160 acres, the exterior boundaries of this location being all that they were called upon to demarcate, their right of possession being a common right of possession, their interests common and undivided interests, and that as the law governing such locations provided that, when one or another of the associates abandoned, his interest should go to such associates as continued in possession doing the work, no reason could be seen why one or more of these associates could not, by conveying to their co-locators, accomplish the same result as would be worked by their abandonment, and it was therefore held that by force of such conveyance the remaining associates or associate acquired all the rights of the others in the whole 160-acre claim. Strictly, therefore, the decision in *Miller v. Chrisman* went no further than to hold that conveyances by the associates amongst themselves, which in no manner segregated the interests, nor destroyed, nor impaired the right of possession which they enjoyed in common, were permissible and legal. The decision of the trial court in the case at bar, it is to be noted, is a long stride in advance of the decision in *Miller v. Chrisman*. By stipulation of the parties, all questions of weight and conflict in the evidence are eliminated, and the court is asked to decide the following legal questions:

"(A) Was the discovery of oil made by plaintiff, the Merced Oil Mining Company, on the 40 acres conveyed to, and held by, said company, sufficient to validate and perfect the entire location of said quarter section under which said corporation derails title to its respective 40 acres as a placer mining claim, and to relieve the said C. H. Castle from the necessity of making any discovery of oil upon the 40 acres claimed by him in order to perfect his claim to such 40 acres under the laws of the United States?

"(B) After the different parts and portions of said quarter section had been conveyed to, and held by, the several parties as shown by said statement and the verdict and findings herein, was \$100 worth of work done upon any one of the several parts and por-

tions a sufficient compliance with the laws of the United States requiring the performance annually of \$100 worth of work upon any placer mining location, as to the entire location of 160 acres, or was each of said parties required under the laws of the United States to perform \$100 worth of work upon each part and portion so held by each party in severalty?"

The case thus presented is not that of a conveyance by one associate to another or to an outsider of his undivided interest, but is a conveyance to an outsider by all of the associates of all their interest to certain designated and described portions of their 160-acre claim. By the conveyance to Merced Oil Mining Company (and the same is true of course of the conveyance to Castle), the associates stripped themselves of all rights of possession, of all right to enter upon the 40 acres of land to prosecute their mining operations, and, upon the other hand, the Merced Oil Mining Company, in taking the associates' title to this 40 acres, acquired no right of entry whatsoever upon the lands remaining to the associates. So far as the record before us discloses, this was the situation.

No doubt may be entertained that a conveyance such as this may be made, and that the effect of such conveyance, if such be its expressed intent, is to surrender to the grantee all of the rights which the grantors formerly enjoyed. If such a surrender be made, without further understanding and agreement between the parties, it is apparent, we think, that the portion so served must be regarded as a separate and independent claim. Excepting as preserved by the agreement of the parties, there are no rights in common between the grantors and the grantee. The right of possession to the portion of the consolidated claim so severed by conveyance is lost to the original associates. In effect it is an abandonment by them of that piece of land. It is their declaration that they no longer hold such land under the right of possession in common which they enjoy as to the remainder. It cannot be perceived, therefore, that under the circumstances stated a discovery made by such independent owners upon the limited tract conveyed to them can be held to redound to the benefit of the associates who have parted with all interest in and control over it. This, we say, must be the condition where the agreement of the parties goes no further than to a bare conveyance of the grantor's possessory rights. But, upon the other hand, by convention and agreement of the parties, a radically different result may be legally accomplished. No one would question but that the associates might authorize a stranger to their interests to enter upon their land and sink a well, agreeing, in the event of a discovery of oil, to convey to such person any designated portion of the claim. In such

case clearly the work would be done for the benefit of all the associates and of the whole claim. It cannot make any difference that the conveyance to the party who is so to develop the land is made before or after discovery, provided that it be understood between them that, as part of the consideration, the work done and the discovery when made shall be for the benefit of the whole claim. As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties, and need not, therefore, be embodied in the deed. As in the case of quartz locations, it is permissible for two locators to join in sinking a shaft or driving a tunnel without the boundaries of their locations in their effort to strike the vein or lode, with the result that the work so done is deemed in law to have been done on and for the benefit of their respective locations, so in these placer locations no reason is perceived why the parties may not make a conveyance of a divided as well as an undivided interest, to the end that the grantee may prosecute the work of discovery for the benefit of all. But, upon the other hand, while the distinction made may perhaps be regarded as overrefined, nevertheless logically the contrary of the proposition is equally true, that if such conveyance be made, without any such understanding, it is in law no more than a surrender and abandonment of the possessory rights which the original locators had, and the establishment, in effect, of a new and independent location in their grantees.

Coming to apply this principle to the facts in the case, if as a part of the consideration of the deed to the Merced Oil Mining Company it was understood and agreed between the parties that the labor done and money expended upon the Merced Oil Company's 40 acres should operate for the benefit of the land remaining in the possession of the associates, such effect would be legally given. And, in turn, the value of the work and the resulting discovery would redound to the benefit of all subsequent grantees of the associates. In this sense must be understood the declaration in *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023. The title of the Merced Oil Mining Company does not by appellants seem to be seriously questioned, but, as to the right and title of Castle, it appears from the instructions given by the court to the jury that they were advised, in effect, that the possession and discovery by either plaintiff of his segregated portion of the claim was a possession and discovery of both plaintiffs. This, as has been discussed, was too broad a statement of the law, and it follows, therefore, that the judgment in favor of castle must be reversed and the cause remanded.

The judgment in favor of the Merced Oil Mining Company is affirmed, and the judg-

ment in favor of C. H. Castle is reversed and the cause remanded.

We concur: ANGELLOTTI, J.; BEATTY, C. J.; LORIGAN, J.; SLOSS, J.

(153 Cal. 543)

HASKELL et al. v. CITY OF LONG BEACH et al. (L. A. 2,015.)

(Supreme Court of California. May 12, 1908.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—ELECTIONS.

St. 1889, p. 358, c. 247, as amended by St. 1905, p. 551, c. 411, relative to the annexation of territory to incorporated cities, provides that notice of intention to hold an annexation election shall invite the electors to vote by placing on their ballots the words "for annexation" or "against annexation," or words equivalent thereto, and that the ballots used at such election, the opening and closing of the polls, the holding and conducting of the election shall be in conformity as far as may be with the general laws concerning elections, and that in counting the ballots and making returns the board shall do as nearly as practicable in the manner provided in the election laws. *Held*, that ballots cast at an election, stamped in the line bearing the phrase "for annexation," were not invalid because of the fact that they were not stamped in the voting square, as required by the general election law.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by L. E. Haskell and another against the city of Long Beach and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

M. P. Goodrich, Ex-City Atty. of San Pedro, J. S. Chapman, and Ward Chapman, for appellants. Lawler, Allen & Van Dyke & Jutten, H. Steylitz, City Atty. of San Pedro, George A. Skinner, City Atty. of Long Beach, and John E. Daly, Ex-City Atty. of Long Beach, for respondents.

LORIGAN, J. Plaintiffs' appeal from a judgment in favor of defendants and from an order denying their motion for a new trial.

This action was brought to set aside and annul an attempted annexation by the city of Long Beach of certain territory on Terminal Island, lying between the cities of Long Beach and San Pedro, in Los Angeles county. The plaintiffs are residents and taxpayers of the territory sought to be annexed and bring the action on the ground that at a special election held for the purpose of determining whether annexation should be made such attempted annexation was in fact defeated by a majority vote of the electors in the territory sought to be annexed, and that the finding of the election board of the election precinct embracing that territory, and the finding of the board of trustees of the city of Long Beach, after a canvass of the votes cast, to the contrary, were both void. The proceedings for the annexation of the territory in question were

had under the statute of 1889, as amended in 1905, providing for the alteration of boundaries of, and for the annexation of territory to, incorporated cities and towns. Stats. 1889, p. 353, c. 247; Stats. 1905, p. 551, c. 411. There is no question in the case as to the regularity of all the proceedings relative to the special election at which the proposition for the annexation of the territory in question to the city of Long Beach was voted on. In order to affect annexation of outside territory to an incorporated city, it is necessary under the statutes above referred to that at a special election held for that purpose there shall be a majority vote in both the municipality and in the territory to be annexed in favor of the proposition of annexation then submitted. The vote in the election precincts embracing the city of Long Beach was largely in favor of the proposition, but it is insisted by appellants that in reality the proposition was defeated by a majority vote of the electors in the territory sought to be annexed. In the election precinct which embraced that territory there were cast 146 ballots. The election officers of the precinct in the count of the ballots unanimously rejected one ballot as improperly marked, and that this was proper is not questioned. The election board certified that 145 legal votes had been cast, of which there were found 73 in favor of annexation and 72 against it, and that the proposition to annex the territory had been carried by a majority of one and the returns being delivered to the board of trustees of the city of Long Beach were canvassed by that body and the same result declared. The action of the plaintiffs was based upon a claim that the certificate of the election officers was false; that the officers counted certain ballots which were illegal and void and which should have been rejected; that in fact according to the legal ballots cast the proposition for annexation, instead of being carried by a majority of one, had been defeated, by just that majority.

Fac similes of the ballots the legality of which are questioned are set forth in the record. There are four, and their validity or invalidity is the only question in the case which requires consideration. The resolution passed by the board of trustees of the city of Long Beach calling such special election, and the notice of election prescribed the form of ballot to be used with instructions in said notice of election to the voters as follows: "To vote, stamp a cross (X) in the voting square to the right of and opposite the answer you desire to give; all marks except the cross (X) are forbidden; all distinguishing marks or erasures are forbidden and make the ballot void." These instructions were also printed on the ballots which were otherwise similar to that required by section 1197 of the Political Code, and a

copy of the form of ballot furnished the voters at their election in question is as follows:

1	For Annexation	
2	Against Annexation	

Two of the ballots in question had a cross stamped after the words "For Annexation" and one of them had a cross after the words "Against Annexation," but on each the cross was stamped in the parallelogram to the left of what was intended on the ballot to be the voting square and not in the square itself. The fourth ballot was marked with a cross to the left of the words "For Annexation" and stamped in the square containing the number "1." The trial court held these four ballots to be legal and to have been properly counted. Appellants contend that this was error, and that such ballots should have been rejected.

It is provided by the first section of the act under which these annexation proceedings were had that "such notice" [the published notice of the resolution of intention to hold an annexation election] "shall distinctly state the proposition to be submitted, i. e., that it is proposed to annex to, incorporate in, and make a part of such municipal corporation the territory sought to be annexed, specifically describing the boundaries thereof; and in said notice the qualified electors of said municipal corporation, and the qualified electors residing in said territory so proposed to be annexed, shall be invited to vote upon such proposition by placing upon their ballots the words 'for annexation' or 'against annexation' or words equivalent thereto." It is further provided in said act that "the ballots used at such election, the opening and closing of the polls, and the holding and conducting of such election shall be in conformity, as far as may be, with the general laws of this state concerning elections"; and further that in counting the ballots and making returns the election board should do so "as nearly as practicable in the manner provided in the election laws of this state."

It is insisted by appellants that under the latter provisions of the act it was intended primarily and unqualifiedly to preserve in such elections all the safeguards minutely provided for in the general election law and to make its provisions applicable; that, under the provisions of that law in order to make a ballot legal and valid, it must be stamped with a cross in the square provided for that purpose; that this provision is mandatory, and that as the four ballots in question here, having the cross stamped in places other than the voting square where the mandatory provision of the general election law required them to be, were invalid and should have been rejected. Conceding, without deciding, this position of appellants to be correct if the validity of ballots cast at an elec-

tion under the annexation act are to be tested by the provisions of the general election law, still it is insisted by respondents that in an election of the kind here involved the electors are not bound by the provisions of the general election law as to how they shall mark their ballots so as to indicate their intention with reference to the proposition of annexation submitted to them; that under the act they are not controlled in their expressions of intention by these provisions of the general election law but may express such intention by marking the ballot in any manner which will indicate such intention on the subject of annexation.

We think this position of respondents is correct. It will be observed that under the provision of the annexation act which states how the voter shall be invited to express his choice of the proposition of annexation there is no requirement that that choice shall be indicated in any particular manner. Nor in the provision making the general election law in certain respects applicable to elections held under the act is there any such explicit language used as would indicate that such choice must be made by marking the ballot in the voting square and nowhere else. If it was intended that such law, in this particular, should be applicable to elections under the act, it is only reasonable to assume that the Legislature would have so declared. The provision in the act that "the ballots used at the election, the opening and closing of the polls, and the holding and conducting of such election shall be in conformity, as far as may be, with the general laws of the state concerning elections," is not an express requirement that the ballots shall be marked in the particular voting square, where under the general election law it is required that the cross shall be placed. The expression used in this particular provision "as far as may be" and the expression in the section of the act heretofore referred to relative to the counting of the ballots by the election board and the returns, and requiring that this shall be done "as far as practicable" according to the provisions of the general election law, indicates that some relaxation of the requirements of that general law as to all these matters was permitted. Of course, these expressions, on account of their indefiniteness, render it very difficult to determine just to what extent it was intended that the provisions should be relaxed, but we think that the expression "as far as may be" found in the provision in reference to the ballots and the holding and conducting of the election was used in view of the fact that the prior provision of the act relative to the method in which the elector might express himself on the proposition of annexation was quite liberal as to the method whereby that choice might be indicated, and that it was not intended to curtail it in any respect. That prior provision is that the "qualified electors residing in said territory so proposed to be

annexed shall be invited to vote upon such propositions by placing upon the ballots the words 'for annexation' or the words 'against annexation' or words equivalent thereto." By this provision any method of indicating his wish upon the subject, either by placing upon the ballot "for annexation" or "against annexation," or "words equivalent thereto," was permitted, and, as we say, it was doubtless the intention of the Legislature, while providing that the general election law should apply to elections under the annexation act, "as far as may be," to relax the provisions of that law as to marking in the voting square, and to permit the expression of the voter to be indicated by marking the ballot in any manner which would clearly and reasonably indicate such choice. It will be observed that under the first provision of the act inviting the voters to indicate their choice on the proposition submitted by the use of the words there mentioned or equivalent words it is not required that the ballot furnished to the voter shall have these words or any equivalent words printed on it. The city of Long Beach might have provided a blank form of ballot which would have permitted the voter, as the section permitted him, to indicate his choice by writing thereon the words specially mentioned in the provision or other equivalent words. The municipality could, it is true, print on the ballots furnished the voters the words "for annexation" or "against annexation." This would be a substantial compliance with the statute as was held in *People et al. v. Los Angeles*, 133 Cal. 345, 346, 65 Pac. 752, as far as submitting the proposition to the choice of the voters. At the same time it would not have interfered with the right of the voter, or limited that right, as to the mode he might adopt in giving expression to the alternative choice submitted to him. In the case last cited it appears that in the annexation election in question there a ballot similar to the one used in this election was submitted to be voted on with similar instructions to the voter to place the cross in the square. While the precise point made here does not appear to have been involved in the case cited, still the court in holding that such a ballot might be provided for the election and would be a substantial compliance with the first provision of the annexation act says as to the effect to be given to the ballot where so provided and used that "it (the ballot) should be read in the light of all the circumstances surrounding the election and the voter, and the object should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty. The ballot should be liberally construed and the intendments should be in favor of a reasoning and construction which will render the ballot effective rather than some conclusion which will, on a technical ground, render it ineffective. *Behrenmeyer v. Kreitz*, 135 Ill. 595, 26 N. E. 704." If the provision

of the general election law was to be applied as appellants insist it should, it would be a restriction and limitation of the liberal method which the annexation act itself offered the voters to express their choice, and while the Legislature might make such a restriction, notwithstanding the method was otherwise liberally extended, we should not construe a provision which is indefinite and doubtful on the subject as having accomplished that result. Under this view, we perceive no reason why these ballots should not be held valid. The voter has clearly indicated by his manner of voting his choice upon the proposition. The only purpose of the annexation law is to ascertain the wishes of the voters upon the subject—the number of those voting in the affirmative and those voting in the negative—and it is apparent from the general language used that great liberality was intended to be afforded to the voter in expressing his choice, and that any method which the voter adopted filled this requirement. All that is necessary is that it be manifest from the ballot of the voter that he has clearly indicated his choice upon the subject, and, in using a cross to indicate such choice, it is not necessary under the annexation act that he use it in conformity with the general election law, and that he should place it in the voting square. It is necessary only that he so use it that its use leaves no doubt as to how he intended to vote upon the proposition. When he has done this he has complied with the annexation law as to voting and the vote must be counted. Now, take the ballots in question. There can be no doubt but that the two voters who placed a cross in the parallelogram to the right of the words “for annexation” intended to vote affirmatively upon the proposition; neither can there be any doubt that the one who stamped the cross in the same place after the words “against annexation” intended to vote negatively on it; nor can it be doubted that the voter placing the cross in the numeral square to the left of the words “for annexation” intended to vote in behalf of the proposition. So that, the intention of the voter being clear from the ballot, the purpose of the provisions of the annexation law was accomplished in the method it allowed and the votes were legal and valid. This being true, it cannot be, as suggested by counsel for appellants, that these crosses, as placed by the voters, were distinguishing marks. The crosses were placed on the ballot where the voter had a right legally to place them, and hence are not subject to the objection that they constituted distinguishing marks. *Tibbe v. Smith*, 108 Cal. 108, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68.

It is insisted, however, by the appellants that, even if the provisions of the general election law as to placing the cross in the voting square is not applicable to the election held under the annexation act, still the

notice of election given by the board of trustees of the city of Long Beach and the directions on the ballots requiring that “to vote, stamp the cross (X) in the voting square to the right of and opposite the answer you desire to give” was a mandatory requirement and noncompliance therewith rendered the ballots in question invalid. There is no merit in this claim. While counsel for appellants have cited a number of cases in support of this proposition, they are cases where elections were held under the general election laws. But as we have concluded that the provisions of the general election law are not applicable under the terms of the annexation act—at least to the extent of marking the ballot by placing a cross in the voting square—there is nothing in the act anywhere authorizing the board of trustees to prescribe any directions as to placing the cross in a voting square. The statute, as we have seen, is quite liberal in its terms, and allows the voter to adopt any method of stamping a cross on his ballot which will show the intent with which he voted on the proposition submitted. While it was not improper in the notice of election to direct the voter where he should mark his ballot so as to best evidence his intention, still such directions could not have the force of mandatory provisions because they are not authorized by any provision of the annexation act. In order to be mandatory, it must at least appear that the directions were warranted by some provision of law. There being no such provision, the directions on that subject by the board in the notice of election and on the ballots were directory merely, and noncompliance therewith did not invalidate the ballot so long as it appeared from any mode of stamping thereon that the voter had clearly indicated his choice on the submitted proposition.

While some other points are made by the appellants as to the canvass of the vote by the board of trustees of the city of Long Beach and upon the findings made by the court, we do not perceive that they present any errors which would call for a reversal of either the order or the judgment, and they are both affirmed.

We concur: HENSHAW, J.; ANGEL LOTTI, J.; SHAW, J.; SLOSS, J.

8 Cal. App. 82

PEOPLE v. YUN KEE. (Cr. 45.)

(Court of Appeal, Third District, California.
April 11, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS—REPETITIONS.

A requested instruction need not be given, a similar instruction having been given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. SAME—REASONABLE DOUBT.

An instruction on reasonable doubt is not objectionable because of the sentence: “A rea-

sonable doubt is a doubt based on reason, and growing out of the testimony and evidence in the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1906-1922.]

3. SAME—PRESUMPTION OF INNOCENCE—RECONCILING EVIDENCE.

The statement in a requested instruction on presumption of innocence: "It is the duty of the jury, if possible, to reconcile the evidence with this presumption"—is sufficiently covered by instructions that every accused person is presumed to be innocent until his guilt is established to a moral certainty and beyond a reasonable doubt, that defendant is entitled to this presumption of innocence until the minds of the jurors are convinced of his guilt beyond a reasonable doubt, and that if they believe the evidence on any essential point admits of any reasonable doubt, he is entitled to the benefit of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

4. SAME—NECESSITY OF INSTRUCTIONS.

There is no necessity of giving a requested instruction cautioning the jury against allowing their judgment "to be swayed by any popular feeling that may exist on the outside," and that "the multitude are not the judges in this case," there being nothing in the case to suggest that "popular feeling" has in any way been aroused or has manifested itself, or that there is anything calculated to arouse popular feeling "on the outside" or elsewhere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Yun Kee, charged as Choy Lung, was convicted and appeals. Affirmed.

C. H. S. Bidwell and Grove L. Johnson, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of robbery. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The sufficiency of the evidence to warrant the verdict of the jury is not questioned. A reversal is asked on the ground that the court erred in giving a certain instruction, proposed by the people, and in refusing to give instructions, asked by defendant, marked 3, 7, and 13. The instruction given at the request of plaintiff was upon the doctrine of reasonable doubt. That part of the instruction complained of reads as follows: "By this term 'reasonable doubt' is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to your minds. It is not a mere guess or surmise, because everything relating to human affairs and dependent upon moral evidence is open to some fanciful doubt or conjecture. *A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case.* A reasonable doubt is that state of the case, which, after an entire comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a certainty, that the accused committed the offense." The ob-

jection is thus stated in the brief: "It requires the jurors to give a reason for their doubt, based upon the evidence introduced." It is further urged that the instruction is "ambiguous and abstruse"; that while the last part of the instruction conforms to that given in *Commonwealth v. Webster*, by Justice Shaw, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, it gives but a part of that instruction, and the court erred in refusing defendant's instruction marked 3, which was the instruction given in the Webster Case, and in holding that it was elsewhere given. So far as this latter instruction attempted to state the doctrine of reasonable doubt it is substantially the same as the one given, except the sentence italicized, as shown above. Some point is made that upon the authority of *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734, it was the duty of the court to give instruction 3, even though the court had given a similar instruction elsewhere. We do not understand this to be the rule. The trial court is not required to repeat instructions once given. Besides, there were some other rules for the guidance of the jury, stated in the proposed instruction, which were elsewhere given correctly. The only objection, therefore, is to that part indicated by italics. In it we discover no error. If a reasonable doubt growing out of the evidence in the case is not to be based upon reason, we are at a loss to discover a foundation for it, unless it be based upon mere conjecture and irrational speculation, and this is not permissible.

Instruction marked 7 stated the rule as to the presumption of innocence, and that "it is the duty of the jury, if possible, to reconcile the evidence with this presumption." It is claimed that the part of the instruction above quoted was not elsewhere given. An instruction at folio 53 was as follows: "All presumptions of law are in favor of innocence, and every person accused of crime is presumed to be innocent until his guilt is established to a moral certainty and beyond a reasonable doubt. This is a substantial right given by the law to every person accused of crime, and this defendant is entitled to this presumption of innocence until your minds are convinced of his guilt beyond a reasonable doubt." The court, at defendant's request, instructed the jury that if "they believe that the evidence upon any essential point in the case admits of any reasonable doubt, the prisoner is entitled to the benefit of it." The court did not use the language requested by defendant, but an intelligent application of the instructions given, which we must presume was given by the jury, must necessarily have led the jury to consider the evidence with this presumption present in their minds. Where followed by "with" or "to" the word reconcile means to make consistent, to bring to agreement. Webster's Dictionary. The jury could not have reached a verdict of guilty, having the in-

structions as given in mind, without having found that the evidence could not be reconciled; i. e., made consistent with the presumption of innocence.

Instruction 13 was refused because elsewhere given. It was framed to caution the jury against allowing their judgment to be influenced by bias or prejudice or their judgment "to be swayed by any popular feeling that may exist on the outside; the multitude are not the judges in this case." The court fully instructed the jury on this point, but did not caution the jury against being swayed by "popular feeling," nor did it inform the jury that "the multitude are not the judges of this case." There is nothing in the case to suggest that "popular feeling" had in any manner been aroused or had manifested itself in any way, or that there was anything in the case calculated to arouse popular feeling "on the outside" or elsewhere, and certainly it was not necessary to instruct the jury that "the multitude are not the judges in this case," nor was it prejudicial to refuse to so instruct the jury.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

8 Cal. App. 71

HOGAN et al. v. BIGLER. (Civ. 439.)
(Court of Appeal, First District, California.
April 9, 1908. Rehearing Denied
June 8, 1908.)

**MECHANICS' LIENS—PROCEEDINGS TO PERFECT
—FILING OF CLAIM—SUFFICIENCY.**

Where a claim of lien, filed by one claiming to have furnished materials which were used in a building or structure, does not state the name of the person to whom the materials were furnished, as expressly required by Code Civ. Proc. § 1187, it cannot be the basis for the enforcement of a mechanic's lien on the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 243.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Mechanic's lien proceeding by Hugh Hogan and others against Louisa Bigler. Judgment for plaintiffs, and defendant appeals. Reversed.

B. F. Bergen and Harry H. Johnson, for appellant. J. E. McElroy, for respondents.

COOPER, P. J. Plaintiffs recovered judgment, foreclosing a materialman's lien on the premises described in the complaint, belonging to defendant, Louisa Bigler. It is required by the Code (Code Civ. Proc. § 1187) that the claim or notice of lien, filed by one claiming to have furnished materials which were used in the building or structure, shall state, among other things, "the name of the person to whom he furnished the materials." In this case the claim of lien stated that the lumber was sold and furnished to J. J. Crawford, and the complaint so alleges. The evidence shows without conflict that the lum-

ber was sold to Fred Hambleton, and the court finds that the lumber was sold, furnished, and delivered to "E. C. Wood, F. Hambleton, and C. M. Cook." The notice of lien, therefore, did not comply with the plain mandate of the statute. Plaintiffs sold the lumber directly to Hambleton; that is, Hambleton was the party who went to them and ordered the lumber. They knew him, and no matter what he stated as to the party for whom he was purchasing the lumber, they could easily have complied with the law by stating the fact, in their claim of lien, as to whom the lumber was furnished. The courts have uniformly held that the party who desires to avail himself of the provisions of the mechanics' lien law, so as to charge the land or building of a third party with a debt incurred by another, and not by the owner, must comply substantially with the statutory requirements as to making out in writing and verifying his claim of lien. We have no power to dispense with the plain requirements of the statute. The Legislature saw fit to require that the claim should state the name of the person to whom the materials were furnished. The claim in this case does not do so; hence it cannot be the basis for the enforcement of a lien on the land of the defendant, Louisa Bigler.

In *Madera Flume Company v. Kendall*, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177, the notice of lien did not state the name of the person to whom the plaintiff furnished the materials, and it was held insufficient. The court said, after quoting the statement in the claim of lien: "In this statement the plaintiff does not state that it furnished any of these materials to William Price, nor does it state the name of the person to whom it did furnish them. Not only does the statement fail to name the person to whom the materials were furnished by the plaintiff, but it is consistent with their having been furnished by it to some one other than Price, for whom he obtained them in fulfillment of his contract with Kendall." It appears clear that if a notice or claim of lien states that materials were furnished to a particular person, when, as a fact, they were sold to a different person, and not to the person named, such claim would be more objectionable and defective than if the claim of lien had contained no statement. In the one case no information is given, and in the other information is given which is untrue and misleading. See, further, *McDonald v. Backus*, 45 Cal. 262; *Wood v. Wrede*, 46 Cal. 637; *Hooper v. Flood*, 54 Cal. 218; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195. In *Buell & Co. v. Brown*, 131 Cal. 158, 63 Pac. 167, it is said: "To charge their property by virtue of this statute it was necessary for him [the lien claimant] to comply with the mandates thereof. We are not required to give a strained construction to the statute in order to enable plaintiff to collect its debt from parties who never agreed to pay it,

and who never requested the delivery of the materials." In *Santa Monica Co. v. Hege*, 119 Cal. 377, 51 Pac. 376, it is said: "The right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Unless the notice of the lien, which is filed with the county recorder, contains the statement required by section 1187 of the Code of Civil Procedure, the claimant is not entitled to his lien. This section requires the claim of a materialman to contain a statement of his demand after deducting all just credits and offsets, also a statement of the terms, time given, and conditions of his contract. The provision that the claim must contain all those statements means that the statements thus contained must be correct. If they are not correctly stated their right to a lien is lost."

It follows that the judgment must be reversed; and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

8 Cal. App. 51

Ex parte DIEHL. (Cr. 68.)

(Court of Appeal, Third District, California.
April 7, 1908.)

1. LICENSES—REGULATION OF BUSINESS.

Horseshoeing is a business which cannot be regulated.

2. SAME—MUNICIPAL CORPORATIONS—REGULATION OF BUSINESS—STATUTORY AUTHORITY.

Where a city, having express power to license every kind of business, either for revenue or for regulation, imposes a license tax on a business which cannot be regulated, there is no presumption that the ordinance imposing the tax was a measure of regulation, merely because of the absence of language therein indicating its purpose to be for revenue, but the presumption is that the measure is a revenue measure.

3. SAME—"BUSINESS."

The word "business" in *Freeholders' Charter*, St. 1903, p. 697, c. 31, authorizing a municipal corporation governed by the freeholders' charter to license, for purposes of regulation and revenue, "all and every kind of business transacted or carried on" in the municipality, includes, with a few exceptions, all manner of occupations or means by which persons earn a livelihood, and includes the business of horseshoeing carried on within the limits of the city, and an ordinance imposing a license tax on such business is valid.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 915-923; vol. 8, pp. 7593-7594.]

4. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—FAILURE TO TAKE OUT LICENSE.

The penal clause of an ordinance imposing, for purpose of revenue, a license tax on enumerated businesses, declaring that any person violating any of the provisions of the ordinance shall be guilty of a misdemeanor, and shall, on conviction, be punished by a fine, or imprisonment until the fine is paid, does not authorize imprisonment until the license tax is paid, but the misdemeanor consists in a refusal to obey the ordinance, and the fine authorized to be imposed on conviction is not intended as a payment of the license tax, but as a punishment for a violation of the ordinance, and the penal

clause is not invalid as providing for a penal punishment for the nonpayment of a debt.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 10, *Constitutional Law*, § 151½.]

5. MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL—REVENUE—LICENSES.

Under *Const. art. 11, § 6*, as amended in 1896 (St. 1895, p. 450, c. 23), declaring that the charters of cities shall be subject to general laws, "except in municipal affairs," etc., *Pol. Code*, § 3366, enacted in 1901, restricting the power of licensing by local legislative bodies of all and every kind of business to the purposes of regulation, has no application to a municipality governed by *Freeholders' Charter*, St. 1903, p. 697, c. 31, authorizing the imposition of a license tax for purposes of regulation and revenue.

Habeas corpus by P. Diehl, praying for his discharge from custody, under a warrant issued out of a justice's court for a violation of a municipal ordinance. Petitioner remanded.

Theo. A. Bell and Jos. D. Cornell, for petitioner. Wallace Rutherford, City Atty., for respondent.

HART, J. The petitioner was arrested by N. E. Boyd, city marshal of the city of Napa, upon a warrant of arrest issued out of the justice's court of Napa township in the county of Napa. The complaint upon which said warrant of arrest was issued charges the petitioner with the violation of Ordinance No. 374, as amended by Ordinance No. 400, of said city of Napa, in that said petitioner engaged in carrying on the business of horseshoeing "for profit, for which a license is required, without procuring a license therefor." It is claimed by the petitioner that his restraint is illegal and void, and he, therefore, asks that he be restored to his liberty through the writ of habeas corpus. The ordinance referred to enumerates a long list of businesses and occupations made, by the provisions thereof, subject to a municipal license tax. In certain instances the amount of the tax required is graduated according to the amount of the business done. Section 21 of said ordinance provides that "every person engaging in the business of shoeing horses, or who does a general blacksmithing business, shall pay a license tax of one dollar per month." Section 4 authorizes the city tax collector to institute suit against any person carrying on any of the businesses or occupations mentioned in the ordinance, who has failed or refused to take out the required license for the recovery of the amount of the license tax. Section 69 provides that "any person violating or willfully noncomplying with any of the provisions of this ordinance is guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than \$5.00 nor more than \$100.00, or imprisonment in the city jail until said fine is paid," in proportion to one day for each dollar of such fine. It is claimed that so much of said ordinance as requires the payment of a license tax as a condition to carrying on the business or exercising the oc-

cupation of horseshoeing, and subjecting a person to the penalty of a misdemeanor for failure to procure the license prescribed, is unconstitutional and void, for the following reasons: (1) That said ordinance attempts to regulate the occupation of horseshoeing, which occupation is not subject to regulation. (2) That the occupation of shoeing horses is not a business carried on or transacted for profit.

The city of Napa is governed as a municipal corporation, by a freeholders' charter, and among the powers thereby granted to the city council or governing body of said municipality is that of licensing, for purposes of regulation and revenue, "all and every kind of business transacted or carried on in said city," etc., and "to provide for the collection thereof by suit or otherwise." St. 1903, p. 697, c. 31. It is contended that the ordinance under consideration does not show upon its face that it is a revenue measure, and that, therefore, the presumption is that it was intended for regulatory purposes. In support of this position counsel cite *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, and *Cooley on Taxation* (3d Ed.) p. 1139. We do not think the contention of the petitioner is sustained by the authorities cited. It is true that it appears to be the rule, as Mr. Cooley declares it to be, that, "as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given, the intentment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated." And the Illinois Supreme Court, in *Bessette v. People*, supra, only follows and adopts the rule as thus laid down by Judge Cooley. But in the case at bar there is no reason for invoking the operation of a presumption as to the object of the provision of the ordinance requiring a license tax to be paid by a person engaging in the occupation of horseshoeing within the limits of the city of Napa. The charter, as we have seen, grants to the municipal authorities the power to license a business either for revenue or for regulation. Thus it is to be observed that there is "something in the language of the grant" indicating that the provision in question involves only the exercise of the taxing power. The provisions of the ordinance grading the amount of the tax on certain businesses therein enumerated according to the amount of the business transacted furnish additional evidence that the ordinance, as a whole, was intended as a revenue measure. But it is not, in our opinion, necessary that the ordinance, so far as the business of petitioner is concerned, should, by any particular language, indicate that the purpose of requiring a license tax for engaging in the business of horseshoeing is for

revenue. We are familiar with no principle sustaining the proposition that where, as here, the charter expressly authorizes the imposition of a license tax for purposes of revenue upon every kind of business transacted, and a business so taxed is one which admittedly cannot be regulated, a presumption arises that the measure is one of regulation, in the absence of language therein indicating its purpose to be for revenue. In other words, it is conceded that horseshoeing is a business which cannot be regulated. *Bessette v. People*, supra; *Cooley on Taxation*, p. 1125. Now, then, upon what principle can a presumption be justified that the city council, having express power to license a business for revenue, intended to license such business, which cannot be made the object of regulation, for the purposes of regulation rather than for revenue? It seems to us, rather, that the presumption would be, if presumption were at all necessary, that the city council intended to do only what it had the right and the power to do. We do not think there is any merit in the point that the occupation of shoeing horses is not a business carried on or transacted for profit. The charter provision no doubt employs the word "business" in its broadest signification, and the term as so used was in our judgment intended to include, with a few possible exceptions, all manner of occupations or means by which persons earn a livelihood. Besides, the profits realized by a farrier, engaged in business for himself, are not, presumably, confined to the value of his services in adjusting shoes upon the hoofs of the animals brought to his establishment to be shod. He is entitled to and no doubt charges for and receives a reasonable profit for the labor and the material necessarily employed in the manufacture of the shoes, or, if he does not manufacture them himself, then a reasonable return on his investment, which, of course, constitutes the profit.

Counsel further makes the point that, if the provision of the ordinance relative to the business of the petitioner is designed for the purpose of revenue, then it is against the spirit and policy of the law to subject a person failing or refusing to pay the license required therefor to penal punishment for the mere nonpayment of a debt. This point was forcefully presented, but no authorities cited sustaining it. Our attention has not been turned to any California authority upholding the position, but, so far as we are advised, it has been uniformly the assumption that the power exists in the local authorities to declare as a misdemeanor the act of noncompliance with the provisions of an ordinance requiring the payment of a license tax for revenue purposes. We see no reason why such power should not be exercised consistently with the policy of the law against imprisonment for debt. We do not understand the penal clause of the ordinance before us

to mean that one engaging in business upon which a license tax is imposed under the taxing power, and refusing to procure the license required, may be imprisoned until the license tax is paid. The misdemeanor consists in a refusal to obey the provisions of the ordinance, and the fine authorized to be imposed upon conviction is not intended as a payment of the license tax, but as a punishment for defying the commands of the ordinance. The mere conviction and punishment do not and cannot have the effect of absolving the offender from the duty of procuring the required license if, thereafter, he resumes engaging in the business. And, if he should again refuse to take out the license, he may then be subjected to another prosecution and punishment for such refusal.

Some reference was made during the course of the argument to section 3366 of the Political Code. This section, enacted by the Legislature of 1901, restricts the power of licensing by local legislative bodies "of all and every kind of business" to the purposes of regulation. But that section has been construed, in view of the provisions of section 6 of article 11 of the Constitution, as amended in 1896 (St. 1895, p. 450, c. 23), as having no application to municipalities governed by freeholders' charters (Ex parte Braun, 141 Cal. 207, 74 Pac. 780), and it can therefore exert no influence on the decision of the questions involved in the case at bar.

We think the provisions of the ordinance complained of here are in all respects valid, and represent a reasonable exercise of an expressly granted power.

For the foregoing reasons, the writ is denied, and the petitioner remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 100

In re KOCH'S ESTATE. (Civ. 498.)

(Court of Appeal, First District, California.
April 13, 1908.)

1. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.

A will should be so construed as to carry out the desire and intention of the testator, if it is possible to do so from the words used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 936.]

2. SAME—CONSTRUCTION TO AVOID INTESTACY.

A will should be interpreted so as to avoid intestacy, if reasonably possible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

3. SAME—CODICILS.

In construing a codicil, it must be read in connection with the will and as a part of it; effect being given to the whole will, if possible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 997.]

4. SAME—"BELONGINGS."

A will bequeathed sums of money to various persons, including testatrix's sister and heir at law, but made no disposition of the residue of the estate after paying the amounts therein

named and the debts, nor of testatrix's household furniture, clothes, and personal belongings. A codicil bequeathed to two of the legatees in the original will "all my belongings, furniture, and clothes included." Held that, by the term "belongings," testatrix did not mean money, but meant her ornaments, books, pictures, besides her furniture and clothes, which she had not disposed of by the original will.

5. SAME—PARTIAL INTESTACY.

There being no disposition of the residue of money after payment of the bequests, it passed to testatrix's sister as heir at law.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Proceedings for the settlement of the estate of Margaret S. Koch. From the portion of the decree of distribution awarding the residue of the estate, there was an appeal. Affirmed.

Charles K. Harper and Jordan, Rowe & Brann, for appellants. Wilbur G. Zeigler, for respondent.

COOPER, P. J. This is an appeal from that portion of the decree of distribution awarding the residue of the estate of deceased, \$1,688.80, to Catherine Billington, her sister and sole surviving heir at law. The question to be decided is as to the construction of a codicil to the will. The will is as follows: "San Francisco, California, February second, 1905. I Margaret S. Koch do hereby declare this to be my last will and testament I revoke all other will heretofore made by me I desire all my Just debts to be first paid Then I desire to leave to my sister Mrs. Catherine Billington the sum of one thousand dollars I also leave to Mrs. Fanny Harpe one thousand dollars I also leave to Charles K. Harper the sum of Five Hundred dollars also I leave to Emile Sherwood Harper one thousand dollars I also leave to Sister Alice late Matron of the Episcopal Home for Old Ladies San Francisco the sum of five hundred dollars as a little gift for her kindness to me when I stayed at the Home I also leave to my dear friend Mrs. Sothern the sum of five hundred dollars I also leave to Miss N. Townsend the sum of five hundred dollars if there should be money enough after all the above named parties have been paid and my just debts have been paid. I hereby appoint my friend Henry P. Harper executor of this my will to serve without bonds. [Signed] Margaret S. Koch." The codicil is as follows: "I leave to Mrs. Fanny Harper and Nettie Townsend all my belongings, furniture and clothes included. [Signed] Margaret S. Koch. January the twentieth nineteen hundred six." A will should be so construed as to carry out the desire and intention of the testator, if it is possible to do so from the words used. It is also the rule in the construction of a will to interpret it, if reasonably possible, so as to prevent intestacy. As to what were the intentions of a testator in a given case is often a question difficult of solution. Sometimes

its final determination is but an approximation. We must take, not only the will, but its entire scheme; the property disposed of; the persons named as devisees or legatees; the words used; and the context. The technical import of words should not prevail over the obvious intent of the testator; and words should be construed with reference to the surroundings. Here the decedent had her little estate all in money or convertible paper. She intended to dispose of it by bequests of certain named amounts to her sister and her friends who were nearest and dearest to her. She began by first naming her only sister and heir at law, Mrs. Billington, to whom she gave \$1,000. She next named Mrs. Harper, to whom she gave \$1,000, and, after other bequests, finally named Miss Townsend, to whom she gave \$500, "if there should be money enough after the above named parties have been paid and my just debts have been paid."

It is plain that by the original will, without the codicil, the testatrix intended to postpone Miss Townsend to the legatees first named, and to leave her less than \$500 if there should not be sufficient money with which to pay the \$500 after paying all the just debts and all the prior bequests. It is also beyond controversy that the will without the codicil made no disposition of the residue of the estate after paying the amounts therein named and the debts. If at the time of distribution there should be more money than enough to pay all expenses, debts, and legacies by the original will, the residue was not disposed of. The household furniture and the clothes of deceased were not disposed of, nor any little items of jewelry, personal belongings, pictures, or books. If the testatrix had died without the codicil having been made, the residue of money and all furniture and belongings would have gone to the sister, Mrs. Billington. It therefore seems reasonable that it occurred to the testatrix that she had not made any disposition of her furniture, clothes, and little personal articles. She therefore wrote the codicil. What did she mean by "all my belongings, furniture, and clothes included"? If by the word "belongings," testatrix meant money, she evidently intended by the words used to give all her money to Mrs. Harper and Miss Townsend, because she said she left them all her belongings. The effect of such construction would be to destroy all the other bequests made in the will, and to give all her property to Mrs. Harper and Miss Townsend. It is evident that she had no such idea in her mind. She knew that she had given Miss Townsend \$500 if there should be money enough left to pay her that amount. She knew of the other bequests to the parties named in the will, and, so knowing, she did not revoke any bequest by the codicil. She said nothing about the residue of her estate, because she evidently thought she had disposed of it all, except that upon which she desired the codi-

cil to operate. She desired her will to remain, to take effect with the codicil affixed thereto. We are therefore of the opinion that by the words of the codicil she meant the furniture, clothes, pictures, jewelry, and things which she ordinarily used for her personal comfort. Her bed, her chairs, her clothes, her pictures, her dishes, her jewelry were her belongings in the sense in which she used the term. She evidently had such things in mind; and, when she said "I leave all my belongings," she did not, in our opinion, mean all her money, nor all the residue of her estate. While her money, as belonging to her, was in one sense a belonging, yet it is clear that she did not mean money by the word "belongings" as she used it, for she had in her own mind expressly disposed of that. She evidently meant to dispose of something that in her mind she had left undisposed of. All of the will must, if possible, be given effect. The codicil must be read into it and as a part of it. It must as so read be held not to have any relation to the money belonging to the deceased. She evidently did not have her money in mind as being a "belonging" which she was disposing of by the codicil. If deceased thought that "belongings" meant all her property, she would not have added the words "furniture and clothes included." Such words would have been entirely superfluous. She used the words with reference to her ornaments, books, pictures, and so forth, and added that she intended it to include "furniture and clothes." She desired all these things to go to Mrs. Harper and Miss Townsend. We must give the word "belongings" the sense in which it is clear that the testatrix used it.

In *Le Breton v. Cook*, 107 Cal. 416, 40 Pac. 553, in speaking of the word "residue," it is said: "Where, however it is manifest from the context or from the provisions of the will that the testator used that word in a more restricted sense, it will be given the meaning in which it is clear that the testator used it." In *Andrews v. Schoppe*, 84 Me. 170, 24 Atl. 805, where the will gave certain enumerated household articles, furniture, beds, and so forth and "all other articles of personal property," it was held that the latter words must be used in connection with the words preceding them, and that, as so used, the words did not include promissory notes found among the effects of deceased. In *Tallman v. Tallman*, 3 Misc. Rep. 465, 23 N. Y. Supp. 734, it was held that, in view of other bequests in the will, a bequest of "all my personal property" referred only to household effects. In *Bills v. Putnam*, 64 N. H. 554, 15 Atl. 138, where the bequest was to two daughters of the testatrix of all her "wearing apparel, household furniture, and personal property of every name, nature and description," it was held that the words personal property were used in their restricted sense, and that they did not include everything except real estate.

The views herein expressed, in our opinion, carry out the intention of the deceased as to all the property she disposed of. Her debts were paid as she desired. The full amount of each legacy has been given as she directed. She made no disposition of the small amount of cash left after all these things had been done. The law gives that to her sister, the only surviving heir.

The decree is affirmed.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 85

FITE v. PERRY. (Civ. 425.)

(Court of Appeal, Third District, California.
April 13, 1908.)

1. GIFTS—CAUSA MORTIS—DELIVERY AND ACCEPTANCE—NECESSITY.

A writing is not necessary to a gift causa mortis, but possession must be absolutely delivered to the donee before the death of either of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 104, 123.]

2. WILLS—DISTINGUISHED FROM GIFT CAUSA MORTIS.

The distinction between a testamentary gift and a gift causa mortis is in the time of the change of possession, which in the case of a gift causa mortis is necessarily before the donor's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 219; vol. 24, Gifts, § 121.]

3. GIFTS—CAUSA MORTIS—SUFFICIENCY OF DELIVERY.

Where plaintiff informed another that a person in his last illness had given her certain property, but took no steps to reduce it to possession, and did not ask the person in whose possession it was to hold it for her, and did not even see the property at the time or thereafter state to deceased before his death that she had seen the person in whose care the property was and told him of the gift, and testified at trial that she understood she was not to take possession and had no right to possession before the owner died, and understood that the owner did not intend to transfer possession to her until after his death, she may not claim the property as a gift causa mortis, since there was no delivery of it before the death of the donor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 122-132.]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Maud Fite against V. E. Perry, as administrator of the estate of C. C. Carlton, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Pardee & Pardee, for appellant. R. M. Rankin and W. M. Boardman, for respondent.

CHIPMAN, P. J. Action to recover possession of certain two horses, two sets of harness, and a buggy, alleged to be the property of plaintiff and wrongfully withheld by defendant. The cause was tried by the court without a jury, and plaintiff had the judgment, from which defendant appeals on bill of exceptions.

The findings are made up largely of probative facts. The ultimate facts found which

are controverted are the following: That deceased on November 4, 1906, "being in contemplation of death, but of clear and sound mind, did give and grant to the said plaintiff the said property" (describing the property mentioned in the complaint); that "at the time the gift of said property was made to the plaintiff, as aforesaid, the said personal property was in the possession of said C. C. Carlton and was situated in a barn and corral jointly used by him and one T. J. Kennedy." There is no finding that plaintiff took possession of the property prior to the death of decedent, or at all, but there is a finding of certain facts which the court probably treated as equivalent to taking possession of or relieving plaintiff from the necessity of taking actual possession. This finding is as follows: "That after said gift was made to plaintiff by said C. C. Carlton, to wit, about the hour of 11 o'clock a. m. of said 4th day of November, 1906, plaintiff left the sick room of said C. C. Carlton and went out to make arrangements to take said personal property; that plaintiff met said T. J. Kennedy, and informed him that said C. C. Carlton had made such gift to her of said property, and said T. J. Kennedy thereupon said to plaintiff: 'I am glad of it. I would rather see you have it than any one'—that plaintiff being satisfied and understanding from his statements that said T. J. Kennedy would care for and hold said property for plaintiff, returned to the bedside of said C. C. Carlton and there remained until his death at about the hour of 8 o'clock p. m. of said 4th day of November, 1906; that the said horses, and particularly one of them, was too fractious and dangerous to be handled and controlled by plaintiff personally." As conclusions of law the court found that deceased, "in contemplation of death, on the 4th day of November, 1906, did give and grant to the said plaintiff the said personal property, and that said plaintiff ever since has been and still is the owner of said property, and entitled to the possession thereof."

It appeared that deceased was about 70 years old, and had been on intimate social relations with plaintiff's family and was particularly attached to her in a friendly way; that he had been sick for some time, and plaintiff was told he wanted her and she went to him on November 4th. She testified: "He died about 8 o'clock in the evening of the 4th of November, 1906, and I was with him nearly all the time. The time he made the gift to me was early in the morning, about 9 or 10 o'clock. I think he was in a dying condition, but perfectly in his right mind. * * * He seemed to realize that he was about to die." She was asked to state what was said by him in reference to the gift, and replied: "Why, the way the subject came up, he was upstairs and he was right on an angle to where his barn was where he kept these horses, and I looked out and says: 'You ought to see Prince and Doc.' Mr. Carlton

says: 'How do they look?' I says, 'They look fine. They are playing.' Then he said—he gave them to me. Shall I say what he said? Mr. Boardman (Plaintiff's Attorney): Go ahead. Witness (continuing): He says: 'If I don't happen to get over this,' he says, 'I want you to have the buggy, horses, and harness.' He says: 'Make arrangements and get them,' or, 'and take them.' I wouldn't swear to that, either 'get' or 'take.'" She further testified that he called the attention of Mrs. Packwood to what he had said; "called her by her given name twice, and I understood it and she did, as he wanted her to witness that he had given me the property." Mrs. Packwood was a friend of deceased and plaintiff, and was present and to some extent corroborated the testimony of plaintiff. The plaintiff further testified: "A few minutes after this conversation I went downstairs out into the street and met Mr. Kennedy, and I told him that Mr. Carlton had given me the team, buggy, and harness. He said he had rather see me get them than any one else, or some words to that effect. Mr. Kennedy is the man who had the buildings and butcher shop and tools rented from Mr. Carlton. Besides the premises known as the butcher shop, there was a barn where Mr. Carlton kept his horses, and there was a back room on the premises that Mr. Carlton kept his things in and slept in there when he was in the town of Bieber. Mr. Carlton took care of his horses until he was sick—until he went to bed. Mr. Kennedy fed the horses for Mr. Carlton after he took sick. At that time Mr. Kennedy gave me to understand that he thought they were mine. Q. Then what did he give you to understand about the horses being there? A. He gave me to understand he thought they were mine. I went back to the room. He asked me if I would stay with him when I first went in the morning, and I felt disposed to go back and attend the sick man. I left him for the purpose of going over to make arrangements about getting the horses or taking the horses as was stated by him. I went over to tell Mr. Kennedy. That conversation with Mr. Kennedy was within less than an hour after he gave me the property. That was before noon, and he died at 8 o'clock at night. I saw Mr. Kennedy the next morning, and told him that I wanted the horses. He said I could have them, but he had nothing to do with them, something of that sort; and then I told him I would have some of the boys go up and get them and take them down to father's place, and he said all right. The horses were not safe for any woman to handle. In a short time I saw him again, and he told me I could not have them."

On cross-examination she testified: "Mr. Carlton stated to me that I was to have possession of the property in case he died, but did not give me any writing at that time. I had three interviews with Mr. Kennedy about the team. In the third one he refused to

give me possession of the team. Q. Did Mr. Carlton have any children? A. Yes, sir. Q. How many? A. Well, I never saw but one of them. I heard he had four, though. Q. What were Mr. Carlton's exact words in reference to the gift? A. He says: 'If I don't happen to get out of this,' he says, 'the horses, buggy, and harness are yours. Make arrangements and get them,' or 'take them.' Q. Did he tell you any particular time? A. No, sir. Q. Didn't say you was to get them at that time? A. No, sir. He started to coughing and didn't say any more. Q. You understood, though, that you were not to have possession of the team unless he died? A. Yes, sir. Q. Did you consider then that you had any right to take possession of the team before his death? A. No, sir. Q. Why did you make that demand of Mr. Kennedy then? A. I didn't make a demand. I understood that they were mine when he died, and we all knew he was going to die because the doctor had said there was no hopes. The Court: How did you understand it at the time he told you he would give you the horses, harness, and buggy; that he intended to transfer the possession from himself to you or not? A. No; I didn't until after he died. Q. Then did you understand that he intended to make a complete gift to you? A. Yes, sir. Q. And that it would only be a short space of time before he died? A. Yes, sir." It may be assumed that the evidence was sufficient to justify the finding that the deceased intended to give the property to plaintiff should he not recover from his then sickness. But to complete this gift and make it effective it was necessary that there should be delivery to the donee, actual or symbolic, before the death of the donor. The principles governing gifts *causa mortis* are well stated in *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883. We quote briefly from authorities cited: "In a gift *causa mortis* a written instrument is not necessary. It may be, and usually is, made by parol, and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and the donee. * * * The most characteristic mark of distinction between a legacy and such a gift is the change of possession. From the nature of the donatio, it is apparent that the infallible test which must distinguish it from a testamentary gift is delivery, a change of dominion in *presenti*. Without this there is really nothing to distinguish it from an ordinary testamentary bequest." *Thornton on Gifts*, § 20, and cases cited. In *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, the question is fully treated and the cases collected. The court said: "If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will. * * * But there must be delivery of possession. The contract must

have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. * * * Without delivery the transaction is not valid as an executed gift; and, without consideration, it is not valid as a contract to be executed."

Under these rules what occurred between plaintiff and Kennedy after the death of Carlton is immaterial. When plaintiff informed Kennedy that Carlton had given her the property she took no steps to reduce it to possession, nor did she request Kennedy to hold it for her, nor did he say he would do so. She did not even view the property at that time, nor did she report to Carlton that she had seen Kennedy. She testified that she understood that she was not to take possession, and that she had no right to take possession before Carlton died. The court asked her whether she understood that Carlton intended to transfer the possession from himself to her or not, and she replied: "No; I didn't, until he died."

In view of the principles of law above stated, it seems to us quite clear that the evidence is insufficient to warrant the findings of the court.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 21

HARROLD v. BARNUM, Auditor. (Civ. 468.)
(Court of Appeal, First District, California.
March 31, 1908.)

OFFICERS—COMPENSATION—INCREASING COMPENSATION—CONSTITUTIONAL PROVISIONS—"TERM OF OFFICE."

The phrase "term of office," in Const. art. 11, § 9, providing that compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office, etc., applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold at the pleasure of the appointing power, and the constitutional inhibition does not apply to the office of deputy county surveyor, the incumbent of which holds under an appointment of the county surveyor at his pleasure.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6920, 6921.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Application for mandamus by Thomas R. Harrold against H. E. Barnum, auditor of the county of Fresno, to compel defendant to issue a warrant to plaintiff. From a judgment for defendant, plaintiff appeals. Reversed.

Everts & Ewing, for appellant. Denver F. Church and M. F. McCormick, for respondent.

KERRIGAN, J. January 7, 1907, one Scott McKay, having been theretofore elected county surveyor of Fresno county for a term of four years, qualified and assumed the

duties of that office. He thereupon appointed the plaintiff deputy county surveyor, which appointment continued in force until June 1, 1907, when it was revoked. Thereafter however, he was reappointed to the same position, qualified under the second appointment, and served for one month, whereupon he demanded of the county auditor (defendant) a warrant upon the treasury of said county for the sum of \$100 as his salary for said month, being the month of June. Compliance with this demand was refused, and plaintiff in his complaint prays for an alternative writ of mandate, directing said auditor to issue and deliver said warrant to him. Judgment went for defendant, from which judgment plaintiff prosecutes this appeal.

When Scott McKay was elected to the office of county surveyor in January, 1907, his salary and that of his deputy was fixed by the county government act (St. 1905, p. 435 et seq. c. 364) as follows:

"In counties of the seventh class (Fresno) the county officers shall receive as compensation for the services required of them by law or by virtue of their offices, the following salaries, to wit:

"Par. 12. The surveyor, two thousand dollars (\$2,000.00) per annum in full compensation for all services as county surveyor, as road viewer and road inspector, and his actual expenses when at work in the field. He shall have one deputy at an annual salary of nine hundred and sixty dollars (\$960.00)."

The Legislature of 1907 (St. 1907, p. 447, c. 10) modified the foregoing paragraph 12 by amending section 4236 of the Political Code, so as to fix the salary of deputy surveyor at \$1,200 per annum. In all other respects the paragraph remains unchanged.

The question for determination is whether the act increasing the salary of the office held by appellant, viz., that of deputy county surveyor, is within the prohibition of article 11, § 9, of the Constitution of this state, which reads: "Compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office, nor shall the term of any officer be extended beyond the period for which he is elected or appointed." After a careful examination of the authorities, we are convinced that the expression "term of office," as used in the constitutional provision just quoted, applies only to officers who have a fixed and definite term, and that it does not apply to appointive officers who hold at the pleasure of the appointing power.

In the case of Gibbs v. Morgan, 39 N. J. Eq. 128, where a preliminary question was whether the constitutional prohibition against increasing or decreasing the percentage or allowance of public officers during the time for which they were elected or appointed applied to a deputy county clerk, the court says: "Deputy clerks are public officers, but they have no term in the sense in which the ex-

pression is used in the paragraph above quoted. They are employes of the county clerks, and their employment is a matter of mere private contract. The law merely constitutes them public officers and gives them certain powers. It does not establish any particular period of service for them. That is left to private agreement. Since they have no term in the sense in which the word is used in the Constitution, it follows that the constitutional prohibition when applied to legislation to create or increase their compensation is unqualified." In *Speed v. Crawford*, 3 Metc. (Ky.) 207, the word "term" is expressly held to designate "a fixed and definite period of time," and the court states that officers removable at the pleasure of another officer, or where they may be removed on the occurrence of an uncertain event, do not hold office for a term. This case was decided on a constitutional provision similar to the one found in this state. In *State v. Johnson*, 123 Mo. 43, 27 S. W. 399, a chief engineer of a city fire department was appointed by the council, and was subject to be removed by it. During his incumbency of the office his salary was increased. There, in construing the following constitutional provision: "The compensation or fees of no state, county or municipal officer shall be increased during his term of office"—the court said: "It will be observed that this section of the Constitution only embraces within its provisions officers who are elected or appointed for some specific or definite term, and that it has no application whatever to the case in hand, where the relator's term of office is not fixed by any law or ordinance and when he simply holds at the pleasure of the appointing power. The relator was not elected nor was he appointed for any definite time. There does not seem to be room for argument in regard to the proper meaning of this section, so plain is it in its construction." *State v. Galusha*, 74 Neb. 199, 104 N. W. 201, involved a definition of the phrase "term of office," and the court held that it meant "a fixed and definite period of time," and in support of this position it cites a number of authorities, among others, *State v. Stonestreet*, 99 Mo. 361, 12 S. W. 895, in which last case it is said: "Whether we take the phrase [term of office] in its ordinary or popular sense, or its technical import, it means one and the same thing—a fixed and definite period of time." *Somers v. State*, is reported in 5 S. D. 321, 58 N. W. 804, and again upon rehearing in 5 S. D. 584, 59 N. W. 962. There the salary of a deputy superintendent of public instruction was reduced by an act of the Legislature from \$1,200 to \$900 per annum, and he contended that this act of the Legislature was in violation of a section of the Constitution, which provided that "the compensation of no public officer shall be increased or diminished during his term." The court reviewed the authorities, and held that this contention was

not correct, for the reason that under the law he has no term. The court said: "He had no title or tenure to the office beyond the pleasure of the appointing power. The word 'term,' when used in reference to the tenure of office, means, ordinarily, a fixed and definite term, and does not apply to appointive offices held at the pleasure of the appointing power." See, also, *State v. Massillon*, 24 Ohio Cir. Ct. R. 249; 19 Am. & Eng. Ency. of Law (1st Ed.) p. 562; 28 Am. & Eng. Ency. Law (2d Ed.) p. 53; *Mechem on Public Officers*, § 385. Respondent also cites the case of *Larew v. Newman*, 81 Cal. 588, 23 Pac. 227, decided in 1857. There are some expressions in the case contrary to the views just expressed, but they were unnecessary for the decision, and therefore are not controlling here.

Respondent also cites the case of *Larew v. Newman*, 81 Cal. 588, 23 Pac. 227. There, a few months after one Engenhoff was elected county superintendent of schools he resigned, and one Larew was appointed to fill the unexpired term. After Engenhoff was elected, and before he resigned, the salary of county superintendent of schools was increased, and Larew sought to recover the increased salary. The court held, construing the constitutional provision already quoted, "that the increased salary did not commence until after the expiration of the time for which Engenhoff had been elected." That case is not in point. There the term of office was fixed and definite. The term of an office relates to the office, and not to the incumbent. When Engenhoff resigned and Larew was appointed a new term was not thereby commenced. The resignation merely created a vacancy within the term. *Somers v. State*, 5 S. D. 584, 59 N. W. 963.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 95

STEELE v. GUARANTY REALTY CO.
(Civ. 474.)

(Court of Appeal, Second District, California.
April 13, 1908. Rehearing Denied
June 11, 1908.)

1. APPEAL AND ERROR—REVIEW—HARMLESS
ERROR—INCONSISTENT FINDINGS.

Even if there be two findings in an action to recover money paid on agreement of defendant to deliver a contract for sale of land, one that the agreement was made by defendant as broker, the other that he undertook to sell directly to plaintiff, such inconsistency would not warrant a reversal of the judgment for plaintiff; it having been defendant's duty, which it did not perform, in which ever capacity it acted, to deliver a contract entitling plaintiff to an unnumbered title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4234.]

2. ESTOPPEL—KNOWLEDGE OF FACTS.

Plaintiff is not estopped to question the character of the contract for sale of land delivered by defendant under its agreement, because having accepted from defendant, before

delivery of the contract, part of a forfeiture on a resale of the contract to another by defendant as plaintiff's agent; plaintiff not having then known of the defect in the contract.

3. EVIDENCE—PAROL EVIDENCE—VARYING CONTRACT.

Parol testimony of previous transactions, the only effect of which could be to change the terms of the agreement relied on, is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778-1793.]

4. SAME.

An instrument signed by both parties reciting deposit by plaintiff with defendant as part of first payment on purchase of a certain lot, purchase price to be a certain amount, balance to be paid within a certain time, when contract of purchase is to be delivered, with provision that, if said contract cannot be procured, deposit is to be returned, and, if balance of payment is not paid, deposit is to be retained in payment of commissions and for services, is a contract, as distinguished from a mere receipt, as regards the admission of parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1779, 1833.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Mary Steele against the Guaranty Realty Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Tanner, Taft & O'Dell, for appellant.
Cryer & Tuttle, for respondent.

ALLEN, P. J. Plaintiff and defendant on July 7, 1905, entered into the following contract: "Mrs. M. Steele has this day deposited with Guaranty Realty Company, of Ocean Park, Cal., twenty-five dollars, as part of the first payment on the purchase of lot 10, block 15, of the Silver Strand tract, Los Angeles county, California. Purchase price, \$1,600. Balance of said first payment amounting to about \$875, to be paid within 5 days from date, when contract of purchase is to be delivered. If said contract cannot be procured this deposit is to be returned, and if the balance of said payment is not paid, the deposit is to be retained in payment of commissions and for services rendered. Date: July 7. Names: G. R. Co. (G.) M. Steele." Pursuant thereto, plaintiff paid defendant the \$875 specified within the time required. Defendant never delivered a contract of sale for the lot described, other than one theretofore executed by the owners with one Albright, by which the premises were to be conveyed subject to such limitations and reservations as to substantially incumber the title. Before the tender of the assigned contract, defendant informed plaintiff that it had resold the contract agreed to be delivered to plaintiff at an advance, and that the proposed purchaser had forfeited \$50 paid on such contract of resale, and defendant accordingly paid to plaintiff one-half of such forfeiture. Thereafter defendant delivered to plaintiff the contract made by the owners of the lot with Albright and by Albright assigned; but, upon examination and discovery

of the limitations and reservations therein, plaintiff refused to accept the same and brought this action to recover the money paid defendant under the agreement. Judgment went for plaintiff for the money so paid, less \$25 theretofore received by her from defendant.

Appellant insists that the findings are inconsistent, in that one finding, in effect, is that the agreement to deliver the contract was made by defendant as a broker, while another finding is that the defendant undertook to sell the lot directly to plaintiff. Were an inconsistency even apparent, it would not warrant a reversal of the judgment, for in whatever capacity the money was received under the agreement with plaintiff it became the duty of defendant to deliver a contract by the terms of which, upon the performance by plaintiff of the obligations imposed upon her, she would be entitled to a deed conveying an unincumbered title. The court finds, and there is evidence in its support, that no such contract was tendered or delivered.

It is insisted, further, that plaintiff is estopped to question the character of the contract tendered, because she had accepted \$25 as part of a forfeiture on a resale of the contract by defendant; but the court finds, and there is evidence to warrant the same, that when defendant represented to plaintiff that it had resold the contract at an advance, and that the proposed purchaser had forfeited \$50 upon deposit, one-half of which plaintiff was entitled to and which she received, she did not know that the lot was incumbered, or that the contract which defendant had undertaken to procure or deliver was so restricted in its terms. Plaintiff being in ignorance as to the character of the contract, the subject of the resale, the acceptance of the \$25 did not estop her from asserting her legal rights when the true character of the proposed contract sought to be assigned was brought to her attention. She is not shown to have accepted the benefit with notice. We are not interested in the question of the weight given by the court to conflicting evidence. That was a matter for the trial court to determine, and with its determination we must be content.

The court did not err in excluding testimony relating to previous transactions between the parties. Its effect could only be to modify and change the terms of the written agreement, which is not permissible, were it even assumed that one who had purchased an incumbered title previously from the same parties would be willing to accept a title of the same character in subsequent transactions. The rule relating to the admission of oral testimony as to matters not inconsistent with the terms of the written agreement has no application here. The paper writing executed by defendant is, in legal effect, a contract as distinguished from a mere receipt, and the rule relating to the ad-

mission of evidence to explain receipts is not here involved.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 98

MEEK v. CUNHA et al. (Civ. 395.)

(Court of Appeal, First District, California.

April 14, 1908. Rehearing Denied

June 12, 1908.)

1. LANDLORD AND TENANT—TERMINATION—INJURY TO PREMISES.

That a tenant after the beginning of his term was deprived of the beneficial enjoyment of the premises by the destruction of a crop thereon by inevitable casualty, happening without the fault of either himself or landlord, did not at common law entitle him to an apportionment of rent under an unconditional promise to pay a stipulated sum as rental.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 835-845.]

2. SAME.

That a tenant's beneficial enjoyment of the premises is interrupted by an inundation thereof does not affect his liability for rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 777, 778.]

3. SAME—DESTRUCTION OF CROP.

Civ. Code, § 1932, providing that the hirer may terminate the hiring before the end of the agreed time where the greater part of the thing hired perishes from any other cause than ordinary negligence, does not authorize a tenant of land planted with asparagus, from which he expected to harvest a profitable crop, to recover the partial rent paid on the destruction of the crop by a flood, without destroying the asparagus beds, since the thing destroyed was the growing crop belonging to the tenant under section 1926, providing that the products of a thing hired during the hiring belong to the hirer; asparagus growing from roots which are perennial, and, being once planted, producing the asparagus of commerce for many successive years.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by W. E. Meek against Margarita Cunha and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Bigelow & Dorsey and Mastick, Van Fleet & Mastick, for appellant. Jordan & Brann, for respondents.

HALL, J. This is an appeal by plaintiff from a judgment on demurrer sustained to plaintiff's complaint.

As appears by the complaint, plaintiff on the 30th day of November, 1903, leased of defendants for the period of 10 months next ensuing 55 acres of land then planted in asparagus, which produced annual crops, and which asparagus, it is alleged, constituted, and was then known to defendants to constitute, the material and sole inducement to plaintiff to hire said land. By the terms of the lease plaintiff unconditionally promised to pay as rental the sum of \$2,500, to

wit, \$2,250 at the execution of the lease, and \$250 on April 1, 1904, and plaintiff did pay on the 30th day of November, 1903, said sum of \$2,250. About the 1st of April, 1904, an extraordinary rise occurred in the San Joaquin river, which bounds the leased lands, whereby the flood waters thereof, without any fault of defendants or plaintiff, broke through the levee which protected said lands and inundated the same, so that the lands and asparagus beds thereon were kept covered by water to a depth of several feet during the months of April, May, and June, 1904, and the whole crop of asparagus for the season destroyed, save what had been cut during the two weeks immediately preceding April 1st, the value of which was much less than the amount expended by plaintiff in the care and cultivation of the leased premises. It is alleged that because of said flood the only beneficial use of said lands or of said asparagus beds which plaintiff made or could have made was between March 15 and April 1, 1904; the use during the remainder of the term being merely nominal and of no benefit to plaintiff. On May 5, 1904, plaintiff served on defendant written notice of rescission, stating that the asparagus crops on the leased lands had been destroyed by the flood, demanded the repayment of the \$2,250 paid by defendants, and offered to surrender possession of the leased land. Repayment being refused, this action was brought to recover the sum of \$2,250 paid as rent for the leased premises.

Plaintiff, upon the facts stated in his complaint, had no cause of action against defendant to recover the money paid as rent, or any portion thereof. When reduced to its last analysis, plaintiff leased land planted to asparagus, from which he expected to harvest a profitable crop, but for a cause for which defendants were in no way to blame he lost the crop and the opportunity to make any profitable use of the land. Neither the land nor the asparagus beds were destroyed—the crop only was destroyed. Asparagus is grown from roots which are perennial, and, being once planted, produce the asparagus of commerce for many successive years. An asparagus bed is in this respect much like an orchard. We apprehend that no one would contend that the lessee of an orchard who lost his entire crop for a season by reason of blight, storm, or insect pest could have an apportionment of rent as against his landlord under a lease containing an unconditional promise to pay rent. Appellant concedes that, under the general rule at common law, the fact that the tenant after the beginning of the term was deprived of the beneficial enjoyment of the leased premises by inevitable casualty, happening without the fault of either the landlord or tenant, would not entitle him to an apportionment of rent (*Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430; 18 Am. & Eng. Ency. of Law, 305, cases in note 6); but he urges that this case is

within the exception to the general rule, recognized in some of the states, that, where a substantial part of the premises is destroyed without fault of either party, the tenant will be entitled to an apportionment of rent. The cases of this character are all where buildings or other structures essential to the use of the leased premises were destroyed. No case can be cited where the destruction of a crop has been held in a common-law state to entitle the tenant to an apportionment of rent under an unconditional promise to pay a stipulated sum as rental.

Neither does the fact that a tenant's beneficial enjoyment of the premises is interrupted by an inundation affect his liability for rent. 18 Am. & Eng. Ency. of Law, 306; *Niedelet v. Wales*, 16 Mo. 214. The case of *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 429, 61 Am. St. Rep. 554, much relied on by appellant, bears no similitude to the case at bar. Icehouses and buildings, necessary and essential to the use of the plant rented for gathering and storing ice, were destroyed. The case would have some likeness to the case at bar if, by reason of high temperature, the ice ponds had produced no ice. *Viterbo v. Friedlander*, 120 U. S. 730, 7 Sup. Ct. 962, 30 L. Ed. 776, also relied on by appellant, arose under the Code of Louisiana, where the rules of the civil law prevail, and was an action to annul a lease of a sugar plantation, where the bridges, roads, drainage canals, and "stubble" and "seed cane," from which cane is harvested and taken to plant and to make into sugar, were destroyed by an overflow of the Mississippi river through a crevasse in the levee along the banks of the river. In this case it was held that, if the crops only had been destroyed, the tenant would not have been entitled to any abatement in the rent, but that the destruction of the bridges, roads, canals, "stubble," and "seed cane" was such a destruction of the subject-matter of the lease, to wit, a "sugar plantation," as to bring the case within the scope of the Louisiana Code, providing that "if, during the lease, the thing be totally destroyed by an unforeseen event, * * * the lease is at an end," and accordingly the lease was annulled. In passing upon the question involved the court used this significant language: "This was not a mere destruction of a crop for one year, like the destruction of a crop of wheat, or of grapes, or of apples, but it was more like the destruction of the vines, or of the apple trees, from which present and future crops are to be gathered." But the case at bar is simply the destruction of the crop; no destruction of any part of the premises or of the asparagus beds or roots being alleged or claimed. Plaintiff in his notice of rescission correctly stated the facts when he wrote, "and that the entire asparagus crop therein has in consequence perished."

Appellant urges that the facts of this case

bring it within the provisions of section 1932, Civ. Code, that "the hirer of a thing may terminate the hiring before the end of the term agreed upon * * * (2) where the greater part of the thing hired or that part which was, and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any cause other than the ordinary negligence of the hirer." But it is perfectly plain that no part of the thing hired has been destroyed. At the time of the hiring no crop was in existence. The land containing asparagus beds was hired, but neither the land nor the asparagus beds were destroyed. Doubtless plaintiff hoped to realize a crop, but, as stated in his notice of rescission, "the asparagus beds on the premises constituted the sole inducement which caused me [him] to enter into the contract," and the asparagus beds have not perished nor been destroyed. The facts do not bring the case within the provisions of section 1932, Civ. Code.

The only thing that was destroyed was the growing crop, which belonged to the tenant (section 1926, Civ. Code), and the loss of which must be borne by him.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 767

CHURCHILL v. MORE. (Civ. 465.)

(Court of Appeal, Second District, California.
March 25, 1908.)

1. APPEAL AND ERROR—BOND TO STAY EXECUTION.

Where, in an action for claim and delivery, plaintiff recovered judgment for possession of certain specified personal property, or \$1,636.80, the value thereof, in case delivery could not be made, whereupon defendant appealed and executed an undertaking that in case of affirmance he would obey the order of the appellate court, or would pay the amount directed to be paid and all damages and costs, such undertaking was not one authorized or contemplated by Code Civ. Proc. § 942, providing for an undertaking on appeal to stay execution on a money judgment, which section is applicable only to a judgment directing the payment of a specified sum of money enforceable by execution, and not to a judgment which may be satisfied in either of two or more modes.

2. SAME—JUDGMENT AGAINST SURETY—MOTION.

Where an undertaking on appeal in an action for claim and delivery was not one authorized by Code Civ. Proc. § 942, which is the only statute authorizing the rendition of judgment against the surety on motion after affirmance, the superior court had no jurisdiction to render judgment against the surety on such undertaking under a stipulation therein that judgment might be so entered, as such stipulation rests for its efficacy on the statute alone.

3. JUDGMENT—WANT OF JURISDICTION—VALIDITY.

Where want of jurisdiction is apparent on the face of a judgment, it is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 23, 24.]

4. APPEAL AND ERROR—RIGHT OF REVIEW—ESTOPPEL AND WAIVER—PAYMENT OF JUDGMENT.

Where a surety on an appeal bond paid a judgment against it which was void for want of jurisdiction, such payment could not be treated as invalid in attacking the jurisdiction of the court that rendered the judgment; the judgment having passed beyond review, in the absence of a vacation of the satisfaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 984-986.]

5. SAME—NATURE OF PROCEEDING—RIGHT TO APPEAL.

Where, after judgment in an action for claim and delivery had been affirmed on appeal, judgment was rendered without jurisdiction on motion against the surety on the undertaking on appeal, the entry of such judgment was not a special proceeding; but in sequence of the judgment appealed from, so that the appellant, not having been affected by the judgment against the surety, was not an aggrieved party who might appeal from the judgment against the surety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

6. JUDGMENT—CONCLUSIVENESS—VACATION.

As such judgment against the surety did not amount to an adjudication by which appellant was bound, he was not entitled to move to vacate it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 722.]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Frank G. Churchill against John F. More. From an order vacating a judgment against a surety on a bond given in replevin suit, plaintiff appeals. Reversed.

Richards & Carrier, for appellant. William G. Griffith and Canfield & Starbuck, for respondent.

ALLEN, P. J. Appeal by plaintiff from an order of the superior court of Santa Barbara county.

The case is this: Plaintiff obtained a judgment in an action for claim and delivery by which judgment he recovered from defendant possession of certain specified personal property, or \$1,636.80, the value thereof, in case delivery could not be had. From this judgment defendant appealed and gave an undertaking on appeal and a further undertaking in double the amount of the value of said property, conditioned that "if that part of the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will obey the order of the appellate court upon the appeal or will pay, in United States gold coin, the amount directed to be paid by said part of said judgment so appealed from, or by the part thereof as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal," with the further stipulation "that, if the appellant does not make such payment within 30 days after filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the

respondent in his favor against said surety, for such amount, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeal." This undertaking was executed by the United States Fidelity & Guaranty Company. Preliminary to the execution of this undertaking, defendant entered into a written contract of indemnity with the surety, by which he agreed to indemnify and keep the said guaranty company indemnified from and against any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature, which said guaranty company shall or may for any cause, at any time, sustain or incur or be put to, for or by reason or in consequence of said guaranty company's having executed said bond. The judgment so appealed from was affirmed by the appellate court and a remittitur duly filed. More than 30 days after the filing of such remittitur, plaintiff filed an affidavit setting forth the execution of said undertaking, the affirmance of the judgment, and, further, that the defendant had not performed the judgment of the court either by delivering the personal property on paying its value, and on November 19, 1906, applied to the court for judgment against the surety in accordance with the terms of the bond, and thereupon a judgment was rendered by said superior court in favor of plaintiff and against said surety company for the sum of \$1,941.85, being the amount of the value of the personal property, together with costs and interest; that execution issued out of this judgment, and the amount called for by such execution was collected by the sheriff of the city and county of San Francisco and paid over to plaintiff, who, on November 28, 1906, duly entered in the judgment book a satisfaction of said judgment. Thereafter, on the 13th of May, 1907, defendant More moved the court to vacate and set aside the judgment rendered against the surety company upon the ground that the judgment so rendered was void for want of jurisdiction, and was procured by said plaintiff by a misrepresentation of fact, and that said judgment was given and made by said court against the surety company through inadvertence, surprise, and excusable neglect. Affidavits and counter affidavits were filed, and on the 27th of May, 1907, the superior court of Santa Barbara county granted the motion of said More vacating and setting aside said judgment, upon the grounds that said judgment was inadvertently given and at the time of the rendition thereof the court was without jurisdiction of the person of said surety company, and that said judgment is void. From this order of the court vacating the judgment, plaintiff appeals.

Counsel for both appellant and respondent discuss in their briefs the character and effect of the undertaking given by the guaranty company. We think it not necessary for a proper determination of this case to deter-

mine whether or not the undertaking given is a statutory bond or a common-law bond, with or without consideration. It is sufficient to say that it is not an undertaking given under section 942 of the Code of Civil Procedure, which provides for an undertaking on appeal to stay execution on a money judgment, and which section alone provides for the entry of a judgment thereon on motion, in default of the payment of the judgment within 30 days after the filing of the remittitur. This undertaking being given in an action of claim and delivery where the judgment was in the alternative primarily for a return of the property, and incidentally for a money judgment for the value thereof if a return be not had, is not the undertaking contemplated by section 942, Code Civ. Proc.: "That section is applicable to a judgment which directs payment by the defendant of a specific amount of money, and which can be directly enforced by a writ of execution, but has no application to a judgment which may be satisfied in either of two or more modes." *Kreling v. Kreling*, 116 Cal. 460, 48 Pac. 383. The stipulation in the bond of the surety company that judgment may be entered upon motion rests for its efficacy on the statute alone. *Reay v. Butler*, 118 Cal. 115, 50 Pac. 375. Section 942 being the only statute authorizing the rendition of judgment upon motion, it follows that recovery upon any bond other than one covered by section 942 must be by action. The superior court had no jurisdiction to render the judgment in this case on motion, and such want of jurisdiction is apparent upon the face of the judgment. Being so apparent the judgment was void. The surety company, however, without appealing therefrom or in any manner questioning the jurisdiction of the court, submitted to subsequent proceedings resulting in a full payment and discharge of said judgment, and the same was satisfied of record. "Satisfaction" means payment, and payment of a judgment cannot be treated as void for the purpose of attacking the jurisdiction of the court that rendered it. The surety had its remedy, by motion or otherwise, to vacate the satisfaction; but until set aside it is valid, and the judgment itself has passed beyond review." *Morton v. Superior Court*, 65 Cal. 498, 4 Pac. 491. In a subsequent case (*Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40), the court, in considering the case last cited, says that the rule there laid down has no application when the party aggrieved has appealed within the statutory period. In this case the surety has neither procured a vacation of the entry of satisfaction nor sought an appeal from the judgment, nor in any manner indicated its desire for relief therefrom. Defendant More alone moved the court for the vacation of the judgment, without moving for a vacation of the entry of satisfaction. The right of More to so proceed depends upon whether or not he is affected by the judgment. If such judgment

against the surety had the effect, under any circumstances, to determine More's rights, then he could move for its vacation. *Crossman v. Vivienda Water Co.*, 136 Cal. 575, 69 Pac. 220. Section 473, Code Civ. Proc. authorizes the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, and mistake of law is comprehended therein. The question is therefore presented as to the effect of this judgment upon More, for if it did not purport and did not in fact adjudge any relief against him personally, or against any property belonging to him, it did not in any wise conclude or impair his previously existing rights. The judgment, being void upon its face, was open to collateral attack, and neither the voluntary nor coerced payment by the surety can have the effect to conclude More in any action upon his indemnity contract. His liability thereon depends upon the terms and scope of such contract, unaffected by any void adjudication upon the undertaking executed as a stay bond.

We are of opinion that, while the entry of the judgment against the surety upon an appeal bond is not a special proceeding, but is in sequence of the judgment rendered therein against appellant, in which action against appellant the surety made itself a party to the original action and proceedings (*Hawley v. Gray Bros.*, 127 Cal. 562, 60 Pac. 437), nevertheless, More, while a party to the original proceeding was not affected by this latter judgment and was neither an aggrieved party who might appeal, nor one who might procure a vacation of such judgment, unless the same was taken against him or in some manner amounted to an adjudication by which he was concluded in some right.

This not being made to appear, we think it was error in the superior court to vacate this judgment upon motion of More, and the order vacating the same is reversed.

We concur: SHAW, J.; TAGGERT, J.

7 Cal. App. 765

Ex parte McCUE. (Cr. 82.)

(Court of Appeal, Second District, California.
March 25, 1908.)

1. CRIMINAL LAW—NATURE OF CRIME—IDLENESS—LEWDNESS—DISSOLUTENESS.

While idleness, in the sense of mere inaction, may not be denounced as a crime, lewdness and dissoluteness imply something more, as applying to the unlawful indulgence of lust, whether in public or private, which the Legislature may denounce, under its power to prohibit or regulate any practice tending to weaken or corrupt morals.

2. VAGRANCY—LEWDNESS—DISSOLUTENESS—REGULATION—POLICE POWER.

Pen. Code, § 647, subd. 5, declaring every idle, lewd, or dissolute person or associate of known thieves to be a vagrant, constituted a valid exercise of the Legislature's power, with reference to the elements of lewdness and dissoluteness.

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The constitutional right of due process of law will not be given such effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society.

4. VAGRANCY—LEWDNESS—AFFIDAVIT.

One charged with being an idle, lewd, and dissolute person is sufficiently advised of the character of his offense.

5. SAME—STATUTES.

Pen. Code, § 647, subd. 5, declaring every idle, lewd, or dissolute person to be a vagrant, was not defective for failure of the Legislature to specify the evil and corrupt practices which might constitute one a lewd or dissolute person.

6. STATUTES — AMENDMENT — REFERENCE TO NUMBER.

Amendment of a section of the Penal Code by reference to its number is proper.

7. HABEAS CORPUS—QUESTIONS REVIEWABLE — FACTS ALLEGED AS CONSTITUTING OFFENSE.

Whether the facts charged in an affidavit alleging defendant to be an idle, lewd, and dissolute person are sufficient to constitute such offense will not be considered on habeas corpus.

Application by Hugh McCue for a writ of habeas corpus. Denied.

J. Wade McDonald, for petitioner. L. R. Kirby, Dist. Atty., and H. S. Utley, Asst. Dist. Atty., for respondent.

ALLEN, P. J. Petitioner is serving a sentence imposed on account of a violation of subdivision 5, § 647, Pen. Code. This subdivision provides: "Every idle or lewd or dissolute person, or associate of known thieves, * * * is a vagrant." It is insisted that this subdivision is void, in that the constituent elements entering into the crime are not defined, and as a consequence one charged thereunder is subject to the arbitrary meaning given by the court to the words employed; that it denounces a penalty against one who is either idle, lewd, or dissolute, without reference to the circumstances or conditions or acts of such person, or their effect as injuriously affecting the public health or morals. We are inclined to the view that while idleness, whether it be that of the "idle rich" or "idle poor," is a prolific source of crime, still it is not competent for the Legislature to denounce mere inaction as a crime without some qualification. But this cannot be said of lewdness or dissoluteness, terms often used interchangeably, but each of which applies to the unlawful indulgence of lust, whether in public or private. "Any practice, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, * * * is a legitimate subject for regulation or prohibition by the state, * * * and unless it clearly appears that a statute enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of the legislative department is conclusive." *Ex parte Tuttle*, 91 Cal. 590, 27 Pac. 934.

The elements of lewdness and dissoluteness, under the accepted definition of those terms, come directly within the inhibited practices and are proper subjects of regulation and prohibition. The statute, then, is a valid exercise of police power as to these elements, and it is within the power of the court to determine whether one charged comes within the class of lewd or dissolute persons. *Ex parte Ah Fook*, 49 Cal. 404. The constitutional right of due process of law will not be given such effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society. *Lent v. Tillson*, 72 Cal. 425, 14 Pac. 71. One charged, as was petitioner, with being an idle, lewd, and dissolute person, is sufficiently advised of the character of his offense. To say that the Legislature must specify the many evil and corrupt practices which might constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary.

The amendment of the section by reference to its number is proper. *People v. Oates*, 142 Cal. 12, 75 Pac. 337.

The affidavit purports to state an offense of a kind of which the courts have jurisdiction. The question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. *Ex parte Ruef*, 150 Cal. 666, 89 Pac. 605. The warrant designated the offense charged, which is all that is required by section 1427, Pen. Code.

The writ is denied.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 58

HILL v. BARNER et al. (Civ. 410.)

(Court of Appeal, Third District, California.
April 7, 1908.)

1. APPEAL AND ERROR — ISSUES IN LOWER COURT.

The defense of laches in a suit to quiet title, raised for the first time on appeal, cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1106, 1107.]

2. EQUITY—LACHES—PLEADING.

Where laches is relied on as a defense, it must be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 395.]

3. QUIETING TITLE — BURDEN OF PROOF — TITLE OF PLAINTIFF.

In a suit to quiet title, the burden rests upon plaintiff to establish his title by sufficient evidence; and hence, where plaintiff's title is deraigned from a purchaser at a sheriff's sale wherein a portion of the land was reserved, it is incumbent on plaintiff to show that the land which he claims was not within the reserved portion.

4. SAME—EVIDENCE—SUFFICIENCY.

In an action to quiet title, in which plaintiff claimed the land by deraining title from the purchaser at a sheriff's sale wherein a portion of the land was reserved, evidence considered, and held insufficient to show that the land was not within the reserved portion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 91.]

5. EVIDENCE—JUDICIAL NOTICE—BOUNDARIES.

Where plaintiff in a suit to quiet title claims the land by deraining title from a purchaser at a sheriff's sale wherein a portion of the land was reserved, there being no showing that the land was not within the reserved portion, the court cannot sustain plaintiff's title by taking judicial notice of the exact boundary lines of the lands included within the reserved portion.

6. QUIETING TITLE—JUDGMENT—DESCRIPTION OF LAND—CERTAINTY.

In a suit to quiet title, in order to give stability to a judgment for plaintiff the judgment and the corresponding findings should describe the land with such definiteness as to enable the parties to know from such description the precise limits or the location of the boundary lines thereof.

7. ADVERSE POSSESSION — ACQUISITION OF RIGHTS BY PROPERTY SUBJECT TO RAILROAD CORPORATION — USE OF PROPERTY — STOCK CORRAL.

A stock corral is a necessary adjunct to the transportation business of a railroad corporation, and hence may be acquired by the corporation by adverse possession.

8. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—BRIEFS—WAIVER—EXCEPTIONS.

The rule that where errors are assigned in the admission of evidence, but the reasons on which the rulings are claimed to be erroneous are not stated in the briefs, the rulings are not reviewable, does not preclude a review of such rulings if from only the necessary examination of the record it is apparent that they are prejudicial, especially where the error is pointed out in the oral argument.

9. EVIDENCE—ADMISSIONS—LETTERS—PRELIMINARY PROOF — AGENCY OR AUTHORITY OF WRITER.

In a suit to quiet title, in which the land is claimed by plaintiff through a record title, and by defendant by adverse possession, the introduction of evidence by plaintiff of a letter making certain admissions as to the land in dispute, which purported to come from defendant railroad company, and signed by one R., is erroneous, in the absence of any evidence connecting R. with the corporation, or showing that he had authority to make such admissions.

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by Samuel Hill against Charles Barner and others to quiet title to land. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Sweeney & Tillotson and Reid & Dozier, for appellants Barner and others. W. M. Singer, Jr., Guy Shoup, and G. O. Perry, for appellant Central Pacific Railroad Company. T. W. H. Shanahan and Charles H. Braynard, for respondent.

HART, J. The court below gave plaintiff judgment quieting his title to the land in dispute, and it is from said judgment and the order of the court denying the defendants a new trial that this appeal is taken. A mo-

tion to dismiss the appeal herein was submitted by the respondent, but it is clearly without merit, and therefore does not demand extended notice. The motion is denied.

The premises in controversy are described in the complaint as follows: "Lots numbered 1, 2, and 6 situate in that certain block, which said block is bounded on the north by the northerly line of what is commonly known as and called Short street, on the east by the westerly line of Center street, on the south by the northerly line of Shasta street, and on the west by the easterly line of the right of way of the Central Pacific Railway Company, a corporation, as said lots and said block more fully appear, and as the same are designated by and upon the official map of said city of Redding now on file in the office of the county recorder of said county of Shasta."

Another appeal is pending before this court, and the same submitted with the case at bar, in which the respondent here is plaintiff and Joseph Hofer and others are defendants and appellants (No. 411, 96 Pac. 116), and which involves the title to lots numbered 3, 4, and 5 situated in the block described in the complaint in the case we are now considering. Counsel representing, respectively, the several parties to the case at bar, also represent in the same positions relatively the parties to case No. 411, and it was stipulated by said counsel that the evidence and the proceedings taken and had in the one case should be considered so far as applicable to the other. An examination of the records in both cases justifies us in saying that the evidence and proceedings in both are practically the same, and that, as in each case plaintiff undertakes to establish a record title and the defendant railroad company title to some alleged portions of the premises in dispute in both cases by adverse possession or prescription, the legal principles involved, and which we are required to consider, apply the same to the one case as the other.

The principal and important question presented in both cases, as we view the records, is, does the evidence support the material findings of the court? In order to a clear understanding of the situation presented by the record in the case before us some reference must necessarily be made to the facts brought out at the trial. The land in dispute is a portion of a Mexican land grant known as the Rancho Buena Ventura, situated in Shasta county, and granted by the United States government to one Pearson B. Reading; the patent therefor having been issued to said Reading confirming his title to said grant in the year 1856. Later J. B. Haggin became the owner of said grant by purchase at a sheriff's sale thereof; said sale having been ordered by the district court of the third judicial district of California in pursuance of a decree of said court foreclosing a certain mortgage on said grant executed by said Pearson B. Reading to one Samuel J. Hensley to secure

a loan by the latter to the former of \$34,438.32. The deed of the sheriff to Haggin, however, excepted and reserved from said sale a certain portion of said rancho, which said portion so excepted and reserved is described in said deed.

In September, 1872, Haggin conveyed by deed to the Central Pacific Railroad Company, the predecessor in interest of one of the defendants herein (the Central Pacific Railway Company), a strip of land 100 feet wide, being a portion of the Rancho Buena Ventura in Shasta county, "upon the located line of the California & Oregon Branch of the Central Pacific Railroad Company's railroad, the full length of said line through said grant." In this connection it may be stated that the evidence shows that from and including the year 1888 to and including the year 1890 the railroad company was assessed on a right of way of 100 feet in width through the town of Redding, and that from and including the year 1891 to and including the year 1903, with the exception of the years 1892 and 1894, in which the assessment did not specify the width of the right of way through Redding, the width of the right of way through said town of Redding, as appeared by the assessment made by the state board of equalization was 400 feet. Portions of the premises in question were leased to a firm known as Kahny & Burgbacher and a firm known as Barner & Riebe. Said leases were executed by the Southern Pacific Company, lessee of the Central Pacific Railroad Company, to the firms mentioned. The lease to Kahny & Burgbacher was dated March 12, 1888. The lease to Barner & Riebe was dated February 11, 1896. Kahny & Burgbacher erected a wooden structure on the land leased to them in the year 1888, and used the same for the purpose of carrying on the beer bottling business, and in the year 1898 they erected a new wooden structure in the place of the old one, likewise using it for beer bottling purposes. This firm remained in possession of said premises under the lease from the Southern Pacific Company until the year 1900, when said firm transferred the possession of the building and premises to the San Francisco Breweries, Limited, a corporation, and one of the defendants in case No. 411. Barner & Riebe took possession of the premises under a lease from the railroad company to the Buffalo Brewing Company, one of the defendants in case No. 410, erected buildings thereon, and conducted a beer bottling business as agents of and for said Buffalo Brewing Company. The block in which the lots in dispute in both cases are situated is commonly known as the "Stockyard Block." The stockyards and corral used by the railroad company at Redding are, it is claimed by appellant, situated partly upon some of the lots in controversy.

In February, 1886, Haggin appointed and constituted one Edward Frisbie his attorney in fact, vesting him with full power to "bar-

gain, sell, transfer, grant, and convey all his right, title, and interest to any and all lots, pieces, or parcels of land in the towns of 'Anderson and Redding.'" Said power of attorney was duly recorded. Frisbie for Haggin, on June 19, 1903, conveyed to the plaintiff and one Alva Gus Hart "lots 1, 2, 3, 4, 5, and 6, designated on the map of the original town of Redding filed in the office of the county recorder of Shasta county on September 25, 1872 as the 'Stockyard Block.'" On July 2, 1903, Hart conveyed all his right, title, and interest in and to said lots to the plaintiff. The stock corral was built in the summer of 1873, and has since been maintained and used as a stock corral by the railroad company.

The foregoing statement embraces, practically all the important uncontroverted facts brought out at the trial. As we have seen, the appellant railroad company contends that the width of its right of way through the city of Redding is 400 feet, to 300 feet of which title was acquired by adverse possession. The other defendants claim no interest in any of the land except as lessees of the railroad company.

It is also contended by said company that the plaintiff failed to connect himself with the Haggin title, through which he undertakes to deraign title to the lots in controversy, because: (1) He has not shown that said lots are within the boundaries of the grant; (2) that, if it appears that the lots are within the boundaries and a part of the rancho, he has not shown that they are not within the portion of the grant excepted and reserved from the sale under the foreclosure proceedings of said grant by the sheriff to Haggin, as evidenced by said sheriff's deed of conveyance. It is also declared that, if the judgment resting upon the facts as found by the court is permitted to stand, the railroad company will thereby be deprived of a portion of the right of way through the town of Redding granted to it by Haggin. It is further urged that the plaintiff is guilty of laches in the assertion of his claim of title; but as to this point we think there need be no discussion, as the proposition seems to have been raised for the first time in this court. We think it is well settled that, where laches is relied upon as a defense, it should be specially pleaded so that an issue as to such defense may be squarely presented to the trial court. There are other points urged and discussed by appellants, but it will not be necessary to specially notice all of them.

By a most careful examination and consideration of the evidence disclosed by the record we are forced to the conclusion that the contention of the appellants that the plaintiff failed to establish his title to the lots in dispute is well founded. In other words, we think that it is clear that he has not shown that the lots which are the subject of this litigation are not within the portion of the grant excepted and reserved from the sale

evidenced by the deed from the sheriff to Haggin. That part of the deed declaring the exception and reservation mentioned reads as follows: " * * * Excepting, however, and reserving from said sale all that part of said rancho which is described as follows, to wit: Commencing on the north bank of Cottonwood creek, at the point where the west boundary line of said Rancho Buena Ventura intersects said creek, in section or subdivision 64, as shown on the private survey of said rancho made by the late P. B. Reading, the map of which is of record in the office of the county recorder of said county of Shasta, and running thence down said creek to the north bank thereof to the Sacramento river; thence along the west bank of the Sacramento river to the point where the line between fractional sections 60 and 61 of the survey aforesaid intersects said river; thence south 42 deg. 30 min. west following the line between sections 60 and 61 and between sections 59 and 62 and 58 and 63 to the western boundary line of said rancho at which point sections 58, 63 and 64 corner; thence south 13 deg. 45 min. east along said western boundary line to an established corner in said line; and thence south 6 deg. 30 min. along said western boundary line to the place of beginning on the N. bank of said Cottonwood creek, which said part of said rancho was set apart and reserved from said sale. * * * "

No evidence of whatsoever nature was introduced into the record identifying and locating the particular land embraced within the foregoing description. The map of the private survey declared in the foregoing to have been made by Reading of the land reserved from said sale, a copy of which it is declared in said deed "is of record in the office of the county recorder of said county of Shasta," was not offered or received in evidence. There is not, as we have declared, the slightest proof, either oral or documentary, which even remotely shows that the premises in dispute are not within that portion of the grant reserved from the sale to Haggin.

The burden rested upon the plaintiff to establish his title to the premises by sufficient evidence. He sought to deraign title from and through the patent from the general government to Reading. The deed under which Haggin became the owner of the grant reserved certain portions thereof from the sale to Haggin, and it was the duty of and incumbent on plaintiff, in order to trace his title to and identify it with the Haggin title to show that the lots were not within the excepted portion. *Corinne Mill Co. v. Johnson*, 156 U. S. 574, 15 Sup. Ct. 409, 39 L. Ed. 537; *Maxwell Land Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Webb v. Phillips*, 80 Fed. 959, 26 C. C. A. 272; *Harman v. Stearns*, 95 Va. 71, 27 S. E. 605. His failure to do this leaves a missing link in his chain of title.

The courts cannot take judicial notice of the exact location of the boundary lines of the lands included within the reserved portion. *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18. So far as the record discloses and the knowledge gained therefrom, the very land excepted from the sale may include the lots in dispute. If so, of course the plaintiff cannot establish title to them, for the source of his title is Haggin's title, and upon that title he must stand or fall.

The findings are vague and indefinite as to the exact location of the lots with reference to the granted right of way of the railroad company. The evidence is equally so. The official map of the city of Redding, filed for record in the year 1890 (upon which no scale is indicated), furnishes the only evidence relative to the location of the premises in dispute, and even this is far from showing whether the lots are within the 100 feet originally granted to the company as a right of way, or without the exterior boundaries thereof, or partly within and partly without said right of way. The map in fact does not show the right of way of the company with the clearness and distinctness necessary to constitute it satisfactory evidence upon the point. Nor does it show upon what portions of the lots, if upon any part thereof, the stockyards and corral and the buildings are situated, or whether they are partly or entirely within the granted right of way of the company. It is practically impossible to determine from the findings, even viewed in the light of all the evidence presented by the records before us, whether the judgment includes a portion of the company's right of way as granted to it by Haggin. A blue print, made by and under the direction of the company's engineers, and received in evidence, shows the stock corral and the buildings to be situated partly within the company's granted right of way and partly without; but whether the court accepted or rejected the evidence thus produced we are unable to determine from its findings. True the plaintiff declares that he lays no claim to any portion of the 100 feet of which the granted right of way consists, but the evidence and findings are, as we have seen, so uncertain that it is impossible to determine even by reasonable approximation where the easterly line of said right of way is located. It is manifest that, if the easterly line of the right of way runs through and takes in a portion of the lots as they are described in the complaint, then title to such portion of said lots could not vest in plaintiff. It is said in the case of *Porter and Russ v. Counts* (Cal. App.) 92 Pac. 655—a case very much similar to this as to the general nature of the evidence, findings, and judgment—that "the premises should be so described that the record will furnish evidence of the limits to which title is established by the judgment as well as to point out to the sheriff who serves the writ of possession the extent and

location of the land recovered"—citing Davis v. Judge, 44 Vt. 500, and Bricken v. Cross et al., 40 Mo. 166, 41 S. W. 735.

The language of the finding and of the judgment as to the description of the land is a repetition of that contained in the complaint, and is too general to furnish any definite idea of the exact location of the boundary lines of the lots. This is obviously insufficient. In order to give stability to the judgment it and the corresponding findings should describe the land with such definiteness as to enable the parties to know from such description the precise limits or the location of the boundary lines thereof. Porter et al. v. Counts, *supra*; Shaw v. Hill, 79 Mich. 86, 44 N. W. 422; Wickersham Banking Co. v. Rice, 137 Cal. 506, 70 Pac. 546. Measured by these tests, the findings and judgments in the cases at bar cannot for a moment be upheld.

Upon the point that the railroad company has acquired a title by prescription or adverse possession to 300 feet of land adjoining and contiguous to the 100 feet right of way granted to it by Haggin, we do not feel called upon to express an opinion since, as we have seen, it is impossible to ascertain from the findings and judgment whether the lots in controversy constitute a part of that portion of the grant expressly reserved from sale by the deed to Haggin, or are even within or without the boundaries of the granted right of way. If they are within the one or the other or both, then plainly the question of whether the company has acquired a prescriptive title to an additional 300 feet to its original right of way through Redding becomes immaterial. This much may be said, however, that if, upon a retrial, it is found that the land or any portion thereof upon which the stock corral is situated is without the limits of the granted right of way, then the undisputed testimony disclosed by the record clearly shows that the railroad has acquired title to so much of such land as is thus occupied, by adverse possession.

In this connection it is to be observed that according to the evidence the railroad company paid taxes on a 400-foot right of way from and including the year 1898 to and including the year 1903, and W. W. Douglass, deputy state controller, testified that the company had paid all the taxes levied and assessed by the state board of equalization against the right of way in the town of Redding of the Central Pacific Railroad Company and its successors for all the years from and including the year 1880 to and including the year 1902. It will be remembered that the width of the right of way of the company in Redding was specified in the assessment by the state board of equalization as 400 feet during all the years, with the exception of two (1892-1894), from and including the year 1891 to and including the year 1903. The undisputed testimony shows

that the land used as the stock corral was inclosed for upwards of 30 years prior to the commencement of this action.

There is nothing in the point suggested by the respondent, so far as the stock corral is concerned, that the railroad company cannot acquire a prescriptive title to land devoted by it to a use not within the essential purposes of the corporation. A stock corral is as necessary an adjunct to the transportation business of a railroad corporation as a depot building or a ticket office. In fact a stock corral is absolutely necessary for the proper care of animals which are presented for carriage from point to point by a railroad company and also to facilitate the loading and unloading of such animals in and from the cars.

In rebuttal the plaintiff offered in evidence, and the court, over the objection of the defendants, allowed to go into the record, certain letters passing between the county assessor of Shasta county and one E. B. Ryan. The assessor in a letter addressed to the "Central Pacific Railroad Company, San Francisco," and dated March 12, 1904, asked said company to designate upon a blank assessment list inclosed in said letter such lands as the company owned in Redding, and to return the same to the assessor. It was suggested in that letter by the assessor that the block known as the "Stockyard Block" was claimed by "Hill and Hart." Said Ryan, evidently in reply to said letter, addressed a letter over his signature to the assessor in the following language: "Your letter addressed to the Central Pacific Railroad Company is referred to me. In the matter of the stockyard block in the city of Redding, we referred the matter to our engineering department, and they advised me that the stockyard does not belong to the Central Pacific Railway Company, but probably, as you say, belongs to Messrs. Hill and Hart; hence we do not claim the property." On May 29, 1904, Ryan wrote to the assessor again, saying, among other things, that "since my letter to you, I have ascertained that we do claim said block, and have paid taxes on the same." But it is declared by the respondent that, as the appellants have failed to refer to and point out in their briefs the reasons upon which they base the claim that the rulings of the court are erroneous, said alleged errors are deemed to be waived under the rule of this court, and that therefore the same cannot be reviewed. The rule referred to is designed for the convenience and aid of the reviewing courts, and to save such courts the time and trouble (which should rest upon the attorneys) of searching the record of a case for the purpose of determining whether complaints made by counsel are well founded or not. Where, as here, however, an alleged error is specified in the assignments of error, and it is apparent from only the necessary examination of the record that such error is prejudicial, we do not understand the

rule to preclude a consideration of the same, and order a reversal thereof. The cases of *Tapscott v. Lyon*, 103 Cal. 312, 37 Pac. 225, and *People v. Gibson*, 106 Cal. 475, 39 Pac. 864, cited by counsel for respondent, justify under the rule a refusal by the court to notice alleged errors where the reasons why they are complained of are not pointed out in the briefs. But there is nothing said in those cases from which it may be gathered that the Supreme Court intended to lay down a "hard and fast" interpretation of the rule, of which the most that can be said in our opinion is that, if an appellate court desires to act upon the presumption of waiver of points not pointed out in the briefs, it may do so, and, e converso, if it is disposed to take up such points at the expense of the labor and trouble which the attorneys should have attended to, there is no reason why it should not do so. Moreover, the error under consideration was pointed out in the oral argument, and we think this is sufficient. The letters referred to were, as stated, objected to, and the rulings, to which exceptions were reserved, assigned in the record as error.

An examination of the record for the purpose of determining the main points discussed in the briefs was only necessary to demonstrate the utter incompetency of the letters as evidence and their prejudicial effect upon the railroad company, viewed by the light of the circumstances under which they were admitted. There is no evidence to show who "E. B. Ryan" is, and if it may be assumed from anything contained in the letters that he is an official of the company, there is nothing to show what particular duties are assigned to him as such, or whether whatever his duties he has any authority to bind the railroad company by his declarations. So far as the record discloses, "E. B. Ryan" may be a perfect stranger to the company, or an employé thereof having no authority to act and speak for and bind the company in the matter involved here. If it had been shown that Mr. Ryan was an official of the company, and as such authorized to bind it by declarations or negotiations involving its property rights, a much different question would be presented. The letters having undoubtedly been admitted upon the theory that Mr. Ryan was authorized to speak for the company upon the subject to which they relate, it may safely be assumed under the circumstances that the court considered the first letter as containing a significant authoritative admission, negating the claim made by the company in these actions. It was therefore, as stated, prejudicial.

The position of the defendants who erected buildings on portions of the lots in dispute that the circumstances displayed by the record are such as to entitle them in equity and good conscience, to compensation for the improvements thus bestowed by them upon the property, seems to be forceful, but beyond the

scope of the records before us. These defendants, to have availed themselves of the equitable principle sought to be invoked, should have by appropriate averments in their answers, tendered an issue upon the proposition. This they failed to do, and therefore, as suggested, we are powerless to consider the point to any purpose.

For the foregoing reasons, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 70

HILL v. HOEFER et al. (Civ. 411.)

(Court of Appeals, Third District, California.
April 7, 1908.)

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by Samuel Hill against Joseph Hoefer and others. From a judgment for plaintiff, defendants appeal. Reversed, and motion to dismiss appeal denied.

Sweeney & Tillotson and Reid & Dozier, for appellant Hoefer. William Singer, Jr., Guy H. Shoup, and G. O. Perry, for appellant S. P. R. Co. T. W. H. Shanahan and Charles H. Braynard, for respondent.

HART, J. The facts and the law involved in this case are admittedly the same as those involved in *Hill v. Barner et al.* (No. 410, this day decided) 96 Pac. 111. A motion was made to dismiss the appeal in this case, but the same is without merit, and is therefore denied.

Upon the authority of *Hill v. Barner et al.*, supra, and for the reasons therein stated, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

153 Cal. 652

In re DOLBEER'S ESTATE. (S. F. 4,874.)

(Supreme Court of California. May 28, 1908.

Rehearing Denied June 25, 1908.)

1. VENUE—CHANGE OF VENUE—GROUNDS—PREJUDICE OF JUDGE.

The fact that the judge, in proceedings for probate of a will, opposed on the sole ground of testamentary incapacity, added, in the facts found, after a verdict of the jury in favor of testamentary capacity, the formal finding, made ex parte, that testator was free from undue influence does not show his prejudice, requiring a change of venue in a proceeding to contest the will after probate, on the grounds of testamentary incapacity and undue influence.

2. SAME.

The prejudice of a judge against a case, as distinguished from prejudice against a litigant, is not a basis for a change of venue or motion of the judge.

3. JURY—RIGHT TO TRIAL BY JURY—CONSTITUTIONAL PROVISIONS.

The right to a trial by jury, secured by the Constitution, does not extend to proceedings for the probate or the revocation of the probate of wills, since such proceedings are special, belonging at common law to ecclesiastical jurisdiction; and, in the absence of a statute providing for trial by jury, such proceedings must be heard by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 111.]

4. SAME—STATUTORY PROVISIONS.

Code Civ. Proc. §§ 1312-1317, authorizing a jury trial in proceedings to contest the probate of wills, and sections 1327-1330, providing for contesting wills after probate, and declaring that, where the original probate was granted without a contest, a trial by jury may be had, as in cases of the contest of a petition to admit a will to probate, when considered in connection with the history of the legislation, as first enacted in the probate act of 1851 (St. 1851, p. 448, c. 124) and as amended in 1855, 1861, and 1868 (St. 1855, p. 132, c. 110; St. 1861, p. 628, c. 534; St. 1867-68, p. 628, c. 469), providing for contests for the probate of wills, and for contests after probate, and providing for jury trials in contests before probate, do not give one contesting a will, admitted to probate after a jury trial on the issues raised in the proceedings for probate, the right to a jury trial, notwithstanding sections 1716, 1717, providing for the trial, by the court, of issues of fact in probate proceedings, where no jury is demanded, since the latter sections are general; and under the general rule of statutory construction, as well as under Pol. Code, § 4482, declaring that, where the provisions of any chapter contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter, those sections are controlled by the special provisions of the sections relating to will contests.

5. WILLS — CONTEST OF WILL ADMITTED TO PROBATE—SERVICE OF CITATION ON PARTIES INTERESTED.

Code Civ. Proc. § 1329, providing that, on filing a petition to contest a will after probate, a citation must be issued to the executor and to all the legatees and devisees mentioned in the will and heirs residing in the state, so far as known to the petitioner, etc., does not make a service of citation on all of the parties essential, and where personal service of citation was made on the executor and a number of legatees, and they answered, and petitioner was defeated, the failure of the court to direct the service of citation on one who took nothing under the will, but who would take as an heir on the probate of the will being revoked, did not affect him.

6. EVIDENCE—HEARSAY DECLARATIONS.

Objections to questions calling for hearsay declarations are properly sustained.

7. WITNESSES—EXAMINATION—CONTRADICTION—DECLARATIONS OF WITNESS.

Where a witness has failed to testify as expected, the deficiency cannot be made good by the offer, in evidence, of declarations made by the witness out of court, except where, to the surprise of the party calling the witness, the witness has given affirmative hostile evidence, in which case declarations are received to neutralize the effect of the hostile testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1210-1219.]

8. SAME.

A witness, who had fully testified by deposition, was called by a party who contended that he was surprised at the hostile testimony given by the witness, though the testimony conformed to the deposition. The adverse party offered to strike out her testimony, but the offer was not accepted. *Held*, that the court properly sustained objections to evidence, admissible on the theory that the witness had given unexpected testimony hostile to the party calling the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1096.]

9. EVIDENCE—HEARSAY EVIDENCE.

Where a witness was in San Francisco at the time another person met her death in New York, the court properly sustained an objection to questions propounded to the witness as to whether or not such other person had committed suicide, since the witness would only know the circumstances of the death from hearsay.

10. WILLS—CONTEST OF WILL ADMITTED TO PROBATE — EVIDENCE — DECLARATIONS OF LEGATEES—ADMISSIBILITY.

Declarations of a legatee are not receivable in evidence against other legatees, whether the evidence is addressed to the mental unsoundness of testator, or to the question of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 821.]

11. NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

Motions for new trial, on the ground of newly discovered evidence, rest in the sound discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 10.]

12. SAME—SUFFICIENCY OF NEWLY DISCOVERED EVIDENCE.

Evidence, alleged to have been newly discovered, on a motion for a new trial in a proceeding to contest a will admitted to probate, held insufficient to show that the trial court abused its discretion in denying the motion.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings by Horatio Schander to contest the will of Bertha M. Dolbeer, deceased, instituted after the admission of the will to probate. From an order denying a new trial after verdict sustaining the will, contestant Schander appeals. Affirmed.

See 86 Pac. 695.

Darwin C. De Golia, Bart Burke, and Chas. J. Pence, for appellant. E. S. Pillsbury, Garret W. McEnerney, and Joseph H. Mayer, for respondent.

IIENSHAW, J. This was a contest of the will of Bertha M. Dolbeer, deceased, instituted after its admission to probate. The grounds of the contest were the mental incapacity of the deceased to execute a will, and alleged undue influence exercised upon the mind of the testatrix by Etta Marion Warren, the principal beneficiary of the testatrix's bounty. In *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, this court considered the contest of Adolph Schander before the probate of Bertha Dolbeer's will. The present contest was instituted by another maternal uncle of Bertha Dolbeer, Horatio Schander. It was tried by the court without a jury, and determined adversely to contestant. From the judgment denying the petition for revocation, an appeal was taken, which appeal was by this court dismissed. The present appeal is taken from the order of the court denying petitioner's motion for a new trial because of asserted errors of law committed at the trial, and upon alleged newly discovered evidence.

For the history and facts in this matter reference may be made to the *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695. It may be added that, upon the question of the insanity of the deceased, the evidence in the present case is certainly no stronger, if not much weaker, than the evidence adduced upon the former contest. Of direct evidence touching undue influence there is nothing worthy of the name, and indeed there is nothing at all upon this branch of the case, other than the inferences which might be drawn from the two facts—the opportunity for exercising such influence, and the circumstance that the will makes Miss Warren the principal beneficiary. But these facts are wholly insufficient to support the charge, and, as was declared in the earlier contest, the will of deceased was not an unnatural one.

With this brief statement we come to a review of the alleged errors of law committed by the trial court, and the first of these is based upon the court's refusal to grant a change of venue. Judge Coffey presided over the department of the probate court before which the first contest, upon the admission of the will to probate, was heard and determined before a jury. The sole issue there presented was that on the mental capacity

of the testatrix to execute a will. The jury found the testatrix, at the time of the making of the will, to be of sound and disposing mind. In the proof of facts found, the judge properly, indeed necessarily, added the formal finding, made *ex parte* (there being no controversy upon the question), that the testatrix was free from undue influence in the making of the will. The only pertinent allegations in the affidavits touching the disqualification of the judge are that the judge "has used language indicating that he has formed a fixed opinion concerning the validity of said alleged will of decedent," and further that the judge has "shown his position as to the merits of the affiant's contest, and shown his prejudice and bias against this affiant's said contest," by fixing the return day of the citation for a date 10 days after its issuance, notwithstanding the fact that Ida J. Moody, one of the heirs at law of Bertha M. Dolbeer, was at that time in Europe, and that service of said citation therefore could not be personally made upon her, and that since then the court has refused to delay the hearing of the case, by issuing an alias citation to bring Mrs. Moody into court, notwithstanding that application had been made therefor. It is to be here noted that it is not charged that the bias of the judge is directed against the contestant nor his attorneys, but simply that it is directed against the case. The return day of the original citation granted contestant reasonable time to serve all parties within the jurisdiction of the court, and the refusal to issue an alias citation for Mrs. Moody was, as will be considered hereafter, entirely proper. These alleged grounds of prejudice may at once be eliminated. The circumstance that the court, in its formal proof of facts, found, upon the former contest, that the will was executed by Miss Dolbeer when free from undue influence, can, under no circumstances, be the foundation for the imputation of bias or prejudice upon this account, since in that contest the question of undue influence was not in issue, and the court found merely upon the legal presumption of the absence of fraud or undue influence where there is failure of allegation and proof of either. There is thus left the single proposition that the judge was biased and prejudiced "against this contest" (wherein the probate of the will was sought to be revoked, upon the ground that the testatrix was insane), because before a jury a similar or like contest, upon the same ground, had been tried and determined in his court favorably to the proponents of the will. But this alleged prejudice of a judge against a case, as distinguished from prejudice against a litigant, has never been recognized as a sound basis for a motion for change of venue or the removal of a judge. Were it otherwise, it would prohibit any judge from sitting in the second trial of a cause which had previously been determined by him, since in the first trial he must have reached his own conclusions, as to the law and the facts, to

the so-called prejudice of one or another of the litigants. Says the Supreme Court of Vermont: "There is no rule or principle that disqualifies the judge of a court from sitting in different causes in which the same legal rules and questions of fact, or either of them, are presented for consideration." *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333. The same principle was enunciated by the Supreme Court of this state in *Patterson v. Conlan*, 123 Cal. 453, 56 Pac. 105. To the same effect may be instanced *Western Bank v. Tallman*, 15 Wis. 92; *Fry v. Bennett*, 28 N. Y. 324; *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; 23 Cyc. 586.

Contestant demanded a trial by jury, which the court refused to grant. Contestant here contends that he was legally and of right entitled to a jury, or that a trial by jury was certainly discretionary, and the court abused its discretion in not according it to him. The right to a trial by jury, secured by the Constitution, has no reference to or bearing upon proceedings in probate. "It has been held that the right of trial by jury is secured by the Constitution only in cases in which it had previously existed, in the administration of justice according to the course of the common law. Probate matters belong to ecclesiastical jurisdiction, where a jury was not a right. Such a proceeding is not really an action at law, as defined in the Code." *In re Moore*, 72 Cal. 335, 13 Pac. 880. A contest of a will and proceedings to revoke its probate are special proceedings. *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768; *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842. It follows, then, in the absence of a statute providing for trial by jury, probate proceedings have always been heard by the court, without the intervention of a jury. Only in those probate proceedings where the statute expressly confers a right to a trial by jury does the right exist. *Wills v. Lochrane*, 9 Bush (Ky.) 550; *Moody v. Found*, 208 Ill. 78, 69 N. E. 831; *Page on Wills*, § 331. Considering briefly the origin and history of our present code sections, it will be found that, in the probate act of 1851 (St. 1851, p. 450, c. 124), sections 20 to 24 provided for a contest of a will before probate, and sections 30 to 34 for a contest after probate. It will be found, moreover, that no jury was allowed by that act in a contest, either before or after probate. In 1855 sections 20 to 24 of the act of 1851, treating of a contest before probate, were amended, making a jury, in such cases, allowable upon demand. St. 1855, p. 132, c. 110; *Pond v. Pond*, 10 Cal. 495. In 1861 section 20 was again amended (St. 1861, p. 630, c. 534, § 9), so as to require that the demand for the jury should be filed at least three days before the date set for the trial in the probate court, and that the case should thereupon be immediately certified to the district court, which court alone, under the existing practice, had power to determine such controverted questions of fact. *Pond v.*

Pond, *supra*. In 1868 section 20 was once more amended (St. 1867-68, p. 628, c. 469, § 1), by providing that the jury trials in the contests therein contemplated should be heard and determined in the probate court, instead of being certified for determination to the district court. St. 1867-68, p. 628, c. 469. These were the only amendments to these sections 20 to 24 of the practice act up to the time when they were transferred to the Code of Civil Procedure and embodied substantially in sections 1312 to 1317 thereof.

Sections 30 to 33 of the probate act of 1851, relating to contests after probate, remained unchanged until re-embodied and re-enacted in sections 1327 to 1330 of the Code of Civil Procedure. But in re-enacting these sections into the code provisions, this declaration was added: "In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate." Code Civ. Proc. § 1330. So far as this review has gone, it establishes that, by the probate act as amended in 1855, a jury trial was demandable only in the case of a contest before probate, and never in a case of a contest after probate, whether the will had been originally admitted to probate with or without a contest. When section 33 of the earlier practice act was re-enacted in section 1330 of the Code of Civil Procedure, for the first time the significant addition was made of the clause above quoted, and the manifest purpose of this clause was to allow a contestant after probate a trial by jury, if the original probate was had and granted without a contest. While in terms the section does not declare that the contestant shall not be entitled to a jury if the original probate was had after contest, yet, as such contestant was only entitled to a jury in probate matters where the statute accorded it, and as the statute in this instance accorded no right, in any case, to a trial by a jury of a contest instituted after probate, it is natural to conclude that section 1330 operated to make an exception to the general rule denying a jury in a case of contest after probate, by awarding the right in the limited cases where the probate had been granted without previous contest. In *re Robinson*, 106 Cal. 493, 39 Pac. 862. And this, it may be said, was a very proper relaxation of the rule, it being considered by the Legislature proper that a jury might once be had to pass upon disputed issues of fact, but that, in the interest of expedition and the speedy disposition and distribution of estates, it was inexpedient that when these contested matters had once been passed upon by a jury, or when a right to a jury had once been accorded, a right to a second trial by jury, with its incident and consequent delays, should be allowed. But appellant places reliance upon sections 1716 and

1717 of the Code of Civil Procedure. These code sections are substantially re-enactments of section 294 of the probate act of 1851 (page 486, c. 124) as amended in 1855 (St. 1855, p. 300, c. 229, § 5), and again in 1861 (St. 1861, p. 653, c. 534, § 110). They have received consideration from this court in *Re Moore*, 72 Cal. 335, 13 Pac. 880. But no sound argument of a contestant's general right to a trial by jury after probate can be drawn from these sections. Their language is general. Their provisions are designed to lay down a rule with respect to cases concerning which no provisions elsewhere are found. Being general, they come under the established canon of construction that their language is controlled by the special provisions of the code sections touching the same general matter. *Martin v. Election Commissioners*, 126 Cal. 404, 58 Pac. 932. Moreover, the provision of section 1330 must be considered as the latest expression of the legislative will. It has been pointed out that it was a new provision, modifying the older sections of the probate act, and it is declared by section 5 of the Code of Civil Procedure that the provisions of this Code, so far as they are substantially the same as existing statutes, must be considered as continuations thereof, and not as new enactments. And, finally, upon this subject-matter, it may be added that section 4482 of the Political Code declares that, if the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter. Section 1330 of the Code of Civil Procedure is contained in article 4 of chapter 2, while sections 1716 and 1717 are contained in chapter 12. Chapter 2 deals with the probate of wills, and article 4 of that chapter deals with contesting wills after probate, while chapter 12 is devoted to the consideration of "orders, decrees, processes, minutes, records, trials, and appeals in probate matters." It is apparent that, when considering a case dealing with the probate of a will and with contesting wills after probate, which is the case here presented, the articles and chapters dealing specifically with these matters must prevail over the general provisions which may be deemed to have a bearing upon this subject-matter. It is thus concluded that contestant was not entitled, as of right, to a jury trial. And as to the second consideration which he advances, namely, that if the matter was one of discretion, it was an abuse of discretion in the court, in this instance, to refuse a jury trial, little need be said. It is the policy of the law to curtail dilatory proceedings in the settlement of estates. There had been a contest before probate, instituted by the brother of this contestant, and tried before a jury, resulting in a verdict sustaining the mental competency of the testatrix. The judgment which followed was sustained upon appeal.

With all of these facts this present contestant was familiar. There had been a full opportunity, given before probate, to have a jury determination of any and all matters of legitimate contest, and it is the policy of the law that where such a contest has been had, subsequent contests should be expeditiously dealt with by the court itself. It was, therefore, not an abuse of discretion, but within the well-defined policy of the law, to refuse a jury trial under the circumstances shown.

Complaint is made that the court refused to delay the proceedings by issuing an alias citation for Mrs. Ida J. Moody, an heir at law of the decedent, who, though a resident of California, was sojourning in Europe, and also upon certain other heirs at law, or successors in interest thereto. Mrs. Moody took nothing under the will, but would have taken as heir had probate of the will been revoked. Her financial interests were therefore with and not opposed to contestants. Section 1329 of the Code of Civil Procedure does not make a service of citation upon all of the parties essential. They may be proper parties, but are not necessary parties. The Code expressly provides that, at the time appointed for showing cause, personal service of the citation having been made upon any persons named therein, "the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will." Personal service of the citation had been made upon the executor and a number of the legatees, and they had answered the petition for revocation, and were ready for trial. Nothing would have been gained by the issuance of an alias citation, except delay; and, although some of the persons interested were not served, since contestant has failed in his petition for revocation, it could not advantage him if they had been served. He has suffered no injury.

Miss Etta Warren was called as a witness for contestant. Her deposition had previously been taken, and with its contents contestant was unquestionably familiar. The objections to certain questions propounded to Miss Warren were sustained by the court. Generally speaking, these questions called for hearsay declarations, and were inadmissible upon that account. Certain others could have been admissible only upon the theory that the witness had given unexpected testimony, hostile to the party who called her. In view of the fact that Miss Warren had previously testified fully by deposition, it cannot seriously be contended that the testimony which she gave, conforming to her deposition, was matter of surprise to the contestant, who had placed her upon the stand. But, moreover, it is well settled that when a witness has failed to testify as expected, the deficiency cannot be made good by the offer, in evidence, of declarations made by that witness out of court. The exception being that above adverted to, where, to the surprise of the party, the witness has given affirmative hostile evi-

dence, the declarations are received only for the purpose of neutralizing the effect of this hostile testimony so unexpectedly given. *People v. Jacobs*, 49 Cal. 384; *People v. Creeks*, 141 Cal. 529, 75 Pac. 101. In each instance where it was contended that the evidence of Miss Warren was thus unexpected and hostile, offer was made by counsel for the executors of the will to strike out her testimony, and thus eliminate any possible necessity for the introduction of these asserted declarations. Counsel refused to accept the offer, and the court thereupon sustained the objection. The ruling of the court, for both the reasons above given, was proper. The same may be said of the rulings touching questions propounded to the witness Mrs. Mai Watson, but, in addition to this, the questions themselves were shown to be plainly inadmissible. Thus, Mrs. Watson was asked whether or not Miss Dolbeer had committed suicide in New York. Counsel for respondent objected, and were permitted by the court to show that Mrs. Watson was in San Francisco when Miss Dolbeer met her death, and could only know from hearsay the circumstances of that death, whereupon the objection to the question was sustained. Mrs. Watson was further asked if she had not said to her sister that Miss Dolbeer had followed in the footsteps of her mother, meaning that she had committed suicide. This question was objected to, upon the ground that it was hearsay. The objection was well taken, and was properly sustained. The witness was further asked if she had not told her mother or sister that Miss Dolbeer had attempted to take her life by suicide when she was on an Alaska trip. It was not shown that the witness was with her on the trip, and it was shown that the testimony, if elicited, would be hearsay, and the objection was therefore properly sustained. Objection was also sustained to evidence touching certain purported admissions of Miss Warren, tending to show that Miss Dolbeer was of insane mind at the time of her death, and had committed suicide. For the reasons discussed in *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, the rulings excluding these declarations were proper. On the former appeal it was held that these declarations were not receivable in evidence, because they could not bind the other legatees, and the same rule holds whether the evidence was addressed to the mental unsoundness of the testatrix, or to the question of undue influence. *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *In re Campbell (Sup.)* 73 N. Y. Supp. 753; *Clarke v. Morrison*, 25 Pa. 453; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

There have thus been considered all of the objections, presented by appellant, embracing the alleged erroneous rulings of law, and, as has been seen, no one of them has any merit.

The court refused to grant a new trial upon the issues upon the ground of newly discovered evidence. Passing over the objections of respondents to the consideration of these affidavits, upon the ground that they were not served or filed within the time allowed by law, and considering them upon their merits, there is nothing therein contained which would have justified the court in granting a new trial, still less to demand a reversal of its order refusing a new trial. Certain of the affidavits go to alleged visits of Miss Warren and Miss Dolbeer to a fortune teller known as Ismar. Some of these affidavits are of persons who saw one or two women, supposed to be Miss Warren or Miss Dolbeer, or both, go to the fortune telling rooms of Ismar. No one of these identifies them both. One of the affidavits declares that the affiant was introduced to Miss Warren. But, again, upon the other hand, Miss Warren denies that she was ever at the rooms of Ismar, with or without Miss Dolbeer, and denies the introduction, and the affidavit of Ismar is to the same effect. It further appears that, whatever may have been the merit or demerits of the Ismar matter, it was known to contestant and his attorney as early as September, 1904; moreover, that Miss Warren herself, upon the trial of the cause, was interrogated as to her dealings with Ismar. The whole question then is in dispute. It had no great significance, and there was a total lack of diligence established. A second matter relates to the affidavit of Dr. Fowler, a physician who attended Miss Dolbeer in New York just previous to her death. Dr. Fowler was dead when the motion for new trial came on to be heard, and any disclosures, in evidence by him, of information acquired as a physician, would have been in violation of subdivision 4 of section 1881 of the Code of Civil Procedure. The affidavit of Patrick L. Francis, a reporter upon a New York newspaper, simply related to certain circumstances that he observed and statements that were made at the coroner's inquest. If admissible at all, the testimony would have been without pertinency or value. Motions for new trial upon the ground of newly discovered evidence are always subject to careful scrutiny by the court, and the decision rests on its sound discretion. *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342. As has been said, there was no abuse of discretion in denying the motion in this case.

For the foregoing reasons, the order appealed from is affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 664

TAPSCOTT v. MEXICAN COLORADO RIVER LAND CO. et al. (S. F. 4,585.)

(Supreme Court of California. May 28, 1908. Rehearing Denied June 25, 1908.)

1. CORPORATIONS—SALE OF PROPERTY—STOCK HOLDERS' CONTRACT—EFFECT ON CORPORATION.

Plaintiff stockholder alleges that the corporation gave the lessee of its land an option to purchase; that the stockholders concurrently agreed that, on an exercise of the option, they would assign their shares of stock and control of the corporation; that the lessee's assignee exercised the option; that the corporation has carried out the terms of the agreement with all the stockholders excepting plaintiff, and has paid them their proportionate shares of the purchase money; that they have assigned their stock, but that he has not been requested to do so, and that he has not been tendered his share of the money; that the corporation has no property excepting such purchase money; and that the corporation intends to invest its funds in a foreign country, with intent to deprive him of such share. *Held*, that these allegations are insufficient to show that the stockholders' agreement binds the corporation so as to entitle plaintiff to sue it for his share of the purchase money.

2. SAME.

If the agreement did bind the corporation, the agreement is void as to the obligation sought to be imposed upon it, since it amounts to an agreement by the corporation, to divide its capital stock between its stockholders, in violation of Civ. Code, § 309, prohibiting a corporation from making dividends, except upon surplus profits, or from dividing the capital stock.

3. SAME.

That the corporation has distributed shares to other stockholders does not entitle plaintiff to his share, his recourse being to compel a restoration of the illegally distributed shares.

4. SAME.

"Capital stock," within Civ. Code, § 309, relating to the distribution of the capital stock of corporations, refers to the actual property of the corporation contributed by the shareholders.

[Ed. Note—For cases in point, see Cent. Dig. vol. 12, Corporations, § 162.]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

Department Two. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by V. A. Tapscott against the Mexican Colorado River Land Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Gillis & Tapscott and Jackson Hatch, for appellant. J. A. Stephens and Curtis L. Hillier, for respondents.

HEENSHAW, J. To plaintiff's complaint a general demurrer was sustained with leave to amend. Upon plaintiff's failure to amend, judgment passed for defendants, and plaintiff prosecutes this appeal.

The material averments of his complaint are as follows: That the Mexican Colorado River Land Company, a defendant herein, is a corporation, organized and doing business under the laws of the state of California; that its capital stock was 40,000 shares, of the par value of 50 cents, and that plaintiff

is a stockholder, owning about one-fifth of the capital stock, and is also a director of the company; that the Mexican Colorado River Land Company (which for convenience will be designated the California corporation) owned lands in the Republic of Mexico; that in June, 1902, defendant executed to Harrison Gray Otis a contract of lease, with an option to purchase these lands. By assignment Otis' rights were transferred to a corporation known as the Colorado River Land Company, Sociedad Anonima (which for convenience will hereafter be called the Mexican corporation); that the Mexican corporation in due course tendered to the California corporation the purchase money for the lands, as agreed upon in the original contract with Otis, amounting to \$271,359, and the California corporation in turn accepted the money, and executed its deeds to the lands to the Mexican corporation. The complaint then further alleges: "That on the same day, and as a part of the same contract [between the California corporation and Otis], the stockholders of said corporation, the Mexican Colorado River Land Company, entered into a contract with said Harrison Gray Otis, in the words and figures following, to wit." This stockholders' contract or agreement with Otis recited that whereas Otis had leased the lands from the California corporation with the option and privilege of purchasing the same at a stated price "now, therefore, if said Otis, his heirs or assigns, should or shall exercise said privilege and buy said property and pay the purchase price as stipulated in said lease and contract, then and in such event we hereby severally agree and bind ourselves, our respective heirs and assigns, to indorse, turn over, and assign without cost and free from all charges and incumbrances, all of the shares of the capital stock of said corporation now belonging to us severally to wit: [here follows the names of the stockholders, with the number of shares respectively owned by them] and we further covenant and promise that, in addition to such transfer of stock, we will individually and collectively by resignation of old and election of new directors, turn over to said Otis, his heirs and assigns, all of the machinery and control of said corporation." This paper was signed by the stockholders (amongst them plaintiff) representing a great majority of the stock of the California corporation. The complaint then alleges that upon receipt of the \$271,359 from the Mexican corporation, and upon the execution of the deeds by the California corporation, certain of the members of the board of directors of the California corporation resigned, and their places were filled with other directors chosen and serving in the interest of the Mexican corporation in fulfillment of that clause in the stockholders' agreement above quoted, whereby "all of the machinery and control" of the California corporation upon

the purchase of this land was to be turned over to the purchaser. Plaintiff then, upon information and belief, alleges, and this seems to be the gravamen of his action, that the California corporation, of which he is still apparently a director, "has executed and carried out the terms of said contract with all of the holders of the stock of said corporation except this plaintiff, and has paid them their proportionate shares of said sum of \$271,359, and that the said stockholders have severally indorsed, turned over and assigned, without cost and free from all charges and incumbrances, their said shares of the capital stock of said corporation, * * * but that plaintiff has never been requested nor has any demand been made upon him to do so, nor has any tender been made to him of his proportionate share of the moneys hereinabove referred to, based upon his stock and the amount thereof in said" California corporation. It is then averred that the California corporation has no property other than such money as it may still have, derived from the sales of its Mexican lands as above set forth, and that the corporation contemplates the investment of its funds in other lands, and alleges that "it is the intention of said board of directors to take action in relation to said matter, and to authorize the investment of said funds in properties and enterprises, which the president or secretary claim or may claim to have found, being situate in the Republic of Mexico, and to thereby remove the said funds from their immediate possession, and out of the state of California, and that they intend, and will in fact, deprive the plaintiff of his proportionate share thereof." Plaintiff, for specific relief on these facts, asks an award to him of the sum of \$46,863.25, being his proportionate share of the amount for which the lands were sold. Ancillary to this, he asks that the corporation be restrained from disposing of the funds until this amount so due him be paid.

From even a cursory consideration of this pleading it is apparent that no legal connection is shown between the California corporation's contract to convey the lands to Otis and the independent stockholders' agreement to make over their stock in the event of such purchase. Whatever may have been the wisdom or unwisdom, the reason or want of reason, which induced the making of this stockholders' agreement, and, notwithstanding the fact that the pleader, for his purposes, treats this stockholders' agreement as the agreement of the corporation, as when he pleads that the corporation "has executed and carried out the terms of said contract with all the holders of the stock of said corporation except this plaintiff," nevertheless, in law, it is nowhere made to appear that this stockholders' agreement was, in any sense, manner, or form, binding upon the corporation. Moreover, if by the most liberal construction of this pleading it could be held,

for the purposes of this demurrer, that this stockholders' agreement did bind the corporation in the sense for which plaintiff contends, then, it must unhesitatingly be said that, as to the obligation sought to be cast upon the corporation, this agreement is null and void, because it amounts to an agreement upon the part of the corporation to divide its whole capital stock amongst its stockholders by a method not in conformity with but in direct violence of the law. Section 309 of the Civil Code of California, so far as pertinent to this consideration, declares as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; * * * nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock. * * * There may, however, be "a division and distribution of the capital stock of any corporation, which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence." The capital stock thus referred to is the actual property of the corporation contributed by the shareholders. *Excelsior Water & Min. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Kohl v. Lilienthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Vercoutere v. Golden State L. Co.*, 116 Cal. 411, 48 Pac. 375; *Schaafe v. Eagle Can Co.*, 135 Cal. 473, 63 Pac. 1025, 67 Pac. 759. It appearing that the California corporation has no property other than the money received from the sales of its Mexican lands, plaintiff's demand, in its essence, is that it shall divide its total capital stock, and give him his proportion, in violation of the provisions of the code section above quoted. The fact that he avers, on information and belief, that the corporation has done this as to certain of the stockholders affords no reason for his demand that it do so to him. The fact, if it be a fact, that the corporation has acted wrongfully in this matter as to certain of its stockholders is certainly no reason for asking equity that it should decree that the corporation should do another illegal act for plaintiff's benefit. Plaintiff's recourse is to compel the restoration of the funds which he alleges were thus illegally distributed.

No weight attaches to the allegation in the complaint that the California corporation purposes to reinvest these moneys in other Mexican lands. The purposes of the organization of the corporation are not in the complaint set forth. All that can be legitimately derived from the complaint is that the investment in transfer and sales of such lands was one of the very purposes of its organization.

For these reasons the order sustaining the demurrer was correct, and the judgment appealed from is affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

BARRON v. BARRON. (Civ. 432, and S. F. 4,509.)

(Supreme Court of California. June 11, 1908.)

1. DIVORCE—INTERLOCUTORY JUDGMENT—VACATION AND DISMISSAL.

After the six months prescribed by Civ. Code, § 131, and Code Civ. Proc. § 473, within which appeal may be taken from or attack by other means inaugurated against an interlocutory judgment of divorce by default, has expired, plaintiff cannot, on an ex parte application, have the same set aside and the suit dismissed before expiration of the year during which such judgment must be in existence, under section 131, preceding entry of final judgment.

2. SAME—WAIVER OF RIGHT TO DIVORCE.

An interlocutory judgment of divorce provided for by Civ. Code, § 131, which becomes final by the lapse of six months from entry without appeal or motion to set it aside, merely establishes conclusively plaintiff's rights to a divorce, and it does not necessarily follow that he or she may not waive the exercise of such right and dismiss the action.

In Bank. Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action for divorce by Rita A. Barron against George H. Barron. From an order denying a motion by plaintiff to dismiss a motion by defendant to set aside and vacate an order on motion of plaintiff, setting aside and vacating an interlocutory judgment for plaintiff, and from an order granting the motion of defendant sought to be dismissed, plaintiff appeals. On affirmance by the District Court of Appeal, plaintiff appeals. Affirmed.

The following is the opinion of HART, J. (concurring in by CHIPMAN, P. J., and BURNETT, J.), in the District Court of Appeal.

"The plaintiff commenced a suit against the defendant for a divorce, in the superior court of the city of San Francisco, by filing a verified complaint in the office of the clerk of said court on the 1st day of June, 1904. On the same day summons was issued in said action, and on the 6th day of June, 1904, the same was served on the defendant in said city of San Francisco. The defendant did not answer the complaint within the time allowed him by law, and, accordingly, his default was entered on the 23d day of June, 1904. The cause was tried on the 25th day of June, 1904, the defendant not appearing at said trial, and, after hearing the proofs, the court granted an interlocutory judgment in favor of the plaintiff, as authorized by section 131 of the Civil Code. On the 6th day of April, 1905, something over nine months after the entry of the interlocutory judgment, plaintiff made an application to the court, in the form of a petition, in which all the proceedings theretofore had in the case were fully set out, for an order setting aside and vacating said interlocutory judgment. Said petition also alleged that it was the desire and intention of plaintiff, if said interlocutory judgment was set aside, to

move for a dismissal of said action. No notice of this last-mentioned proceeding was served upon or given the defendant. 'On said 6th day of April, 1905, the said court read and heard said petition, and made an order and decree in said action vacating and setting aside the interlocutory judgment and decree made and entered on the 25th day of June, 1904, and dismissing the said action, and directing the clerk of said court to enter a dismissal thereof upon his docket.' This order of the court was entered on the 6th day of April, 1905. On the 31st day of May, 1905, the defendant, having by some means learned of the action of the court vacating the interlocutory judgment, gave notice of a motion for an order vacating and setting aside the said order of April 6, 1905, setting aside and vacating the interlocutory judgment made and entered on the 25th day of June, 1904. On the 2d day of June, 1905, the plaintiff filed a motion to dismiss the last-mentioned motion by the defendant for an order vacating and setting aside the said order of April 6, 1905. On September 25, 1905, defendant's motion to vacate the order made on the 6th of April, 1905, and the plaintiff's motion to dismiss said motion of defendant, were heard by the court, and an order made and entered denying the motion of plaintiff to dismiss the motion of defendant, and granting the motion of defendant to set aside and vacate the order made on the 6th day of April, 1905, setting aside and vacating the interlocutory judgment entered on the 25th day of June, 1904. The plaintiff prosecutes this appeal from the order denying her motion to dismiss the motion of the defendant and from the order granting the defendant's motion to set aside and vacate the order vacating and setting aside the interlocutory judgment.

"The appellant contends that the court was without jurisdiction to make the order upon defendant's motion, as heretofore explained, because the action had been dismissed and was no longer pending in said court. On the other hand, the respondent contends that the court exceeded its jurisdiction in making the order setting aside the interlocutory judgment and the subsequent order dismissing the action after the lapse of six months after the entry of said interlocutory judgment. Under the decisions of the Supreme Court having any bearing upon the question, as we understand them, the contention of the respondent must be sustained. Section 131 of the Civil Code reads: 'In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such

interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final.' The exact question presented here is a new one in this state. By this we are to be understood as saying that whether a plaintiff who has obtained an interlocutory judgment by default in an action for divorce may, upon an ex parte application, have the same set aside and the suit dismissed at any time before the expiration of the year during which said interlocutory judgment must be in existence preceding the entry of final judgment, is a question upon which there are in this state no judicial precedents precisely in point.

"The policy of the law is not only to discourage divorces, but to encourage the reconciliation of married persons between whom some degree of estrangement has arisen which may likely or probably will lead to permanent separation and the restoration of the parties to the status of unmarried people through judicial determination. The institution of marriage constitutes one of the essential and strongest of the corner stones of the social fabric. While in a restricted sense it involves a contractual relation in which the immediate parties themselves are alone vitally interested, in a comprehensive sense it affects and permeates and is an indispensable part of the whole social system, and in that view becomes a question of vital public concern. Consequently, the public is in fact, if not in name, a party to every action for the dissolution of the marriage relation. Therefore the legislative policy has been, is, and always will be, so long as society is supported by its present standard, against allowing divorces for slight or trivial or capricious reasons, but strongly favors a prevention of them where it can be done consistently with the highest interests of the immediate parties and of society. Our present law is the fruition of many years of legislative effort to bring about the ends to which we have referred. First, it was thought that the interdiction of the marriage of the divorced parties within a year after the final decree would discourage, to some extent, the desire for legal separation for at least slight and capricious causes. This enactment proved futile for the purpose intended to be achieved, for the courts held that, while in this state a marriage contrary to the provisions of that law would be void, either party could avoid the effect of the law by having the marriage ceremony solemnized in another state at any time after the entry of the decree. The facility with which such persons could cross the California line, either into Nevada, Oregon, or Arizona soon demonstrated the utter impotency of the enactment to accomplish its principal design. Then the Legislature gave us the present law, by the provisions of which a final judgment must be predicated of an interlocutory judg-

ment of one year's existence. Many specific reasons could be given why the Legislature has thus exercised such jealous solicitude over the institution of marriage as evidenced by the restrictions which it has thrown around the action for divorce. Among these it has been suggested that the provision for the postponement of a final decree of divorce for a specified time after the finding that a party was entitled thereto was founded upon the consideration that the parties might be reconciled during such time, and a final separation thus obviated. *De Yoe v. Superior Court*, 140 Cal. 484, 74 Pac. 28, 98 Am. St. Rep. 73, per Mr. Justice Angellotti. And again, as is further suggested by the learned writer of the opinion in the case just cited, 'it might be contended with much force that such legislation was justified upon the theory that the postponement of the giving of final judgment for a specified time removes to some extent the temptation to resort to collusion or fraud, in order to obtain a speedy divorce and contract a new marriage.'

"We have thus referred to some extent to the nature of the contract of marriage and its peculiar relation to the state and its effect upon society, in order to show that the policy of the law is to discourage divorces and encourage reconciliation between the parties where divorces seem imminent, thus showing the reasons impelling legislation regulating the subject of marriage and divorce. And, it is upon the policy of the law against divorces that counsel for appellant builds almost the entire fabric of his argument in support of the principle for which he contends here, to wit: That the statute should be so construed as to sustain the action of the court in setting aside, on the motion of plaintiff, an interlocutory judgment in an action for divorce, at any time within the year during which such judgment must exist before the entry of a final judgment; that such a course would harmonize with the public policy upon the subject as expressed through the legislation thereon. But, the Supreme Court, in a very recent case, has used language which forbids such a construction of section 131 of the Civil Code as would authorize either party to a divorce suit, upon a mere *ex parte* application, to cause an interlocutory judgment therein to be set aside and vacated after the expiration of the time prescribed by said section within which an appeal may be taken from or an attack by any other means inaugurated against such interlocutory judgment. The statute provides, as will be observed, that an appeal may be taken from the interlocutory judgment in an action for divorce within six months after the entry of such judgment. Section 473 of the Code of Civil Procedure prescribes the same time limit within which proceedings under that section may be initiated. In the case at bar the motion to vacate the interlocutory judgment and to dismiss the action and the orders

of the court to that effect were made over nine months after the entry of such judgment. In *Claudius v. Melvin*, 146 Cal. 260, 79 Pac. 897, the following plain, unambiguous, and unqualified language is used by Mr. Justice Shaw, speaking for the court: 'The judgment entered on September 4, 1903, therefore constituted a valid interlocutory judgment declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal, or on motion for a new trial, or by proceedings under section 473 of the Code of Civil Procedure. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted, *the court thereupon lost all power by any proceeding in the case to modify or vacate the judgment, in so far as it constituted an interlocutory judgment.*' (The italics are ours.) The foregoing language is, as already suggested, so clear and plain as to the meaning intended to be thereby conveyed that nothing can be added to make its meaning clearer. The proposition as thus declared is stated without qualification—that the time having expired within which proceedings to vacate such judgment could be instituted, and no authorized proceedings having been instituted within the time limited, the 'court thereupon lost all power by any proceeding in the case to modify or vacate the judgment, in so far as it constituted an interlocutory judgment.' Indeed, if this language cannot be clearly understood, then surely judicial opinions are of little force and practically of no use as precedents upon which *nisi prius* courts can rely to guide them to correct conclusions, or at least conclusions in harmony with the regularly authenticated views of the higher courts.

"But it will doubtless be argued that the proceedings authorized to be taken as against such interlocutory judgments are supposed to be initiated by the defendant in the action and not the plaintiff, and therefore the opinion of the Supreme Court from which we have quoted deals with the section as exclusively applying to and qualifying the rights of the defendant in such case, and that the opinion may be interpreted as having no application to a case, like the one here, where the plaintiff is merely attempting to recall her own act. The unequivocal language of the opinion, in no manner or degree or in any sense qualifying or attempting to qualify the proposition expressed thereby, will not, by even the most adroit or subtle interpretation, if indeed interpretation is necessary to gather its true meaning, support such a position. Besides, we think there are sound and unimpeachable reasons why the distinction suggested cannot be sustained. It is our opinion that when the six months have expired within which proceedings may be inaugurated, either by way of appeal or otherwise, against the interlocutory judgment, such judgment, if no such proceedings have been tak-

en within the time prescribed, becomes a permanent interlocutory judgment and remains so until superseded by the final judgment, into which it finally merges. We think therefore the court's power over that judgment under such circumstances ceases to exist as clearly and conclusively as does the power of the court over a final judgment after the expiration of the time for an appeal therefrom. We are, of course, assuming the judgment in either case to be valid on its face. Has it ever been supposed for an instant that the court possesses the power to recall a final judgment, valid on its face, and vacate or modify it in any material respect, either upon its own motion or upon the application of one of the parties, after the time within which an appeal may be taken therefrom has elapsed, except where it appears that the judgment entered is not the judgment actually rendered, or some other clerical misprision affecting such judgment is apparent upon the face of the record? The very fact that the Legislature has fixed a time within which an attack by any authorized means upon an interlocutory judgment in an action for divorce must be made, if at all, necessarily implies that after the expiration of the time so limited an interlocutory judgment, as such, is as strongly intrenched against disturbance from any cause or any source, except where both parties join in a motion to set it aside, as is a final judgment after the time for appeal therefrom has passed.

"Again, let it be supposed that the plaintiff in the case at bar had, in addition to the allegations declaring the grounds upon which she sought a divorce, alleged that there were certain community property rights, as to which she prayed for an adjustment by the court. Suppose, further, that the defendant defaulted, or failed to answer the complaint or to appear at the trial, and that the court awarded the plaintiff the full relief called for by the allegations of the complaint and as prayed for. In such case, is it possible that more than six months after the entry of the interlocutory judgment, valid on its face, none of the authorized proceedings having been instituted against said judgment within that time, the plaintiff could by any proceeding of her own cause said judgment to be modified or vacated merely because she had been convinced or had convinced herself after the entry of the judgment that she had not, for some reason, thereby obtained a fair adjustment of the community property rights? We think no such contention would for a moment be made, and we think the supposititious case contains not an extreme but a conservative and fair illustration of the precariousness and instability of an interlocutory judgment in an action for divorce if the plaintiff were permitted for any reason to cause it to be set aside or modified after the time when the law contemplates that it

is, for the purposes for which it is intended, as formidable as a final judgment.

"The interlocutory judgment in a divorce case is the result or crystallization in concrete form of all the material issues tendered and tried and presumptively covers and includes all such issues, and, after the time has passed within which it may be attacked, is, as such interlocutory judgment, if valid on its face, as impregnable against attack as a final judgment under similar circumstances.

"The final judgment in a divorce case is, practically and in reality, in our opinion, only the judicial declaration authorized to be made in accordance with the expressed legislative policy of the state against the marriage of married persons already found to be entitled to a divorce within a year from such finding that the interlocutory judgment shall become active and effective, and that the parties may exercise all the rights which such judgment declared them to be entitled to, and which rights, while actually existing, were only dormant because of the avowed policy of the law. These rights, we should say, in other words, became vested rights from the time of the entry of the interlocutory judgment, subject only to be modified or set aside by appeal or by other appropriate proceeding within the time prescribed, but their actual enjoyment postponed, for reasons of public policy, to a future determinate time. Laying aside a consideration of a right of appeal from the final judgment, the Legislature has in effect said that 'the interlocutory judgment shall go into effect and become final one year after its entry, unless an appeal within time has been taken therefrom and the same undisposed of at the expiration of the year.'

"If, for any reason, the contention of appellant were sustained, the result would be that, while the defendant could not, after he had allowed the prescribed time to pass without initiating any proceedings against the judgment, exercise any power over such judgment, the plaintiff would be without any restraint in that respect until the final judgment was entered. It is impossible that the law contemplates any such absurd situation.

"The court below, in making the orders appealed from, no doubt did so upon the theory that it was without jurisdiction to make the orders vacating and setting aside the interlocutory judgment and dismissing the action.

"As the action of the court as to the orders appealed from conforms to the views herein expressed, the said orders are affirmed."

F. A. Berlin, for appellant. Lynch & Drury, for respondent.

PER CURIAM. In denying the petition for a rehearing of this cause we are not to be understood as approving that part of the opinion of the District Court of Appeal which

implies that, after an interlocutory decree of divorce has become final by the lapse of six months from its entry without appeal or motion to set it aside, the plaintiff has not the right to dismiss his or her action at any time before the entry of a final decree. The interlocutory decree, when final, merely establishes conclusively the right of the plaintiff to a divorce. It does not necessarily follow that he or she may not waive the exercise of that right. Whether the plaintiff could have done so was not a question arising on this appeal, and it is not decided.

153 Cal. 677

CASSIN v. COLE. (S. F. 4,613.)

(Supreme Court of California. May 29, 1908.
Rehearing Denied June 25, 1908.)

1. EASEMENTS — PRESCRIPTION — ADVERSE CHARACTER OF USE.

Use by a grantee of grantor's premises to reach a public road under permission to do so until the whole tract had been surveyed and a permanent road dedicated, and continued use of the old road after this had been done under permission to do so until the land should be devoted to other purposes than farming, gave no prescriptive right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 24.]

2. SAME—WAYS OF NECESSITY.

A way of necessity, given grantee over grantor's premises until a permanent road had been dedicated, ceased on dedication of such road, notwithstanding the way of necessity was more convenient for grantee's purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 72½.]

3. TRESPASS — REAL PROPERTY — EVIDENCE—SUFFICIENCY.

Evidence, in an action to restrain repeated trespasses on land and for damages, by plaintiff, that he did not put in an orchard because of the traveling across his land, that he lost the growth of the trees for two years, and was damaged \$100, was not subject to the construction alone that he was damaged \$100 because of the loss of the growth of the trees, but was open to the construction that he lost the growth of the trees, and in addition was damaged \$100, and, so construed, it was the duty of defendant's counsel, if they questioned this estimate of damages, to have inquired on cross-examination as to the foundation on which the estimate rested, and, not having done so, the evidence was sufficient to support a judgment for \$100, notwithstanding damages for the loss of the growth of the trees may not have been allowable in such an action.

Department 2. Appeal from Superior Court, San Benito County; M. H. Dooling, Judge.

Action by Charles T. Cassin against D. W. Cole. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Wyckoff, for appellant. Charles M. Cassin and Briggs & Hulner, for respondent.

plaintiff's land, and the existence of this right of way is the principal matter in controversy between the parties. After trial the court gave judgment for plaintiff as prayed for. The findings, which are supported by the evidence, though as to certain matters the evidence is conflicting, were to the effect that the defendant purchased a farm of 325 acres from Jesse D. Carr, who was the owner of a very large tract of land, at that time undivided. Defendant's land did not touch upon any public street. He explained this to Carr, who replied that he would give defendant an outlet. Defendant wanted Carr to include a right of way for a road in the deed, but Carr declined to do so, stating that he could not tell where the road designed for the land bought by appellant would be until the whole tract had been surveyed and subdivided. He told appellant, however, that he proposed to make a way out for everybody, and that every piece of land he sold should have a way to a road. Meanwhile he gave appellant permission to travel over his land until it was subdivided. Appellant was to travel where anybody was traveling on the ranch, so long as he did not interfere with the farming business. At no time did Carr tell appellant that he should have a right of way over any particular part of the land, but only that he should travel as other people traveled over the ranch. Entering the ranch by a gate, people traveled about as they liked, sometimes following one track, and sometimes another. This they did, without express permission; but nobody objected so long as the gates were closed. Appellant in traveling across the lands of Carr traversed lands subsequently purchased by this plaintiff. No objection was made to appellant's doing this while the land was used for farming purposes. In fact, the respondent informed appellant that he could continue using the road until respondent devoted the land to other purposes than farming. Some years after, Carr's land was finally subdivided, and a road laid out through the ranch along appellant's south line, which would give him access to the county road without traversing the land of any other person; but appellant continued to travel by the old route under this license from respondent, as it was more direct and convenient for his purposes, and some little labor and expense would be necessary in making the road dedicated by Carr suitable for travel. So things continued, appellant still driving with the respondent's permission over the latter's land, until respondent desired to plant the land to orchard trees, when he requested appellant to cease traveling over it. Appellant refused to do so, and here asserts his right to the old road which he used by prescription and as a road of necessity. The findings of the court, supported by the evidence, are destructive of the appellant's contention of prescriptive right. It is made to appear that the road which he traveled was used permissively until such time as his grantor should delimit

and dedicate a permanent road for his purposes. After this was done, appellant's continued use of the old road was still, as found by the court, under revocable permission given by respondent.

The facts so found render unnecessary any consideration of the law governing rights of way by prescription, and as little force can be accorded appellant's contention that he acquired a perpetual right over the old way by necessity. It was shown that he was allowed to travel over any part of the ranch until such time as a specific road was described and dedicated to his use. A way of necessity arises from necessity alone, and continues only while the necessity exists. Unquestionably appellant had a way of necessity across his grantor's ranch until a road was dedicated to his use; but, when that was done, his right to a way of necessity ceased, and it matters not that the old road was more convenient for his purposes. When it ceased to be indispensable, the right ceased. *Kripp v. Curtis*, 71 Cal. 65, 11 Pac. 879; *Carey v. Rae*, 58 Cal. 163; *Blum v. Weston*, 102 Cal. 369, 36 Pac. 778, 41 Am. St. Rep. 188.

Upon the question of damages, plaintiff testified as follows: "I did not put in the orchard on account of his traveling through there. I did not want an orchard where a man was going through it. I lost the growth of the trees for two years and was damaged in the sum of \$100. I don't know whether it is easy to get at damages of this kind." Upon this appellant contends that the damages awarded were because of the loss of the growth of the trees for two years, and insists that damages upon this account are not allowable in an action such as this. *Dorsey v. Manlove*, 14 Cal. 553; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626. If this were the only legitimate and possible construction which could be put upon plaintiff's evidence above quoted, much force would attach to appellant's contention; but it is equally open to the construction that plaintiff meant that he lost the growth of the trees for two years, and in addition was damaged in the sum of \$100. So construed, it was the duty of appellant's counsel, if they questioned the soundness of this estimate of damages, to have inquired upon cross-examination and shown the reasons and the foundation upon which the estimate rested. *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848. Failing to do this, the evidence of plaintiff is sufficient to support the judgment rendered.

The alleged errors of the court in ruling upon the evidence and in overruling appellant's demurrer to plaintiff's second amended complaint do not call for special consideration. The evidence which the court admitted was pertinent and proper, and its decision overruling the demurrer was sound. The complaint was in the usual and sufficient form for an injunction to prevent future trespasses and for the award of damages for trespasses already committed. *Hughes v. Dun-*

lap, 91 Cal. 390, 27 Pac. 642; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119. The judgment is not susceptible of the construction sought to be placed upon it by appellant. It does not limit his right to travel on Aromitas avenue to one direction only.

The judgment and order appealed from are affirmed.

We concur: **McFARLAND, J.; LORIGAN, J.**

153 Cal. 673

DORCY v. BRODIS et al. (S. F. 4,641.)

(Supreme Court of California. May 28, 1908.
Rehearing Denied June 25, 1908.)

1. APPEAL AND ERROR—DISCRETION OF COURT—NEW TRIAL—DILIGENCE.

A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party; and it devolves upon him to proceed with diligence, and the determination of the question whether there has been due diligence is one necessarily largely within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3865.]

2. NEW TRIAL—PROCEEDINGS—DILIGENCE.

It is not an abuse of the trial court's discretion to dismiss a motion for new trial for lack of prosecution, where from the time amendments to the statement of the grounds in support of the motion were served, four months elapsed without the mover taking any action to have the statement of his grounds for new trial heard or settled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 238, 243.]

3. SAME—EXCUSES FOR DELAY.

Where sufficient delay has been made to authorize the dismissal of a motion for new trial, the fact that the mover filed an affidavit excusing his delay on grounds which were denied by counter affidavit is not sufficient to excuse the delay.

4. APPEAL AND ERROR—RECORDS—PRESUMPTIONS—NEW TRIAL.

On appeal from the dismissal of a motion for new trial, where the record does not show that notice to fix the time for settlement of the statement of the grounds for new trial was given before the motion to dismiss was made, it will not be presumed that it was so given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772-3776.]

5. NEW TRIAL—MOTIONS—DILIGENCE—DISMISSAL.

Where, by reason of delay, a party has the right to move to dismiss a motion for new trial, the fact that the court of its own motion fixed a day in which to settle the statement, or that the mover, by an ex parte application, secured the fixing of such day cannot affect the right to dismiss.

Department 2. Appeal from Superior Court, Santa Cruz County; *Lucas F. Smith*, Judge.

Suit to quiet title by *Joseph M. Dorcy* against *Maria Brodis* and others. From an order dismissing a motion for new trial, plaintiff appeals. Affirmed.

William A. Bowden and *Charles M. Cassin*, for appellant. *Jas. Alva Watt*, for respondents.

LORIGAN, J. This is an appeal by plaintiff from an order dismissing his motion for a new trial.

The action was brought to quiet title to a tract of land in the county of Santa Cruz, in which judgment was rendered in favor of the defendants and against plaintiff. In due time and on May 18, 1905, plaintiff gave notice of intention to move for a new trial. Thereafter, on June 1, 1905, his counsel served on the attorney for defendants what purported to be a statement in support of said motion. On the 31st day of August thereafter, defendants prepared and served upon plaintiff their proposed amendments to such statement, subject to objections interposed and saved therein against the settlement of said statement on the ground that it was a mere skeleton statement, inaccurate and incorrect in every material particular, and that it was sham and not prepared or proposed in good faith. Thereafter, defendants gave notice of a motion to dismiss plaintiff's motion for a new trial on the same grounds urged against the settlement of the statement. This motion came on to be heard on September 9, 1905, and was by the court denied. Subsequently, and on December 29, 1905, defendants again gave notice of motion to dismiss said motion for a new trial, to be heard January 2, 1906, and among other grounds, upon the ground that the plaintiff had failed to prosecute his motion for a new trial with due diligence. The matter was presented and heard upon affidavits of the respective attorneys in the action and the proceedings in the cause, and after due consideration was granted by the trial court, and plaintiff appeals. It is insisted by the appellant that the court abused its discretion in granting the motion to dismiss.

In *Galbraith v. Lowe*, 142 Cal. 296, 75 Pac. 831, it is said: "A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party. * * * It is the moving party who is the actor in the proceeding and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence. * * * The power to dismiss a motion for a new trial on the ground that the same has not been prosecuted with due diligence being conceded, the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court." See, also, *Boggs v. Clark*, 37 Cal. 236; *Hopkins v. W. P. R. R. Co.*, 44 Cal. 389. Applying this rule it appears that from the 31st day of August, 1905, when the amendments were served, up to the hearing of the last motion to dismiss which was granted, plaintiff had taken no action whatever to have the proposed statement heard and settled. It is true that in his affidavit counsel for plaintiff endeavors to excuse his delay upon the ground that he

understood that there was an arrangement between himself and the attorney for defendants that the statement would be taken up at any time agreeable to both parties. But counsel for defendants, in a counter affidavit, deny any such agreement or understanding, and these conflicting affidavits were the only evidence upon that subject. The court was of the opinion that in this conflict there was no sufficient showing on the part of counsel for plaintiff excusing his delay in procuring the settlement of the statement, and so stated in disposing of the motion. The court could then only look, as it did, to the records in the case, which did not show any stipulations between the parties extending time or any orders of court having that effect. From the record it simply appeared that practically for four months after the statement and amendments should have been presented for settlement nothing was done by counsel for plaintiff to effect that end. The law required plaintiff as the moving party to proceed with diligence at the peril of having his motion for a new trial dismissed and an inexcusable inactivity for almost four months was sufficient to warrant the trial court in finding that the plaintiff had not proceeded with due diligence. Hence, there was no abuse of discretion on the part of the court in dismissing the motion for a new trial for that reason.

It is claimed by plaintiff that at the time the notice was given of the motion to dismiss, the court had already fixed the 3d of January, 1906, as the date for the settling of the statement. While it appears from the affidavit of plaintiff that the court had fixed that date for the settlement, there is nothing to show that the order fixing it was made prior to the filing of the notice of the motion to dismiss the motion for a new trial, or that that time was fixed by the consent of the parties. In the absence of such showing no presumption is to be indulged that the order fixing the date of the settlement was made prior to the filing of the notice of motion to dismiss. All that appears is that there was a day fixed by the court for the hearing of the statement, which was subsequent to the filing of the notice of motion to dismiss and the date fixed for hearing such motion. The right of the defendants to have the motion for a new trial dismissed on account of failure to prosecute it diligently by having the statement settled could not be affected by the action of the court of its own volition or by the ex parte application of the attorney for the plaintiff in fixing a day for the settlement. If there was inexcusable delay on the part of plaintiff the defendants had a right to move to dismiss for that reason, and the action of the court in fixing a day for settlement could in no respect interfere with that right.

The order appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 669

BECKER v. SCHMIDLIN. (S. F. 4,705.)

(Supreme Court of California. May 28, 1908.)

COSTS—SECURITY FOR COSTS—SLANDER—ALLOWING NEW UNDERTAKING—DISCRETION.

The jurisdiction of the court in an action for slander not being dependent on the filing before commencement of the action of the undertaking for costs, provided for by St. 1871, p. 533, c. 377, § 1, it is an abuse of discretion, where plaintiff in good faith believed his undertaking was sufficient, and the sureties thereon are present in court to justify, to refuse to allow a new undertaking to be filed, and to dismiss the action, especially where at such time the statute has run against the cause of action.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by A. Becker against Ida Schmidlin. Judgment for defendant. Plaintiff appeals. Reversed, with directions.

Will M. Beggs, for appellant. E. E. Cothran, for respondent.

LORIGAN, J. This is an appeal from a judgment and order dismissing an action. The suit was brought to recover damages for slander, the complaint setting forth several causes of action, and it being alleged that the slanderous words were uttered by defendant of and concerning the plaintiff at various dates between the 1st day of December, 1904, and the 1st day of February, 1905. The complaint was filed October 16, 1905, and was accompanied by an undertaking in the sum of \$500, filed on the same day, in favor of defendant as provided by statute. St. 1871, p. 533, c. 377, § 1. Upon January 26, 1906, upon notice of defendant excepting to the sureties on the undertaking filed and objecting to the undertaking itself and the manner of its execution and requiring that the sureties justify, that matter came up for disposition before the department of the superior court in which the action was pending. At the hearing counsel for defendant waived objection to the sufficiency of the sureties themselves, but objected that they had never executed any undertaking in the action. From the showing made it appeared that the undertaking in question had been executed by the sureties on October 9, 1905, for the purpose of being used in another action for slander between the same parties which was then pending in another department of the superior court of Santa Clara county. In that action an undertaking had been given which had been objected to, and it was intended to file the undertaking now under consideration in place thereof. The undertaking, however, was not used, the motion to permit it to be filed being denied and that action dismissed. Thereafter, the attorney for plaintiff, who was likewise a notary public before whom the sureties had verified the undertaking in question, being about to commence substantially the same action in another department of the superior court,

saw the sureties, who consented that the undertaking they had signed might be used in this other contemplated suit. The notary thereupon changed the dates of the undertaking and of the verification from the 9th to the 11th day of October, 1905, and as so changed, filed it with the complaint in this present action.

These facts appearing, counsel for defendant immediately moved that the action be dismissed upon the ground that no undertaking had been filed as required by the statute. The matter of the sufficiency of the undertaking was thereupon submitted to the court, and the judge thereof stated that he was satisfied that the undertaking was insufficient. Thereupon, counsel for plaintiff moved for leave to file a new undertaking—no new undertaking being then presented—to which offer objection was made by counsel for defendant and the matter submitted to the court on briefs of the respective parties to be filed. Thereafter, on February 9, 1906, the motion of plaintiff for leave to file a new undertaking was denied, and the motion of defendant that the action be dismissed was sustained, and an order and judgment entered dismissing it. Exception was taken by plaintiff to the order denying the motion for leave to file a new undertaking and to the order dismissing the action, and under these exceptions the ruling and order of the court below are here for review.

It is insisted by the appellant that under the circumstances disclosed by the record it was an abuse of discretion on the part of the trial court to deny him permission to file a new undertaking, and to dismiss the action, and we are inclined to that view.

The jurisdiction of the court in an action for slander does not depend upon whether a sufficient undertaking is or is not filed at the time the suit is commenced. It has such jurisdiction even when no undertaking at all is filed, and may permit one to be filed subsequent to the commencement of the action, and, of course, may permit a new undertaking to be filed in lieu of a defective one. *Dixon v. Allen*, 69 Cal. 527, 11 Pac. 179; *Stinson v. Carpenter*, 78 Cal. 571, 21 Pac. 304; *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34.

It is true that a plaintiff neglecting to file a sufficient undertaking when suit is commenced incurs the danger of having his action dismissed upon the motion of the defendant for such failure, but when such motion is made and is well taken, the court may, nevertheless, in the exercise of a sound discretion, having jurisdiction of the action, permit the plaintiff to file a new and sufficient undertaking. The undertaking provided by the statute to be given runs in terms in favor of a defendant, and is intended to secure him in the costs and charges of the action which may ultimately be awarded him. The provision is for his sole benefit, and this being true, the discretion vested in the court

of permitting plaintiff to file a new undertaking which will afford a defendant all the protection the law intends, should be exercised to effect that end. So exercised, it will permit the cause to be tried on its merits, which the law favors, instead of preventing it, which it discourages. Especially should this permission be granted where it appears that a party in good faith has originally endeavored to comply with the statute by filing an undertaking when the suit is commenced. This the plaintiff here did. We do not discuss the matter of the legal sufficiency of the undertaking which was filed, because that point is not involved on this appeal. But assuming that it was insufficient—or void as the trial court found—because executed to be used in another action, still the circumstances under which it was used in the present action, which disclose that it was with the express consent of the sureties who were admittedly financially responsible, indicated that counsel for plaintiff was, at least, acting in good faith under a belief that the undertaking was valid when he filed it. It further appeared at the hearing that the sureties on the undertaking were present in court offering to justify. One of them, the only one who testified, offered then to go on the undertaking, and it is to be inferred that the other who had consented to be bound before the undertaking was filed and was present in court to justify, would have been equally willing, and, hence, if plaintiff's application had been granted, it would have taken but a short time to have prepared a sufficient undertaking and filed it then and there. Aside from the fact, however, that the plaintiff was ready, able and willing to then furnish a good and sufficient undertaking, it further appears that when the court ultimately refused to permit him to do so, and dismissed the action, the statute of limitations had run against plaintiff's cause of action, and he was prevented from commencing a new suit. The result of the action of the court was, therefore, to defeat the assertion of any meritorious claim for damages which plaintiff might have had against the defendant.

Under these circumstances we are satisfied that the application of plaintiff should have been granted, as was done in the case of *Dixon v. Allen*, supra, where no undertaking had been filed at all, and on motion to dismiss the trial court properly allowed plaintiff to file one. And this court, in *Smith v. McDermott*, supra, makes no question but that it should be done, where it says: "When the motion to dismiss was made and the plaintiff's attention was directly called to the matter (the insufficiency of the undertaking) she might have asked, and doubtless would have obtained leave, to file an undertaking in due form as required by the statute."

There is nothing in the suggestion in respondent's brief that no new bond was pre-

sented to the court. Counsel for respondent offered to give one at the hearing, and, as we have said, the record discloses with almost a certainty that he was prepared then and there to do so. This was the very offer that was submitted on briefs and taken under advisement by the court, and it was not fatal to the claim of plaintiff of abuse of discretion by the court in denying it, that he did not actually tender an executed undertaking, when the court had under consideration the very matter of whether it would permit him to do so or not.

The judgment of the trial court is reversed, with directions to set aside the order of dismissal, and grant leave to the plaintiff to file an undertaking as required by the statute within a limited time.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 644

CITY AND COUNTY OF SAN FRANCISCO
v. BROWN et al. (S. F. 4,594.)

(Supreme Court of California. May 28, 1908.)

1. JUDGMENT—VACATING—AUTHORITY OF COURT—TIME TO EXERCISE.

The rule that a motion to vacate a judgment cannot be made after six months from its entry has application only where the judgment which it is sought to vacate is the judgment which was actually rendered by the court.

2. DISMISSAL AND NONSUIT—INVOLUNTARY—OPERATION.

A judgment of nonsuit, granted on defendant's motion, operates simply as a dismissal of the cause, and simply declares that plaintiff has failed to make proof of material allegations to sustain his cause, and decides nothing on the merits.

3. JUDGMENT—NONSUIT—CONCLUSIVENESS.

A nonsuit, suffered from any cause, is not a bar to a suit subsequently brought on the same cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1028-1045.]

4. EJECTMENT—TITLE TO SUPPORT ACTION—JUDGMENT OF NONSUIT—OPERATION.

In ejectment plaintiff must recover on the strength of his own title, and when he fails to prove title, it is immaterial whether defendant has title or not; and therefore the granting of a nonsuit only determines the fact that plaintiff has not proven his case, and does not adjudge the rights of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 17.]

5. JUDGMENT—ENTRY BY CLERK.

The entry of a judgment by the clerk of the court is a ministerial act to be performed by the clerk, and it is his duty to enter only such judgment as the court rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 506.]

6. SAME—JUDICIAL ERROR—CLERICAL ERROR—CORRECTION.

Where, in ejectment, the court granted defendant's motion of nonsuit, the act of the clerk in entering a judgment adjudging that defendant is the owner of and entitled to the premises in controversy is a clerical and not a judicial error, which the court has the inherent power at any time to amend, so as to make the judg-

ment entered conform to the judgment actually rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 598.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the City and County of San Francisco against Yankee Brown and others. From an order setting aside a final judgment in favor of defendants, they appeal. Affirmed.

Robert Ash, for appellants. Wm. G. Burke, City Atty., for respondent.

LORIGAN, J. This is an appeal from an order setting aside and vacating a final judgment. The action was commenced in the district court of the Fourth judicial district on the 17th day of April, 1868, and was in ejectment to recover possession of certain premises in the city and county of San Francisco, of which plaintiff alleged it was the owner and entitled to the possession, and had been dispossessed by the defendants, and which property, the record on this appeal shows, was claimed to be a portion of Oregon street. In due time Charles P. Brown and Andrew V. Smith, impleaded with the other defendants under fictitious names, filed their answers, in which they denied the allegations of the complaint, and set up, as separate defenses, the statute of limitations and adverse possession for the requisite statutory period. The cause came on regularly for trial, without a jury, on the 16th of November, 1870, and, plaintiff resting after having introduced certain evidence, the defendants moved for a judgment of nonsuit. The minute orders of the court, with reference to the motion and disposition of it, were that certain named "witnesses for plaintiff were sworn and examined, and, plaintiff having rested his case, defendants moved for a judgment of nonsuit, which motion was taken under advisement by the court." This is from the minutes of the trial of November 16, 1870. On November 19, 1870, the following minute order was made by the court: "The motion on behalf of defendants for a judgment of nonsuit herein having been fully considered by the court, it is ordered that the said motion be and the same is hereby granted, and that a judgment of nonsuit be entered therein in favor of said defendants and against the plaintiff." No further proceedings seem to have been taken in the case until the 31st of March, 1905, when Robert Ash, Esq., attorney of record for appellant herein, without any stipulation or order of substitution as attorney for said defendant Brown, wrote in the request book kept in the county clerk's office the following: "Enter judgment as per memorandum filed. Robert Ash, Attorney." Thereafter, on April 4, 1905, the clerk, without any order or direction of the superior court, entered judgment in the

cause, pursuant to the directions of said attorney who had requested it. The judgment recited that, the cause having come on regularly to be heard on the 19th day of November, 1870, "the parties thereupon introduced oral and documentary evidence, and there was thereupon put in issue, between the respective plaintiff and said defendant C. P. Brown, the title and possession of said parties, respectively, in and to" the land described in the complaint. It further recites that, "after said evidence had been closed, defendants moved for a nonsuit, on the ground that plaintiff had no title to said lot of land, which the court had granted, and rendered judgment in favor of said defendants and against said plaintiff for the possession of the * * * described premises." The judgment then "ordered, adjudged, and decreed that the defendant C. P. Brown is the owner and entitled to the possession of said lot of land described, and entitled to recover his costs herein." On November 17, 1905, the said attorney of plaintiff, pursuant to notice regularly served on said Robert Ash, as attorney for defendants, moved in the superior court of the city and county of San Francisco, where such judgment had been entered, for an order vacating the judgment as entered in said action of April 4, 1905, and for a further order directing that judgment be entered in conformity with the decree of the district court rendered in said action November 19, 1870, on the ground that the judgment as entered on April 4, 1905, did not conform to the decision of the court rendered on November 19, 1870. After hearing, the court made the order as prayed for, to the extent of vacating the judgment of April 4, 1905.

The only question involved on this appeal is as to the jurisdiction of the superior court to make the order vacating the judgment. It is insisted by appellant, against such jurisdiction, first, that the court had no power, after the expiration of six months from the entry of the judgment April 4, 1905, to vacate it on motion; and, secondly, that if there was error in the judgment as entered, it was judicial error, and not clerical error or misprision, and, hence, could not be corrected by motion to vacate the judgment, but only on motion for a new trial or on appeal. Both propositions of appellant, in so far as they embrace rules of law, are correct, but we are satisfied that neither of them has application in the matter under consideration. The rule that a motion to vacate a judgment cannot be made after six months from its entry has application only where the judgment which it is sought to vacate is the judgment which was actually rendered by the court. But here it is apparent that the judgment which was entered was not the judgment rendered by the court. The judgment, as rendered, was one of nonsuit only, the effect of which was simply to declare that the plaintiff

had failed to make proof of material allegations necessary to sustain his cause of action. It decided nothing on the merits of the controversy, and necessarily could not, as its effect was to virtually put the plaintiff out of court. It operated simply as a dismissal of the case. *Wood v. Ramond*, 42 Cal. 643. And a nonsuit suffered for any cause is not a bar to a suit subsequently brought on the same cause of action. *Merritt v. Campbell*, 47 Cal. 543. This being the law, a nonsuit, granted in an action of ejectment, determines nothing, save that the plaintiff has not proven his case as alleged. The plaintiff in such an action must recover on the strength of his own title, and failing in proof of his title, is subject to be nonsuited; but the presence or absence of title in the defendants does not enter at all in the determination as to whether such nonsuit should be granted, and is, of course, not considered or determined in the matter of the nonsuit. The defendant in an ejectment suit may have no title whatever, or right to possession of the property, but this is entirely immaterial, if the plaintiff proves no title or right of possession. He can only prevail by showing it in himself, and it is immaterial, for all purposes, if he fails in this respect, whether defendant has title or not.

Now, applying these principles to the matter under consideration. It may be that in fact the city of San Francisco had a perfect legal title and right to the possession of the premises in controversy, but may have failed, on the trial, in making the necessary proof in that respect. The nonsuit did not determine that it had no such title or right, but only that, if it had, it had not proven it, and went out of court for that reason. This was, however, by no means an adjudication that the title to the premises was in Brown, for a judgment of nonsuit could be entirely proper, and Brown have no shadow or pretense of title. If it could be held that the nonsuit was determinative of title in Brown, then it would be necessarily *res adjudicata* on the subject of title, and would be a bar to the maintenance by plaintiff of another action of ejectment for the recovery of the property. This, however, could not be, because it is fundamental that the doctrine of *res adjudicata* has no application to judgments of nonsuit. *Merritt v. Campbell*, *supra*. Or, again, as far as the necessity of proof of title on the part of plaintiff is concerned, it might have been that the nonsuit was properly granted, because the title appeared from the proofs of plaintiff to be in a stranger to the action, or in one of the other defendants who had appeared in the case, either *Eliza Brown* or *A. V. Smith*. It is thus apparent that the judgment of nonsuit, in an action of ejectment, determines nothing, except that the plaintiff has not proven his right to recover as alleged, and his action is dismissed, and he is sent out of court for such failure. It determines nothing

whatever as to title, nor is it conclusive in any respect upon that question. This being the effect of the order for a nonsuit by the district court on November 19, 1870, the judgment entered thereon, by the clerk at the direction of Attorney Ash on April 4, 1905, adjudicating that the appellant Brown was the owner, and entitled to the possession, of the premises described in the complaint, was essentially a different and distinct judgment from that which was rendered by the district court, and was entered unauthorized.

Concluding, then, that the judgment entered was different from that which was rendered, brings us to a consideration of the second contention of appellant, namely, that if there was any error in entering the judgment, it was not a clerical error or misprision, but a judicial error, which was subject to correction on motion for a new trial, or on appeal, only. We cannot perceive how any claim that the entry of the judgment was judicial is maintainable. There was no error in the judgment as rendered. The error was in entering a different judgment from that which the court had ordered. The entry of the judgment was a matter with which the court had nothing to do. It was a ministerial act to be performed by the clerk, and his duty was to enter only such judgment as the court had rendered. Counsel for appellant cites several cases, which he claims support his contention that the entry was judicial error. The only ones which have any relevancy to the point are *Egan v. Egan*, 90 Cal. 21, 27 Pac. 22, *First Nat. Bank of Fresno v. Dusy*, 110 Cal. 69, 42 Pac. 476, and *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775. An examination of these cases shows that they are not authority for the proposition he advances, but inferentially are authorities against him. In all those cases the judgments were entered exactly as the court had ordered them, and the language used in *Byrne v. Hoag*, *supra*, "the judgment was entered by the clerk exactly as the court ordered it to be entered, in the surest way in which the judge could express his intention," is applicable to them all. Certainly such authorities can have no bearing where it is clear that the clerk entered a judgment entirely different from what the court had rendered. This is what the clerk did here, and it is clear from the authorities that, in entering judgment, the clerk acts in a purely ministerial capacity, and that no judicial function is exercised. On this point it is said in *Kelly v. Van Austin*, 17 Cal. 565: "The clerk, in entering judgments upon default, acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only an agent by whom it is written out and placed among the records of the court. He must therefore conform strictly to the provisions of the statute, or his proceedings will be without any binding force." In *Crim v.*

Kessing, 89 Cal. 488, 26 Pac. 1074, 23 Am. St. Rep. 491, it was held: "The entry of a judgment after it has been rendered by the court is but the ministerial act of the clerk. The judgment, when entered, becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. 'The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial.' Freeman on Judgments, § 38." As the court has nothing to do with the entry of a judgment, that being a duty devolving solely on the clerk of the court, it follows, under the authorities cited, that the act of the clerk in the matter at bar, in entering a judgment at the request of the attorney different from that which had been rendered by the court, was not a judicial error, but strictly a clerical one.

This being true, the rule is unquestioned that a court of record has the inherent right and power at any time to correct or amend its judgment, which has been entered as the result of clerical error or misprision, in order to make it conform to the judgment which was actually rendered by the court, and so as to speak the truth in that respect. "A judgment is the decision or sentence of the law, given by a court or competent tribunal, as the result of proceedings instituted therein for the redress of an injury." To be valid, it must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires, and is usually entered up by the clerk, under the supervision of the court. Our statute, like that of many states, has introduced a new rule, adapted to the convenience of the public, and pronounces a judgment of law upon a certain state of facts, which, when duly authenticated, authorizes the clerk to enter judgment thereon. If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal; but when entered by a mere ministerial officer, without authority of law, it is wholly void." *Stearns v. Aguirre*, 7 Cal. 449. "Clerical errors and misprisions may occur in respect of entries of judgments, which it is competent for the court to order amended or supplied; and this may be done even though the term when the error or mistake happened may have passed, provided the party moving proceeds with due diligence." *Hegeler v. Henckell*, 27 Cal. 491. "It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time so as to make the judgment entry correspond with the judgment rendered. *Swain v. Naglee*, 19 Cal. 127; *Freeman on Judgments*, §§ 70, 71. And this may be done even after an appeal and affirmance of the judgment. *Rousset v. Boyle*, 45 Cal. 64." *Dreyfuss v. Tompkins*, 67 Cal. 340, 7 Pac. 732. "Courts have the power at all times to allow amendments to judgments, for the purpose of having the

judgment as entered express that which was rendered, so that the record shall contain the actual decision of the court; and such amendment can be made after the expiration of six months from the entry of the judgment. Where the clerk fails to enter judgment as it was pronounced, the court has always the power to correct the matter, and order the proper entry to be made." *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22. "Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and, whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was, in fact, made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. *Matter of Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Balch v. Shaw*, 7 Cush. (Mass.) 282; *Fay v. Wenzell*, 8 Cush. (Mass.) 315; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *Crim v. Kessing*, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491." *Kaufman v. Shain*, 111 Cal. 19, 43 Pac. 393, 52 Am. St. Rep. 139. "A court may at any time amend a judgment where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. *Morrison v. Dapman*, 3 Cal. 255." *Scamman v. Bonslett*, 118 Cal. 97, 50 Pac. 272, 62 Am. St. Rep. 226. These are quotations from but a few of a long line of authorities in this state, uniformly sustaining the doctrine which these quotations announce, and under them it is quite evident that the judgment entered by the clerk on April 4, 1905, was not the judgment rendered by the court on November 19, 1870. It was clerical error on the part of the clerk to so enter a different judgment, and the court was authorized, and had jurisdiction on motion of plaintiff, to set it aside, in order that a judgment conformable to that which was in fact ordered might be actually entered.

The order appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 630
STEVENSON v. BOYD et ux. (S. F. 4,429.)
(Supreme Court of California. May 26, 1908.
Rehearing Denied June 25, 1908.)

1. TENANCY IN COMMON—RIGHTS OF CO-TENANTS—PURCHASE OF OUTSTANDING TITLE.

A co-tenant cannot, by purchasing an outstanding incumbrance against property held by him in common with another, assert it against his companion in interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 55-59.]

2. SAME.

A co-tenant, by purchasing an outstanding incumbrance against property held by him in

common with another, holds the title acquired by the purchase for the equal benefit of himself and his co-tenant, upon condition that the latter shall contribute or offer to contribute his portion of the purchase money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 55-59.]

3. EQUITY—LACHES.

Though mere delay to commence a suit for a period less than the statutory period is not a sufficient reason for dismissing the suit, still courts of equity will, where the delay in commencing the suit is unreasonable, refuse to entertain it, even though it is brought before the expiration of the period of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 242.]

4. SAME—EXTENT OF DELAY.

To warrant a court of equity in refusing to entertain a suit because of delay in commencing it for a period less than the statutory period of limitations, there must be something more than a mere passive neglect; in addition thereto facts amounting to an acquiescence in the acts complained of, or other circumstances which, coupled with the delay, will render the granting of the relief inequitable must be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 242.]

5. SAME.

The principal factors in determining whether a plaintiff in equity has been guilty of laches are acquiescence and lapse of time, but other circumstances are also material; such as, that a change in the value or character of the property has taken place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 192.]

6. SAME—DETERMINATION AS TO LACHES—DISCRETION OF COURT.

The determination of whether plaintiff, in a suit in equity, has so long delayed his suit as to be guilty of laches, precluding him from maintaining it, is within the discretion of the chancellor in each case.

7. TENANCY IN COMMON—RIGHTS OF CO-TENANT—ACQUISITION OF OUTSTANDING TITLE.

The right of a co-tenant to share in the benefit of a purchase of an outstanding claim is dependent upon his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim, and whatever delay he may have occasioned must be entirely consistent with fair dealing on his part, and in nowise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 59.]

8. SAME—ACTIONS BETWEEN CO-TENANTS—LACHES.

Where one co-tenant, with knowledge of a purchase of an outstanding claim by another co-tenant, for more than four years neglected to elect to bear her portion of the expense incurred in making the purchase and to claim the benefits, and in the meantime the land had been greatly improved, and more than doubled in value, the trial court was justified in finding that the delay was unreasonable, and constituted such laches as barred a suit to obtain the benefits of the purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 111.]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Melissa J. Stevenson as trustee, etc., against Thomas M. Boyd and wife to compel the conveyance to plaintiff of an undivided one-half interest in certain property.

From a judgment for one of the defendants, plaintiff appeals. Affirmed.

Frohman & Jacobs, for appellant. M. K. Harris, Frank H. Short, and F. E. Cook, for respondents.

SLOSS, J. Thomas Boyd, now deceased, was the father of Melissa J. Stevenson, the plaintiff, Thomas M. Boyd, one of the defendants, George Culberson Boyd, and Mary Alice Zinns. In December, 1892, Thomas Boyd and his son, the defendant Thomas M. Boyd, each then owning an undivided one-half of an 80-acre tract of land situated in Fresno county, executed a deed of trust of said real property to E. R. Hamilton and W. P. Coleman, as security for the payment of their promissory note for \$3,200, payable two years after date to the Sacramento Bank. In October, 1897, Thomas Boyd, the father, conveyed his undivided one-half interest to the plaintiff in trust, to receive the rents and profits, and to pay them to the use of the grantor, Thomas Boyd, during his life, and in case George Culberson Boyd should survive his father, to apply such rents and profits for his support and maintenance during his life. The deed of trust gave plaintiff power to sell, mortgage, or lease said real estate, and provided that, if the property was not sold by plaintiff, in pursuance of said deed of trust, it should, upon the death of Thomas Boyd and George Culberson Boyd, be vested in the plaintiff and Mary Alice Zinns, share and share alike. In July, 1897, Thomas M. Boyd married his co-defendant, Josephine Porter Boyd. Some months thereafter the Sacramento Bank, the holder of the note secured by the deed of trust to Hamilton & Coleman, requested payment of the note. Some attempt was made to raise the money, but it was not paid, and the bank finally directed the trustees to sell. The sale was originally advertised to take place in March, 1898, but Mrs. Stevenson, the plaintiff, secured from the bank a postponement for six months. In August, 1898, the defendant Thomas M. Boyd made arrangements with the Bank of Selma to pay off the loan of the Sacramento Bank, which at that time amounted to about \$3,400. Of this amount, some \$1,800 was furnished by the defendant Josephine Porter Boyd, and the balance by the Bank of Selma. The note was assigned by the Sacramento Bank to the Bank of Selma, and the latter directed the trustees, Hamilton & Coleman, to make a sale. On October 15, 1898, the trustees did sell the property for \$3,500—a little more than the amount due on the note. The purchaser at the sale was the Bank of Selma, which immediately conveyed to T. M. Boyd and Josephine Porter Boyd, the defendants. On February 21, 1901, Thomas M. Boyd conveyed to his codefendant, Josephine Porter Boyd, an undivided one-half interest in the ranch for \$7,500, of which \$500 was paid in cash and the balance in installments, evidenced

by notes. Some of these notes were paid by Mrs. Boyd to her husband.

On October 13, 1902, 2 days less than 4 years after the sale by the trustees to Thomas M. and Josephine Porter Boyd, and over 19 months after the conveyance from Thomas M. Boyd to Josephine Porter Boyd, this action was brought by the plaintiff. The complaint alleged that, prior to the trustees' sale, the defendants, in pursuance of a conspiracy to that end, did, by threats of violence and otherwise, prevent the plaintiff from raising the money necessary to pay off her one-half of the indebtedness to the Sacramento Bank, and that they procured the Bank of Selma to take an assignment of the note, and to direct a sale of the property by the trustees, Hamilton & Coleman, for the purpose of destroying the rights of plaintiff under the deed from Thomas Boyd. It is alleged that the Bank of Selma, in taking the assignment of the note from the Sacramento Bank, was acting as agent for the defendants, and not in its own interest. In the complaint plaintiff offers to pay to the defendants such portion of the indebtedness paid to the Sacramento Bank, and to make such allowance to the defendants, for the cultivation of the property since the sale, as the court may deem equitable. She asks for an accounting of the profits, and prays judgment that it be decreed that she is the owner, as trustee, of an undivided one-half interest in said real property, and that defendants be compelled to convey to her such interest free of incumbrance, except for her just share of the indebtedness to the Sacramento Bank. Thomas M. Boyd and his wife, Josephine Porter Boyd, answered separately. Each of the answers denies that the defendants had conspired or contrived to defeat the deed of trust under which plaintiff claims, or to deprive the plaintiff, as trustee, of her interest in the property, or that plaintiff was prevented by any act of the defendants, or either of them, from raising the money necessary to pay her share of the indebtedness. The defendant Josephine Porter Boyd set up a special defense of laches, alleging that, at the time the land was sold by the trustees to the Bank of Selma, and by the Bank of Selma to the defendants, its value did not exceed \$5,000; that on February 21, 1901, Thomas M. Boyd sold his interest in the land to Josephine Porter Boyd for the sum of \$7,000, more than \$3,000 of which has been paid in cash and the balance in notes secured by mortgage; that since said sale by the trustees to the Bank of Selma, and by the Bank of Selma to the defendants, the land has greatly increased in value, and is now of the value of about \$15,000; that the defendant bought the interest of her codefendant in good faith, and paid and obligated herself to pay the full increased value thereof to said codefendant Thomas M. Boyd; that plaintiff made no claim to any interest as trustee or otherwise in or to said property, and took

no steps and made no effort to subject said property to any claim until it had greatly increased in value. The defendant further alleges, on information and belief, that the plaintiff would not have made any such claim had the property not increased in value, and that at the time the defendant Josephine Porter Boyd bought the said property the same was of little value, and yielded very little income, and that in buying the same the defendants ran the risk of losing the money paid upon the purchase price thereof. It is further alleged that ever since the sale the defendants have cultivated the land, and been in charge thereof, and have improved and increased the value of said property. The answer of Thomas M. Boyd, in addition to its denials of many of the allegations of the complaint, set up a claim, as against his wife, the codefendant Josephine Porter Boyd, his contention being that the \$1,800 belonging to Josephine Porter Boyd, which went into the purchase of the property at the time of the trustees' sale, was a loan to him, and that the conveyance of the undivided one-half interest to said Josephine Porter Boyd was made as security for such loan. The trial resulted in findings and judgment in favor of the defendant Josephine Porter Boyd. The court found against the allegations of the complaint regarding a conspiracy between the defendants, found against the allegation that the sum of \$1,800 paid by Josephine Porter Boyd was a loan to her codefendant, and found that the conveyance of October 19, 1898, from the Bank of Selma to Thomas M. Boyd and Josephine Porter Boyd, conveyed to each of said defendants an equal undivided one-half interest in and to said property, and that the defendant Josephine Porter Boyd, in consideration of said conveyance, paid, as a part of the purchase price for said land, the sum of \$1,800. It was found that Josephine Porter Boyd did not take the title of such one-half interest as security for any loan to her codefendant Thomas M. Boyd. The allegations of the answer of Josephine Porter Boyd, with reference to the defense of laches, are all found to be true, except that the court finds that the value of the property at the time of the conveyance to the defendants was \$6,000, instead of \$5,000, as alleged in the answer. As conclusions of law, the court found that the plaintiff should take nothing against Josephine Porter Boyd, and said Josephine Porter Boyd should have judgment against plaintiff and her codefendant for her costs. Judgment was entered accordingly. The plaintiff appeals from the judgment.

Thomas M. Boyd has not appealed; and, so far as concerns the issues raised by the pleadings between himself and his codefendant, the finding that the payment of \$1,800 by the respondent, Josephine Porter Boyd, was not made as a loan to her husband stands unquestioned.

The appellant's position is that, inasmuch as she and defendant Thomas M. Boyd were co-tenants in the property, the latter could not purchase, for himself alone, the outstanding interest vested in the trustees Hamilton & Coleman, but was bound to hold any title, acquired on such purchase, for the equal benefit of himself and his co-tenant, upon condition that the latter should contribute, or offer to contribute, her portion of the purchase money. This is undoubtedly the general rule as to co-tenants. "A co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and assert it against his companions in interest. The purchase is, notwithstanding his design to the contrary, for the common benefit of all the co-tenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing or offering to contribute, their proportion of the purchase money." Freeman on Co-Tenancy and Partition (2d Ed.) § 154. The respondent contends that this principle applies only where the co-tenants hold under the same instrument. Whether or not the rule is subject to this qualification is a question which has given rise to a considerable conflict of authority. It need not, however, be here decided. Assuming that the plaintiff (regardless of her allegations that the defendants prevented her from paying off her share of the debt to the Sacramento Bank) was entitled, as against her co-tenant and his wife, to claim the benefit of the purchase by them of the interest sold by the trustees, she must still fail, for the reason that the court below found that her cause of action was barred by laches. This finding is fully sustained by the proofs offered and the principles of law applicable.

The plaintiff's delay in seeking relief in the courts had not lasted for such a period as to make the statute of limitations available as a bar to the suit. Undoubtedly mere delay to commence the suit for a period less than that of the statute of limitations is not a sufficient reason for dismissing the proceeding. *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674. It is well settled, however, that courts of equity will often refuse relief, even where the statutory time of limitation has not run. "There must be something more than a mere passive neglect. There must be, in addition, a showing of facts amounting to acquiescence in the acts complained of, or of other circumstances which, coupled with the delay, will render the granting of the relief inequitable." *Lux v. Haggin*, supra. In *Chapman v. Bank of California*, 97 Cal. 155, 159, 31 Pac. 896, the court says: "Regardless of the question as to whether there has been a plea of the statute of limitations, a court of equity will refuse to entertain a suit brought after unreasonable delay. *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Bell v. Hudson*, 73 Cal. 287, 14 Pac. 791, 2 Am. St. Rep. 791. The re-

fusal to grant relief is not put upon the presumption of payment or analogy to the statute of limitations, but upon considerations of public policy, and the difficulty of doing entire justice between the parties in consequence of the unreasonable delay. The principal factors in determining whether the plaintiff had been guilty of laches are acquiescence and lapse of time; but other circumstances are also material; such as, that a change in the value or the character of the property has taken place. The matter is one which is left to the sound discretion of the chancellor in each case."

These principles have been applied with, perhaps, more than ordinary strictness to the case of a co-tenant demanding the benefit of a purchase by the other co-tenants. "The right of a co-tenant to share in the benefit of a purchase of an outstanding claim is always dependent upon his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim.

* * * The co-tenant asking a court of equity to award him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition." Freeman on Co-Tenancy and Partition (2d Ed.) § 156. In *Mandeville v. Solomon*, 39 Cal. 125, this court said. "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property. It, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it, at the same time, exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his co-tenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying, until the rise of the land or some event, yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction, and abandoned its benefits." See, also, 17 Am. & Eng. Ency. of Law (2d Ed.) 679; *Stevens v. Reynolds*, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; *Reed v. Reed*, 122 Mich. 77, 80 N. W. 996, 80 Am. St. Rep. 541; *Buchanan v. King's Heirs*, 22 Grat. (Va.) 414; *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019; *McFarlin v. Leaman* (Tex. Civ. App.) 29 S. W. 44.

We think the facts shown in the case at bar are clearly sufficient to justify the conclusion of the court that, so far as the defendant Josephine Porter Boyd is concerned, the delay of the plaintiff was so great as to deprive her of the right to seek the relief here demanded. It is not disputed that the plaintiff knew of the trustees' sale and of the conveyance by the Bank of Selma to the defendants at the time these transactions took place. In the meanwhile the respondent has purchased the interest of her co-tenant, has cultivated and cared for the land, has made some improvements upon it, and taken the risks of declining values and failure of crops. It is in evidence, and it is found by the court, that property of this character was in little demand at the time of the sale. Since such sale it has increased greatly in value, until, at the time of the trial, it had more than doubled in value. We cannot doubt that the court below was fully justified in finding that a delay of almost four years was unreasonable under these circumstances. To permit the plaintiff now to reinstate herself as the owner of an undivided one-half interest in the land, upon payment of one-half of the amount paid at the trustees' sale, thereby securing to herself the full benefit of the increase in the value of the land, without having undergone any of the risks connected with its holding and cultivation, would manifestly be inequitable. The appellant points out certain facts, which, it is alleged, should have been held to have excused the delay in seeking relief. But whether or not, under all the circumstances, the delay has been such as to render it inequitable to grant the relief is, in the first instance, a question for the trial court, the determination of which is left, as is said in *Chapman v. Bank*, supra, "to the sound discretion of the chancellor in each case." The matters relied on by appellant as explaining her delay were proper to be considered by the court below; but, without stating them at length, we are compelled to say that, giving due effect to all of them, they were not of such character as to require that court to conclude that, at least as against the respondent Josephine Porter Boyd, the plaintiff had not slept on her rights to such an extent as to justify the denial of relief.

Our views on this point make it unnecessary to consider any of the other contentions urged by counsel.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(153 Cal. 559)

CHEESEBOROUGH et al. v. CITY AND COUNTY OF SAN FRANCISCO.
(S. F. 4,538.)

(Supreme Court of California. May 12, 1908.)

1. TAXATION — CORPORATE STOCK — DOUBLE TAXATION — "PROPERTY."

The Constitution requires all property not exempt under the federal laws to be taxed in

proportion to its value to be ascertained as provided by law, and defines "property" as including corporate stock. Pol. Code, § 3627, requires taxable property to be assessed at its full cash value. Section 3608 provides that since stock has no intrinsic value above the actual value of the corporation's property, and the taxation of the stock and the property would be double taxation, corporate property, excepting that of national banks, etc., shall be taxed, but that stock except that of national banks, etc., shall not be. *Held*, that under these provisions stock held by citizens is taxable at full value to the extent that its value exceeds the value of the corporation's property taxed in the state; that property situated in another state is taxed there, not making taxation of the stock double, since the inhibition of double taxation applies only to such taxation in the same state or government.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693, 5728; vol. 8, pp. 7768, 7770.]

2. CORPORATIONS—SHARES OF STOCK—NATURE.

Shares of corporate stock represent the value of all the assets of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 162-164.]

3. CONSTITUTIONAL LAW — STATUTES — CONSTRUCTION.

When a statute is susceptible to two constructions, one making it constitutional and the other unconstitutional, the former must be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

4. TAXATION — CORPORATIONS — STATUTES — "PROPERTY" — "CASH VALUE."

Though the constitutional provisions that all property not exempt shall be taxed in proportion to its value to be ascertained as provided by law, and defining "property" as including corporate stock, are not self-executing, any deficiency was supplied by Pol. Code, § 3627, requiring property to be assessed at its full cash value, and section 3617 defining that cash value to be the amount at which the property would be taken in payment of a just debt from a solvent debtor.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 998, 999; vol. 8, p. 7597.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by H. C. Cheeseborough and others, executors, against the city and county of San Francisco. From a judgment for plaintiffs, defendant appeals. Partly affirmed, and partly reversed, with directions to enter a judgment for defendant.

Wm. G. Burke, City Atty., Percy V. Long, City Atty., A. S. Newburgh, Asst. City Atty., Jesse H. Steinhart, Asst. City Atty., and W. I. Brobeck, Asst. City Atty., for appellant. Jordan, Treat & Brann, Jordan & Brann, and Jordan, Rowe & Brann, for respondents.

LORIGAN, J. This action was brought by the plaintiffs as executors of the estate of Charles Hanson, deceased, to recover from the defendant the sum of \$5,765.26 paid under protest for taxes on certain shares of stock assessed to said estate. The action arose out of a state of facts set forth in the findings of the court, and which in substance are as follows: The Tacoma Mill

Company is a corporation duly organized and existing under the laws of this state, having its principal place of business in the city and county of San Francisco, with a capital stock of \$500,000 divided into 10,000 shares of the par value of \$50 per share. Charles Hanson, the deceased, at the time of his death, was a resident of the city and county of San Francisco, and owned 9,998 shares of said corporation, which had an actual par value of \$499,900. It was further found by the court that the Tacoma Mill Company owned and possessed property in the state of Washington on the first Monday of March, 1902, at 12 o'clock noon of said day, of the actual value of \$400,000 and over; that said Tacoma Mill Company further owned and possessed in San Mateo county in this state property which was assessed by the assessor of that county and was of the value of \$21,100; that said Tacoma Mill Company further owned property in the city and county of San Francisco which was of the actual value of and assessed for \$150, making the value of the corporation's California property \$21,250. The assessor of the city and county of San Francisco assessed said shares of the Tacoma Mill Company owned by Charles Hanson in his lifetime to his estate at a valuation of \$350,000, and there was levied thereon the amount of taxes, for the recovery of which this suit is brought. Plaintiffs paid said taxes under protest, and thereafter brought this action for the recovery of the amount so paid. Judgment was rendered against defendant, the superior court holding that the assessment of said stock belonging to the estate of Charles Hanson, deceased, by the assessor of the city and county of San Francisco, and the subsequent collection of the taxes levied thereon by the tax collector of said city and county were illegal and void acts, in violation of the Constitution of the state of California, and section 3608 of the Political Code of the state, and constituted illegal and double taxation of the property belonging to said estate. This appeal is taken from the judgment.

We are at a loss to understand upon what legal basis under the facts in this case it can be asserted that the assessment of this stock to the estate of Hanson constituted double taxation. The Constitution of this state declares that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law, and that the word "property" includes shares of stock. The Legislature has declared that taxable property shall be assessed at its full cash value (Pol. Code, § 3627), and that cash value means the amount at which the property would be taken in payment of a just debt due from a solvent debtor (Pol. Code, § 3617). Under these provisions of the law it is the duty of the assessor to assess shares of stock at their full value, unless there is something

in the provisions of the Code which exempts them from such taxation. The only section of the Code under which it can be claimed that such exemption exists is section 3608 of the Political Code, which provides: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute." The purpose and meaning of this section is, however, plain. Shares of stock represent the value of all the assets of the corporation. *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 60, 55 Pac. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32. As the shares of stock represent no value independent of the corporate property, when all such property is assessed to the corporation, it would be double taxation to assess the shares as well as the corporate property. As said in *Burke v. Badlam*, 57 Cal. 601: "To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the numbers of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each." But, as was said in that case, this result of double taxation could only follow where all the property of the corporation was assessed. It could not apply where none or only a portion of the property of the corporation going to make up the value of the stock was taxed. While the value of shares of stock is determined by the aggregate value of the corporation property, the property which goes to make up such value may or may not be within the jurisdiction of this state. If it is within the state and assessed to the corporation, then the shares of stock may not also be assessed to the stockholders, as that would clearly constitute double taxation. But section 3608 cannot be extended so as to exempt such shares from taxation when all the assets of the corporation are not taxed in this state by reason of the fact that some of them are beyond its jurisdiction. Neither is it of moment that the tangible property of the corporation is situated in some other state and has there been taxed. The fact that some of the property of the corporation is assessed in another state or country is no prohibition of the taxation of the shares of stock held here. This does not constitute

taxation of all the property of the corporation within the terms of the section. The inhibition of double taxation only applies to such taxation in the same state or government. Section 3640 of the Political Code, until repealed, and its place taken by section 3608 of that Code, provided: "The owner or holder of stock in any firm or corporation, the entire capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation." This and section 3608 declared the same legal principle against double taxation.

It is held by this court in *City and County of San Francisco v. Fry*, 63 Cal. 470, that section 3640, cited above applied only to corporations whose property is situated in this state. The court there said: "It is further urged that to tax the shares in this state when the property of the corporations is taxed in the state of Nevada would be double taxation. But the inhibition of double taxation only applies to such taxation made by the same state or government. There is a double taxation or 'duplicate taxation,' as it is styled by Judge Cooley, which is wholly inadmissible under any Constitution requiring equality and uniformity in taxation. 'By duplicate taxation in this sense,' says the learned author above named, 'is understood the requirement that one person, or any one subject of taxation, shall directly contribute twice to the same burden while other subjects of taxation belonging to the same class are required to contribute but once.' Cooley on Taxation, p. 164. It will be seen that in this state the shares of the corporation alone are taxable. Its property is not here assessed. Conceding that taxation of the shares and property of a corporation by the state of California would be double taxation, there is here no taxation of that kind."

In the case of *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264, it is also declared: "As to sections 3640 and 3641 of the Political Code, relied on to show that the shares above mentioned are not taxable, in our opinion section 3640 by its express terms only exempts the shares from assessment where the entire capital or property of the corporation in which the shares are owned is assessed, and it does not appear that the corporation or corporations in which the shares here assessed were owned were assessed at all during the fiscal year for which the assessment herein was made."

There is no difference between the former section 3640 and the present section 3608 as far as the application of the doctrine there laid down is concerned. Under either section the exemption of the stock of a corporation from taxation only exists where there is assessed in this state to the corporation all the property thereof, the value of which is represented by the shares of stock. Section 3608, while declaring that no shares of stock shall be assessed, is to be read in the

light of the preliminary language of the section declaring the reason why it should not be, and was intended to mean only that as shares of stock represent the value of the property of the corporation, so when all the property of the corporation in the state is taxed it would be double taxation to assess both, and that, where all the property of the corporation was assessed, the shares of stock should not be. It was not meant or intended that if less than the aggregate value of the property of the corporation was assessed in this state the actual value of the corporate stock in excess of the value of the corporate property so assessed should not be taxed here. It means only that when the aggregate property of the corporation is assessed in this state shares of stock of the corporation shall not be assessed, but that, if all such property is not here assessed, the actual value of such stock, less the value of the corporate property which is assessed here, shall be taxed. Property of the corporation located outside of the state, and over which the state cannot exercise its sovereign power of taxation, is not to be taken into consideration in diminishing the actual value of the stock held here for purposes of taxation.

In the case of *Commercial National Bank v. Chambers*, 21 Utah, 324, 61 Pac. 560, 56 L. R. A. 346, in the Constitution of which state provisions are found relative to the taxation of stock such as are in our Constitution, it is said: "In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but deductions for its real estate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred. * * * The state has a right to fix a particular situs as to such stock (corporate stock) for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. 'The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporations beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the shares of

stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock and their true value as representing the entire corporate assets that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this state.' *American Coal Co. v. Allegany County*, 59 Md. 185; *Dwight v. Boston*, 12 Allen (Mass.) 316, 90 Am. Dec. 149; *Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703; *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904, affirmed in 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 959." See same case, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. 863, 45 L. Ed. 1227.

If section 3608 were to be given any other construction than as heretofore suggested, it would be unconstitutional. We have seen that the Constitution declares that shares of stock are property, and that it requires all property to be assessed in proportion to its value to be ascertained as provided by law. Shares of stock when held in this state by our citizens are subject to the taxing power of the state as personal property following the person of the owner, and are taxable at their full value, and under the constitutional provisions above referred to they must be so taxed. No property is exempt from taxation except as declared in the Constitution, which, of course, does not include shares of stock. If section 3608 is to be construed as a direction to the assessor that shares of stock in a corporation are not to be assessed, and the effect of that direction is to exempt, when all the property of the corporation is not assessed in this state, shares of stock from taxation, it would be unconstitutional. *Crocker v. Scott*, 149 Cal. 575-588, 87 Pac. 102. For, assuming that 10,000 shares of stock in a domestic corporation of the actual par value of \$100,000 were held in this state, and that the assets of the corporation contributing to that value were located, 25 per cent. thereof in this state assessed to the corporation, and 75 per cent. located outside of the state and beyond our jurisdiction for taxation purposes, it is quite clear that, if the stock held here is not assessed, \$75,000 worth of property, which the Constitution requires should be taxed at its full value, has been exempted from taxation. Only 25 per cent. of its value has been taxed by the taxation of the corporate property in this state. The other 75 per cent. is represented by the assets outside of the state, and to that extent the actual value of the stock, will be exempt from taxation. Or, to illustrate further, if no property is assessed here to the corporation, and the stock cannot be assessed, it necessarily follows that \$100,000 worth of property is exempt under the section in question.

If this were the effect which must result

from a literal construction of section 3608, it would clearly be unconstitutional as exempting property from taxation which the Constitution requires shall be taxed. But we are not compelled to so construe it. When a legislative provision is capable of two constructions, one consistent, and the other inconsistent, with the provisions of the Constitution, it is a well-recognized principle of construction that the statute should be given that construction which will make it harmonious with the Constitution, and comport with the legitimate powers of the Legislature. *People v. Frisbee*, 26 Cal. 135; *Jacobs v. Supervisors*, 100 Cal. 121, 34 Pac. 630; *In re Mitchell*, 120 Cal. 384, 52 Pac. 799. Applying this principle to the section in question in connection with the constitutional provisions requiring the taxation of all property, including shares of stock, at its full value, and it must be taken to mean that, when the property of the corporation in the state is taxed directly to the corporation, the shares of stock held here and subject to taxation shall not, to the extent that the property represented by it is taxed, be thus taxed. This exemption can only be extended, however, to deductions from the value of the shares of stock, the corporate property of which is situated in this state and directly taxed to the corporation. It is the purpose of all revenue laws as nearly as possible to impose upon all property its just proportion of taxation, and a construction of the statute should not be had which will permit shares of stock held here of vast value in domestic corporations whose properties are located beyond the state to escape their just proportion of such taxation. Under these views the shares of stock of the Tacoma Mill Company held by the estate of Hanson, except to the extent that the property of the corporation in this state was actually assessed and taxed to the company, were taxable to their full value.

It is, however, insisted by respondent that, while the Constitution has declared shares of stock to be property and to be taxed in proportion to their value, to be ascertained as provided by law, still the Legislature has not provided a method of ascertaining the taxable value of such shares as shall be paid by the individual stockholders which does not violate those provisions of our law now in force prohibiting double taxation and requiring that all property shall be assessed at its full cash value. We do not think this position well taken. While these provisions of the Constitution are not self-executing, the Legislature immediately subsequent to the adoption of that Constitution supplied any deficiency by providing a standard under which values could be measured by passing sections 3617 and 3627 of the Political Code defining cash values, and declaring that all property should be assessed thereat. *Crocker v. Scott*, *supra*.

The method of taxation adopted by the assessor was to deduct from the value of the shares held by the estate of Hanson the value of the corporate property situated in this state and taxed directly to the corporation. This is the only method he could have adopted in order to avoid double taxation of the property which is prohibited by section 3607 of the Political Code, and conforms to the provisions of the sections above cited. It is made the duty of assessors to assess the property of corporations in the counties where found. Section 3641, Pol. Code. The assessors of San Mateo and San Francisco counties found property of the Tacoma Mill Company within their respective counties, which they assessed to that corporation at its actual cash value, aggregating \$21,250. The assessor of San Francisco found shares of said Tacoma Mill Company owned by the estate of Hanson in the city and county of San Francisco, which it was his duty to assess at its full cash value (Pol. Code, §§ 3607, 3617, 3627), unless he found, as we have construed section 3608 to mean, that the corporation property which they represented was fully taxed in the state. As he did not find the corporate property so fully taxed, it was the duty of the assessor to assess these shares of stock. In doing so it was necessary to avoid a double taxation. Obviously the only way he could avoid it, and at the same time carry out the mandate of the law requiring the taxation of the property of the corporation and the taxation of the shares of stock at their full cash value, was to deduct the value of the corporate property actually assessed in the state from the value of the shares, and tax the stock as of the value diminished by the deduction. Under our view of the construction to be given to section 3608, taking into consideration with it the other provisions of the Political Code and those of the Constitution, this was the only legal method the assessor could have adopted to avoid double taxation, and in our judgment was the proper one.

As to whether in adopting this method the shares of stock were assessed at their full cash value. As has been seen, a share of stock represents no value outside of the actual value of the property of the corporation it stands for and represents. Pol. Code, § 3608; *Burke v. Badlam*, 57 Cal. 601. In the cited case of *Burke v. Badlam* it is said that "when all the property of the corporation is assessed, then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with." See, also, *Crocker v. Scott*, supra. These being judicial and legislative declarations on the subject, it necessarily follows, as tersely and logically put by one of the counsel for appellants in his brief: "That if the constitutional provision demanding the taxation of the shares of stock at its full cash value is satisfied when no part of the stock is taxed,

and when all of the property of the corporation is taxed, this constitutional provision must necessarily be satisfied when a part of the stock is taxed and the rest of the tax levied against the corporation property. This is taxation of all the property at its full cash value." Upon both these propositions urged by respondents we are satisfied that, in order to have assessed the shares of stock in harmony with the Code and constitutional provisions, the method adopted by the assessor was the only one whereby the full cash value of the shares could be ascertained for the purposes of taxation and to have avoided double taxation. *Com. Nat. Bank v. Chambers*, supra. It follows that the trial court was in error in holding that the assessment of these shares of stock as made was violative of either the constitutional provisions or of section 3608 of the Political Code, or that the assessment of said shares and the levy of a tax thereon constituted double taxation.

As to the order to be made on this appeal. The appeal is from the judgment alone. The judgment involved two causes of action. As to the first, appellant consented to a judgment in favor of respondents in the court below. This appeal involves only the judgment on the second cause of action, and to which our consideration has been addressed. In the view we take of it, the judgment should have been entered on the findings by the trial court for the appellant. It is therefore ordered that the judgment as to the first cause of action consented to by appellant in the court below be affirmed. As to the second cause of action, the judgment is reversed, with directions to the trial court to enter a judgment upon the findings in favor of the appellant as to said second cause of action. Appellant is also awarded costs on this appeal.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

153 Cal. 551

SALSTROM et ux. v. ORLEANS BAR
GOLD MINING CO. (S. F. 4,652.)

(Supreme Court of California. May 12, 1908.)

1. MINES AND MINERALS—OPERATION OF MINES—RIGHTS AND LIABILITIES INCIDENT TO WORKING—ACTIONS.

Plaintiffs and defendant owned adjoining lands fronting on a creek. Defendant, in making a large prospect cut in its land, had thrown a large quantity of gravel, boulders, and earth into the creek, forming a bar therein, and in operating a placer mine above plaintiffs' premises had caused a large amount of boulders, gravel, detritus, and debris to be placed in the creek, all of which were prevented from being carried down stream by reason of the bar; the result being that the waters of the creek were diverted from their natural channel and thrown with great force upon plaintiffs' land, washing away a portion thereof with a growing crop of grain thereon, and covering the land with a deep deposit of gravel and boulders. In an action for damages to the land, the court charged that one engaged in mining may deposit his

tailings in a running stream to a reasonable extent, but may not flood a lower owner's land and by depositing tailings thereon substantially injure such land, even though he uses all reasonable means to prevent such damage, and therefore, if defendant obstructed the creek by a mass of earth, gravel, and boulders, which caused the waters of the creek to flow upon plaintiffs' land, washing it away and injuring it, and if defendant, after such obstruction, commenced mining operations upon its land and placed in the creek a quantity of detritus, debris, rocks, tailings, etc., which was carried down stream to the obstruction and thereby diverted upon plaintiffs' land, injuring it, a verdict should be rendered for plaintiffs. *Held*, that the charge was not objectionable for being outside the issues.

2. SAME.

The instruction was not objectionable in ignoring the question of negligence on defendant's part, for, no matter how careful the miner may conduct his operations, he has no right to flood or wash away his neighbor's land, or deposit debris thereon to his injury, and, if by the deposit of debris in the stream he causes such result, he is liable for the resulting damage.

3. SAME.

The instruction was not argumentative or contradictory and confusing.

4. DAMAGES—INJURY TO LAND—EXCESSIVE DAMAGES.

In an action for damages to land fronting on a creek caused by an adjoining landowner's mining operations, which resulted in an obstruction in the creek, so that plaintiffs' land was flooded, and its soil washed away, and a great quantity of tailings and debris deposited thereon, there was evidence showing that the land damaged was more than eight acres, that, on account of the mining debris deposited thereon, it would cost from \$1,000 to \$1,250 an acre more to mine the land than it would otherwise have cost, that the value of the land for mining purposes was sufficiently great to warrant such increased expenditure, and that the growing crop washed away was of the value of \$200. *Held*, that it cannot be said that the evidence was insufficient to support a verdict of \$9,000.

5. SAME—INSTRUCTIONS.

In an action for damages to land fronting on a creek caused by an adjoining landowner's mining operations, which resulted in an obstruction in the creek so that plaintiffs' land was flooded and soil washed from some of it, destroying a growing crop, and a great quantity of tailings and debris deposited all over it, the evidence showed that the land for agricultural purposes was worth \$500 per acre, that, on account of the mining debris deposited on it, it would cost from \$1,000 to \$1,250 an acre more to mine than it would otherwise have cost, and that its value for mining purposes was sufficient to warrant such increased expenditure. The court instructed that the jury might consider the character of the soil for farming purposes and the value thereof, and also the land for mining purposes prior to the injury, and the depreciation caused by the acts of defendant, if any, and that, if plaintiffs were entitled to recover at all, the jury should determine the value of the crop washed away and the difference between the value of the land for any and all purposes prior to the injury and its value after the injury; such difference being the measure of damages. *Held*, that the instruction was erroneous, using the land for agricultural purposes and for mining purposes being absolutely incompatible, so that the most plaintiffs could recover in addition to the value of the growing crop would be the amount of injury based on the availability of the land for the most valuable use for which it could be used.

6. SAME—MEASURE OF DAMAGES.

In such a case, the true rule as to the measure of damages would be: First, that

plaintiffs were entitled to the value of the growing crop destroyed; then, as to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris would amount to less than the value of the property prior to the injury, plaintiffs were entitled to such cost, but, if such cost would exceed such value, the plaintiffs were entitled to the value of the property; and, lastly, as to the land used for agricultural purposes, if such land had a greater value for mining than for agricultural purposes, the rule as to the land exclusively used for mining purposes would apply, but if, on the other hand it was more valuable for agricultural than mining purposes, it having been absolutely destroyed for agricultural purposes, plaintiffs were entitled to its value for such purposes.

7. APPEAL AND ERROR—DETERMINATION AND DISPOSITION OF CAUSE—MODIFICATION—REDUCING AMOUNT OF RECOVERY.

In an action for damages to land caused by an adjoining landowner's mining operations, plaintiffs recovered a verdict of \$9,000, which amount was reduced by the court to \$7,000. On the trial erroneous instructions were given, the utmost effect of which was to improperly increase the verdict by \$2,550. *Held* that, not knowing upon what theory the trial court reduced the verdict, such reduction cannot be held to have obviated in any degree the effect of the erroneous instructions, but that, as such effect may be absolutely obviated by deducting \$2,550 from the \$7,000 judgment, and as the proceedings were correct in all other particulars, plaintiffs should not be compelled to try the case again in the event of their willingness to make such deduction.

Department 1. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Jonas Salstrom and wife against the Orleans Bar Gold Mining Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed, provided plaintiffs consent to a specified reduction in the amount of the judgment; otherwise reversed.

L. F. Puter and Denver Sevier (Page, McCutchen & Knight, of counsel), for appellant. Gillett & Carter and F. A. Cutler, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment and an order denying a new trial in an action brought by plaintiffs for damages to their land, alleged to have been caused by unlawful acts of defendant in conducting its hydraulic mining operations. There was a verdict in plaintiffs' favor for \$9,000. On motion for new trial, the trial court ordered that the motion be granted, unless plaintiffs remitted all over and above \$7,000, and costs of suit, in which event the motion was to be denied. This plaintiffs did by filing their written consent to the modification of the judgment within the time and in the manner prescribed by the trial court.

Plaintiffs were the owners of a tract of land containing about 78 acres, in Humboldt county, extending on the easterly side to and there fronting on Camp creek for a considerable distance. The defendant owned land adjoining plaintiffs' land on the creek frontage and running northerly along said creek for a considerable distance above plaintiffs' lands.

The theory of plaintiffs' case as shown by the complaint was that defendant, in making a large prospect cut in its land opposite plaintiffs' land, had thrown a large quantity of gravel, boulders, and earth into the creek, forming a bar therein, and that, in operating a placer mine above plaintiffs' premises, it had caused a large amount of "boulders, gravel, detritus, and debris" to be placed in the waters of Camp creek, which were prevented from being carried down said creek past plaintiffs' land solely by reason of said bar; the result being that the waters of the creek were diverted from their natural and ordinary channel and thrown with great force against and upon plaintiffs' land, washing away a portion thereof, with a growing crop of grain thereon, and covering such portion with a deep deposit of gravel and boulders.

1. There was evidence sufficient to sustain the conclusion of the jury that the injury to plaintiffs' land and crop was solely due to the acts of defendant so alleged in the complaint. This was not questioned in defendant's opening brief, which was devoted exclusively to the discussion of alleged errors in instructions given to the jury and the claim that the damages awarded were excessive. An attempt is made in the closing brief to show that the evidence demonstrates that the injury was in part caused by mining operations by plaintiffs themselves and others; but the record shows that the evidence was conflicting on this proposition, and that there was evidence sufficient to warrant the jury in finding that the acts of plaintiffs and others in no degree contributed to such injury.

2. Complaint is made of the following instruction given to the jury at plaintiffs' request: "One engaged in mining has a right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and debris thereon to substantially injure or ruin the latter's property, although he may have used all reasonable means to prevent such damage. No person or corporation has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel, or other material so as to injure or damage the same. So I instruct you that if you find upon the evidence that the plaintiffs are in the possession of the land described in the complaint, and were in such possession at and during the times therein mentioned, and if you further find that while they were in such possession the defendant caused to be placed in the channel of Camp creek and upon the lands of plaintiffs a large obstruction, by placing in said creek and upon said land a large mass of earth, gravel, rocks, and boulders, which caused the waters of said creek to flow upon and against plaintiffs' land, washing it away and damaging and injuring it, and if you further find that said defend-

ant, after making such obstruction, commenced mining operations by the hydraulic process upon its land and above plaintiffs' land and in so doing caused to be placed into Simm's Gulch a large mass of earth, detritus, debris, gravel, rocks, and boulders, tailings from its mine, and if you further find that said detritus, debris, gravel, rocks, and boulders came down said gulch into Camp creek and were thence carried by the waters of Camp creek down stream to said obstruction and were there by reason thereof diverted to and upon the said land of plaintiffs, damaging and injuring the same, then you should render a verdict for the plaintiffs." It is said that a portion of this instruction was outside the issues; but we think the whole thereof was pertinent to the issues and in line with the theory of plaintiffs' case, which was that by reason of the bar placed by defendant in the creek, and its deposit of debris in the creek above such bar, it caused a portion of plaintiffs' soil to wash away, and deposited on the subsoil remaining and on other adjoining land of plaintiffs a large amount of debris. The instruction is not objectionable in that it ignores the question of negligence on defendant's part. It is thoroughly established that, no matter how carefully the miner may conduct his operations, he has no lawful right to flood or wash away his neighbor's land, or deposit mining debris thereon, to its injury, and that, if by the deposit of mining debris in the stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial. See 2 Lindley on Mines, § 843; Hill v. Smith, 27 Cal. 481; Robinson v. Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118; Hobbs v. Amador, etc., Co., 66 Cal. 161, 4 Pac. 1147; Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622. The instruction was not objectionable on the ground that it was argumentative or contradictory and confusing.

3. It cannot be held that the evidence was not sufficient to support a conclusion that the damage to plaintiffs amounted to \$9,000, which was the amount of the verdict. The evidence on this point was given entirely by plaintiffs' witnesses; defendant making no attempt to contradict such witnesses, and contenting itself with its effort to show that the damage was not caused by its acts. There is some difference between counsel on this appeal as to the quantity of land destroyed and injured; defendant's counsel asserting that only some three acres were thus affected, while plaintiffs declare the quantity to have been over eight acres. There was ample evidence to sustain plaintiffs' counsel in this regard. Plaintiff Jonas Salstrom testified that the portion of his land available for agricultural purposes and which he was

engaged in farming extended to a certain line pointed out by him on the ground to a surveyor, and that the soil so available had been washed away as a consequence of defendant's acts to the present line of his agricultural land. The surveyor testified that the amount of land between these lines was 5.10 acres. It was further made to appear that, extending from the original line of such farming land to Camp creek, there were about four acres of mining ground included in plaintiffs' lines, as stated in the complaint, only one of which had been mined, leaving three acres still available for mining purposes. Whatever uncertainty there may have been in the complaint in this regard, there can be no doubt that the case was tried upon the theory that the plaintiffs were entitled to recover for all damage caused by defendant to any portion of the tract described in the complaint, which necessarily included, in addition to the portion devoted to farming purposes, the portion in front thereof extending to the creek. As to these three acres, there was evidence to support a conclusion that the land had been so covered with mining debris by the acts of defendant that it would cost from \$1,000 to \$1,250 an acre more to mine the land than it would otherwise have cost, and that the value of the land for mining purposes was sufficiently great to warrant such increased expenditure, or, in other words, that the value of the land for mining purposes was reduced by from \$1,000 to \$1,250 per acre by the acts of defendant. The same is true as to the 5.10 acres used for agricultural purposes, as to which there is testimony to support a conclusion that the value for mining purposes was the same as that of the other three acres. There was in this warrant for a conclusion that the damage amounted to from \$1,000 to \$1,250 per acre for the whole 8.10 acres, and the growing crop destroyed was shown to be of the value of \$200.

4. A more serious question is presented by certain instructions on the measure of damage. After correctly instructing the jury in the general language of section 3333, Civ. Code, that the amount to be awarded to plaintiffs in the event of a recovery was such amount as would compensate them "for all the detriment proximately caused" by the acts of defendant, not exceeding the amount named in the complaint, the court, at the request of plaintiffs, instructed the jury as follows: "In passing upon the question of damages, if you should find that plaintiffs are entitled to recover in this action, you may take into consideration the character and quality of the soil for farming purposes and the value thereof, and also the land for mining purposes prior to the injury complained of and what depreciation in the value thereof has been caused by the acts of defendant, if any." Of its own motion the court gave this further instruction on the same subject: "If

you believe from the evidence that the plaintiffs are entitled to recover, then, in ascertaining the amount of damages, you will determine from all the evidence as near as may be the value of the crop, if any, on the land washed away, and the difference between the value of their land for any and all purposes, prior to the injury and the value of the same after the injury, and this difference would be the measure of damages to which they would be entitled for permanent injury to their lands." These were the only instructions given upon this particular matter, except a general instruction that the jury must use their best judgment in assessing damages to do what was right and fair and just. Plaintiff's claim, sustained by his evidence, was that the 5.10 acres were worth \$500 per acre for farming purposes, to which use they were then, and had been for several years, devoted. The effect of the defendant's acts, according to plaintiff's claim, was necessarily to destroy the land so far as agricultural purposes were concerned; the soil adaptable to such use having been entirely washed away, and mining debris having been deposited thereon to such an extent that it would cost from \$1,000 to \$1,250 per acre more to mine the land than it would have cost had this change not been effected. The theory of learned counsel for plaintiffs, as indicated by his brief, appears to be that plaintiffs were entitled to recover as damages both the value of the land for farming purposes, \$500 per acre, and the increase in the cost of mining the land, \$1,000 to \$1,250 per acre. It appears manifest to us that this cannot be so. No part of the land could be mined except by a process that would entirely destroy it for agricultural purposes; it being absolutely essential to completely remove the upper soil by what is known as ground sluicing in order to get at the gold distributed in the ground beneath. As long as any of the land was used for agricultural purposes, it could not be used for mining purposes, and, when used for mining purposes, its value for agricultural purposes was destroyed. The two uses were necessarily absolutely incompatible. Under such circumstances, the most that a plaintiff can rightfully claim is that the amount of injury be determined upon the basis of the availability of the land for the most valuable use for which it can be used. The two uses being absolutely incompatible, the property cannot well have a higher market value than its value for the most valuable use to which it is adapted. To hold otherwise would necessarily give double compensation to the owner of the land to the extent that the amount awarded exceeded the value for the most valuable purpose for which the land could be used. See *Northern Pacific & M. Ry. Co. v. Forbis*, 15 Mont. 452, 39 Pac. 571, 48 Am. St. Rep. 692, and cases there cited; also, *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681. The true rule as to the measure of

damages in the case at bar was this: Plaintiffs were first entitled to the value of the growing crop destroyed. As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris deposited by defendant would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage; but, if such cost of repair or of restoration would exceed such value, then the value of the property would be the proper measure. See *Hartshorn v. Chaddock*, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426, and cases there cited. As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of the other land; and, on the other hand, if it was more valuable for agricultural than mining purposes, it having been absolutely destroyed for such purpose, plaintiffs would be entitled to the value, testified by plaintiff to be \$500 per acre. Defendant's claim is that the instructions on the subject of damage hereinbefore set forth were in line with the theory of counsel for plaintiffs as we have stated, and practically told the jury that they could allow plaintiffs both the amount that the land was worth for farming purposes, and the damage to it as mining property. This we are satisfied was, under the circumstances of this case, and in the absence of other instructions more precisely defining the rights of the parties, the effect of the instructions complained of, the sense in which the jury were reasonably warranted in taking them and in which they probably did take them. They were therefore prejudicially erroneous. The utmost possible effect of such instructions was to improperly increase the verdict against defendant by \$2,550. It is impossible for us to say upon what theory the learned judge of the trial court reduced the verdict from \$9,000 to \$7,000, and consequently such reduction cannot be held to have obviated in any degree the effect of such error. As such effect may be absolutely obviated by a remission of such amount, and as the proceedings were correct in all other particulars, so far as this record shows, plaintiffs should not be compelled to try the case again in the event of their willfulness to remit such amount.

It is ordered that in the event that plaintiffs, within 30 days from this date, file with the clerk of this court their written consent to a modification of the judgment in their favor by the deduction of \$2,550, leaving the same to stand for \$4,450 and costs of suit, said judgment shall be modified accordingly, and the order denying a new trial shall be affirmed; but that, in the event that said consent be not so filed within said time, the judgment and order denying a new trial shall be reversed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 460

PATTEN et al. v. PEPPER HOTEL CO. et al.
(L. A. 1,973, 1,993.)

(Supreme Court of California. May 29, 1908.
Dissenting Opinion, June 12, 1908.)

1. MORTGAGES—ASSIGNMENT OF DEBT AND MORTGAGE—RIGHTS OF SECOND ASSIGNEE—OPTION TO FORECLOSE ON DEFAULT AS TO INTEREST.

In an action by the second assignee and pledgee of a note and mortgage securing the same, the note giving the holder thereof the option to declare the whole principal and interest due for nonpayment of interest, even if such second assignee could not exercise the option on a failure to pay interest, because the note and mortgage were in the actual possession of the first assignee thereof, the exercise of the option by the latter would inure to the benefit of the second assignee, so as to entitle him to foreclose the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1163, 1231, 1232.]

2. SAME—FORECLOSURE BY ACTION—PARTIES—PLAINTIFFS—FIRST ASSIGNEE.

In an action by the second assignee and pledgee of a note and mortgage, to foreclose the mortgage, where the first assignee, the mortgagee, and grantee of the mortgage were made parties defendant, the grantee of the mortgage may not insist that the first assignee should have been a party plaintiff instead of defendant; such first assignee not having objected, and all those interested in enforcing the mortgage lien being before the court, either as parties plaintiff or defendant.

3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—PARTIES—JOINDER.

In an action by the second assignee of a note and mortgage, to foreclose the mortgage for nonpayment of interest, where the first assignee, the mortgagee, and the grantee of the mortgage were made parties defendant, and after a demurrer to the complaint had been overruled, the first assignee filed a cross-complaint, alleging practically the same facts showing the default, etc., and praying foreclosure, even if the first assignee was misjoined as a party defendant, such defect was obviated by the subsequent filing of the cross-complaint, whereby it became a plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4069-4074.]

4. SAME—DEFECT SUPPLIED BY SUBSEQUENT PLEADINGS.

A judgment will not be reversed for a ruling on demurrer for nonjoinder or misjoinder of parties, where, for all the purposes of the action, the defect has been supplied or removed by subsequent pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4069-4074.]

5. MORTGAGES—FORECLOSURE BY ACTION—DEFENSES—WANT OF CONSIDERATION—DEFENSE BY PURCHASER OF PROPERTY SUBJECT TO MORTGAGE.

Failure or want of consideration, as between the parties as to a mortgage, cannot be set up by the purchaser of lands subject to the mortgage which is a part of the consideration, whether he expressly assumed the mortgage as a part of the purchase money or not; and in an action by the second assignee of a note and mortgage, to foreclose the mortgage, where defendant had purchased the mortgaged property long after the execution of the note and mortgage, and as a part of the consideration therefor had agreed to pay two notes, to secure the payment of which the note and mortgage sought to be foreclosed were assigned to the first assignee and to plaintiff, and had also agreed in writing with the first assignee of the note and mortgage

that the mortgage should be a lien on the property for the assigned note, defendant may not set up a want of consideration to the mortgagor for the note and mortgage.

6. SAME—PLEADING—COMPLAINT—NONPAYMENT AND ELECTION TO FORECLOSE—SUFFICIENCY OF ALLEGATION.

In an action by the assignee of a note and mortgage to foreclose the mortgage, the note giving the holder thereof the option to declare the debt due for nonpayment of interest and elect to foreclose, the allegation in the complaint that default in the payment of interest had been made, and because of such default plaintiff had elected to exercise the option, was a sufficient averment that the option was exercised when the interest became due, and could not be construed to mean that plaintiff had elected to exercise the option only at the time of filing the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1312.]

7. SAME—NONPAYMENT OF INTEREST—TENDER—SUFFICIENCY OF ALLEGATION.

While the tender by the mortgagor of interest, due on a note secured by a mortgage, would have defeated the right of the holder of the note to elect to declare the interest and principal due for nonpayment of interest, if the tender was made before the latter had elected to exercise his option on default of payment in interest, where, in an action to foreclose the mortgage for nonpayment of the note, the complaint alleged that defendant defaulted in paying the interest, and plaintiff had elected to declare the note due, and the answer only alleged that defendant had tendered his interest on a certain date, which was after the interest became due, and plaintiff had exercised his option to declare the note due, the answer raised no issue as to plaintiff's exercise of his option to declare the whole debt due on default in payment of interest, as it showed that the tender was made after default in payment, it being necessary that defendant, if it desired to raise such issue, should allege the tender was made before the exercise of the option.

8. SAME—EVIDENCE—ADMISSIBILITY—MATTERS NOT IN ISSUE.

In an action to foreclose a mortgage securing a note, which gave the holder of the note the option to declare the principal and interest due on default of the payment of interest, where the complaint alleged default in payment of interest, and that plaintiff had elected to foreclose, and this was not denied in the answer, no issue as to the exercise of the option was made, and there was no necessity of introducing evidence upon that allegation in the complaint.

9. SAME—NONPAYMENT OF INTEREST—RIGHT TO FORECLOSE ON DEFAULT—RELIEF AS FROM FORFEITURE—"WILLFUL."

Civ. Code, § 3275, provides that whenever a party incurs a forfeiture by the terms of an obligation, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty. A note, secured by a mortgage executed by defendant's grantor, provided that upon nonpayment of interest the holder of the note might elect to declare both the principal and interest due, which was done by plaintiff, as the assignee of the note and mortgage, upon default of payment in interest. Defendant alleged that, before such default, plaintiff had expressed to defendant its intention of being indulgent as to the payment of the note and mortgage, which lulled defendant into a sense of security, and that defendant, by circumstances over which it had no control, was prevented from paying the interest when due, until it subsequently made tender thereof; but the court found against these averments, on evidence sustaining the findings. *Held*, that de-

fendant, having shown no justification or excuse for its omission to make payment when due, was not entitled to relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1163.]

For other definitions, see Words and Phrases, vol. 8, pp. 7468, 7481, 7835, 7836.]

10. SAME—FORECLOSURE BY ACTION—COSTS—ATTORNEY'S FEES—DISCRETION OF TRIAL COURT.

The amount which will be allowed as attorney's fees on foreclosure of a mortgage rests on the discretion of the trial court, as that court is familiar with the pleadings and proceedings on the trial, and may better determine what is the reasonable compensation.

11. SAME—AMOUNT.

The amount of compensation to be allowed for attorney's fees upon the foreclosure of a mortgage depends upon the extent of the responsibility assumed, by reason of the amount involved in the proceedings, together with the actual services in the foreclosure proceedings; and, in an action to foreclose a mortgage, where the pleadings were simple, and the actual trial of the case took but a short time, the mortgage debt amounting to about \$38,000, it cannot be said, as a matter of law, that the trial court abuses its discretion in allowing a counsel fee to plaintiff of only \$600.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1675.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by H. S. Patten and others against the Pepper Hotel Company, German-American Savings Bank, a corporation, and others, in which the bank filed a cross-complaint, to foreclose a mortgage. From a judgment for plaintiff and cross-complainant, decreeing the foreclosure, one of defendants appeals. Plaintiffs also appeal from a portion of the judgment allowing attorney's fees. The judgment against defendants, as well as that portion of the judgment appealed from by plaintiffs, affirmed.

The following is the opinion of LORIGAN, J. (concurred in by HENSHAW and McFARLAND, JJ.), filed April 29, 1908, in department:

"This action was brought by the plaintiffs, as second assignees and pledgees of a note and mortgage, to foreclose said mortgage. The complaint alleged that on August 25, 1903, Coonrod Smith (not a party to the action) executed to the defendant Abbie E. Barr a promissory note for \$60,000, payable five years after its date, and to secure its payment also executed a mortgage in her favor on the property described in the complaint. The note set forth in the complaint provided for the payment of interest quarterly, and contained an option, in favor of the holder of the same, to declare the whole principal and interest due in case of default in payment of the interest. It is then alleged that, subsequent to the execution of said note and mortgage, said defendant Abbie E. Barr made two assignments thereof, in pledge, however, one to secure the payment of an indebtedness, then owing by the defendant Barr Realty Company to the defendant German-American

Savings Bank on the promissory note of said company, in the sum of \$35,000, the other assignment being in pledge to secure an indebtedness due to the plaintiffs from the said Barr Realty Company in the sum of \$33,340.60, evidenced by a promissory note of said realty company; that said second assignment to plaintiffs was subject to the pledge of said note and mortgage in favor of the defendant bank; that default in the payment of the interest due on said promissory note of said Smith had been made, and because thereof the German-American Savings Bank, as the owner and holder of the same, had elected to exercise the option in said note contained, and declared the whole of said note, principal and interest, due and payable; that because of said default, the plaintiffs also had elected to declare the whole of said note executed by Smith due and payable. It is then alleged that the defendant Pepper Hotel Company, by mesne conveyances since the execution of said mortgage by Smith, had become and was the owner of the real estate covered by said mortgage. The prayer was for a foreclosure and sale of the mortgaged premises; and that the proceeds of said sale be applied, first, to the payment of the note of the Barr Realty Company to the defendant bank; and, second, for the application of the balance of the proceeds to the payment of the promissory note executed by said Realty Company in favor of plaintiffs. The defendant Pepper Hotel Company demurred to the complaint, challenging the sufficiency of the facts stated to warrant relief, and asserted, as a further ground, that there was a defect and misjoinder of parties plaintiff and defendant. The demurrer was overruled, and thereafter an answer and cross-complaint was filed by the defendant German-American Savings Bank. The answer admitted all the allegations of the complaint. The cross-complaint set up substantially the same facts that were contained in the complaint relative to the assignment and pledge of said Smith note to the bank by the defendant Abbie E. Barr, to secure payment of the note of the Barr Realty Company; that default in the payment of interest on both notes had been made; that it had elected to exercise the option provided for in the Smith note, and had declared the whole of said note, principal and interest, due and payable, and concluded with a prayer similar to that in the complaint for the foreclosure of the mortgage and application of the proceeds. The Pepper Hotel Company, by its answer, as a defense to the claim of both the plaintiffs and the cross-complainant German-American Savings Bank, averred that the note and mortgage, from Smith to the defendant Abbie E. Barr, was without consideration, and that the plaintiffs and the said bank took their assignments thereof with notice of that fact. By way of relief against a foreclosure of said mortgage it was averred that the Pepper Hotel Company was willing

and able and intended to pay the interest, which fell due on the Smith note on July 12, 1905 (and for default in the payment of which the option was exercised), but that circumstances over which it had no control prevented it from so doing until about the 20th of July, 1905; that on said date said hotel company offered to pay the cross-complainant bank all accrued interest on said note, and that on the 25th of July, 1905, a similar offer was made by the defendant. It was then averred that, if a foreclosure be ordered, it will entail great financial sacrifice on said hotel company to meet the judgment; that if said note were permitted to run to maturity according to its terms, said hotel company would meet the payments thereof without such great loss; that the said mortgaged premises were ample security for said debt, were worth the sum of \$90,000, and that cross-complainant is in no danger of loss because of insufficient value of said property. The prayer is that the note and mortgage be declared void for want of consideration, or that, if held to be valid, and a valid lien against the property of the hotel company, said company be relieved from the penalty of having the principal of said note declared due and payable; that said defendant cross-complainant bank be required to accept said interest, and that the action be dismissed. The German-American Savings Bank and the Pepper Hotel Company were the only defendants who answered; the others making default. The findings of the court were in favor of the plaintiffs and the cross-complainant bank, and a judgment decreeing a foreclosure and sale and application of the proceeds as prayed for by them was ordered entered thereon. The Pepper Hotel Company appeals from said judgment, and also from an order denying its motion for a new trial. The plaintiffs also appeal from that portion of the judgment which allows them but \$600 as attorney's fees. Both appeals will be disposed of herein.

"As to the main appeal by the Pepper Hotel Company. Several grounds are urged by it for a reversal of both the judgment and the order, but there are only a few which we think merit consideration. It is insisted, on the appeal from the judgment, that the court erred in overruling the demurrer of appellant to the complaint. Its position in that respect is, first, that plaintiffs had no right to bring the action because, not being the holders of the note, they could not exercise the option to declare the principal due, as it is provided in the note that such option must be exercised by the holder thereof, and that the German-American Savings Bank, and not the plaintiffs, had the actual control and exercised dominion over said note and mortgage as a pledge; second, that, plaintiffs and the German-American Savings Bank being united in interest, there was a nonjoinder of parties plaintiff in not making the bank a plaintiff, and a misjoinder of parties defendant

in making the bank a defendant, without alleging that the bank refused to join as a plaintiff. In support of the second point appellant cites section 382 of the Code of Civil Procedure. While it is true that the plaintiffs did not actually hold the note and mortgage of Smith, they being held by the defendant bank as the first assignee and pledgee thereof, it is not questioned but that the plaintiffs had such an interest in said note and mortgage as would entitle them to maintain an action for foreclosure, but it is insisted that the complaint does not disclose a present right to do so, nor did the plaintiffs attempt to enforce such right by proper pleadings, and hence, the demurrer should have been sustained upon all the grounds urged. We cannot agree with this view. From the allegations in the complaint itself it appears that there is nothing in the point made by appellant that the plaintiffs, not being the holders of the note, could not exercise the option to declare it due. It is alleged therein, not only that the plaintiffs had exercised the option, but that the bank, the actual holder of the note when the action was commenced, had also done so. If it be conceded that the plaintiffs, not being the holders, could not exercise the option, still no question can be made but that the bank could do so, and that its action in that respect would inure to the benefit of plaintiffs.

"As to the other point urged, of defect and misjoinder of parties. There are, at least, two sufficient reasons why the point is untenable. It will be observed that the bank, as first assignee of the note and mortgage, and the mortgagee Abbie E. Barr were both made parties to the action as defendants. All those, therefore, who were interested in enforcing the lien of the mortgage were before the court, either as parties plaintiff or defendant. This was all that the appellant, as successor in interest to the mortgagor, could insist on. It was immaterial to the appellant, as such successor, whether the bank, as first assignee of the note and mortgage, was a party plaintiff or defendant. If the bank did not object, it did not lie with appellant, as successor of the mortgagor, to raise the question. This same point urged here was before the Court of Appeals of New York in *Simson v. Satterlee et al.*, 64 N. Y. 657, where the decision of the Supreme Court in the same case (6 Hun, 305) was affirmed. That action was to foreclose a mortgage for \$4,000 from the defendants Satterlee to the plaintiff's testator, and assigned by said testator to the defendant Martling to secure payment of \$1,000. The complaint alleged the assignment, that the debt for which the mortgage had been pledged had been unpaid, and prayed that from the proceeds of the sale the amount thereof should first be satisfied. The defendants Satterlee—the mortgagors—demurred to the complaint, on the ground, among others, that the defendant Martling should have been made a plaintiff instead of a defendant. The demurrer was overruled,

and on appeal it was held by both courts that, while in such actions the pledgee is a necessary party, still, as far as the mortgagor or other parties in interest are concerned, it is immaterial whether he be made a party plaintiff or defendant; that so long as the assignee was a party, and did not object to his position under the pleadings, the mortgagor could not raise the question. See, also, *Burlingame v. Parce*, 12 Hun, 149. There is no difference between the case at bar and the cases referred to, as far as the principle announced in the latter is concerned. Aside from this, however, and as an additional reason why the point urged is untenable, it appears that, after the demurrer was overruled, the defendant German-American Savings Bank filed a cross-complaint, in which it alleged practically the same facts as were contained in plaintiffs' complaint, among others, a default in the payment of the interest on the \$60,000 note, and that it had elected to exercise the option contained therein of declaring the whole amount due, and sought a foreclosure of the mortgage. So that, in effect, it joined with the plaintiffs in the action to foreclose; and hence, if there was any merit in appellant's point as to a defect or misjoinder of parties, it was subsequently obviated by the filing of the cross-complaint, in which the bank became a plaintiff in the case. A judgment will not be reversed for a ruling on demurrer for nonjoinder or misjoinder of parties, when it appears from subsequent pleadings, that, for all intents and purposes of the action, the defect complained of has been supplied or removed.

"Now as to the appeal from the order denying the motion of appellant for a new trial. It is insisted, first, that the court erred in refusing to allow appellant to offer evidence with a view of showing that the Smith note and mortgage were made wholly without consideration. As heretofore stated, Smith, the maker of the note and mortgage, was not a party to the action. Nothing whatever was sought against him. The attack upon the note and mortgage was sought to be made by the appellant as successor in interest of Smith to the mortgaged premises. Under the conceded facts in the case, however, appellant had no right to make such attack. It appears from the evidence that appellant purchased the property mortgaged from the Barr Realty Company, the successor in interest of Smith, long after the execution of the note and mortgage by him, and that, as part of the purchase price thereof, appellant assumed the payment of an indebtedness of \$102,000; that this consisted of several amounts contained in a certain schedule introduced in evidence. From the schedule it appeared that, among the other items of indebtedness represented by this \$102,000 so assumed, and to be paid by appellant, were the sums due to the bank and the plaintiffs on the notes of the Barr Realty Company, to secure the payments of which the assignments

of the \$60,000 note and mortgage were made by the defendant Abbie E. Barr. It further appeared, by the terms of an instrument executed between the appellant and the said bank, having reference to the said two notes, to secure which the assignment of the Smith note and mortgage had been made by the defendant, that it was expressly agreed by the appellant that the mortgage should be a lien on the real property, described therein as security for the payment of said \$60,000 note. Under these conceded facts the appellant had no right to attack the note and mortgage of Smith for want of consideration. It assumed the payment and discharge of them as part of the purchase price. If under the circumstances the attack, which the appellant was attempting to make, were permitted, it would be, in effect, to hold that, notwithstanding appellant, as purchaser, retained \$60,000 of the purchase price of the land, under an express agreement to pay it to plaintiffs and the bank in discharge of a note and mortgage on the purchased premises, still it might show that there was no consideration for said note and mortgage, and thus defeat the loan and retain the money. This would be clearly inequitable, and the law does not permit it, to be done. The rule is that failure or want of consideration, as between the parties to a mortgage, cannot be set up as a defense by a purchaser of the lands subject to the mortgage, which is, in fact, part of the consideration, whether he has expressly assumed the mortgage, as a part of the purchase money or not. *Jones on Mortgages* (6th Ed.) § 1491; *Pratt v. Nixon*, 91 Ala. 192, 8 South. 751; *Freeman v. Auld*, 44 N. Y. 50; *Price v. Pollock*, 47 Ind. 362.

"The next point raised is as to one of the findings of the court upon the exercise of the option contained in the note. The court found that the interest on the \$60,000 note, which was due on July 12, 1905, had not been paid, and that 'on account of such failure to pay said interest, said defendant and cross-complainant German-American Savings Bank and said plaintiffs thereupon elected to declare, and did declare, the whole of the principal of said \$60,000 note and the interest thereon due and payable.' The appellant claims that the portion of the finding which we have quoted was not sustained by the evidence; that the uncontradicted evidence shows that when appellant offered to pay the bank the interest on the \$60,000 note on July 28, 1905 (the bank having agreed that the appellant might have until the 12th of July, 1905, to pay it), the option, which it was provided might be exercised on default of payment of interest, had not, in fact, been exercised. But we do not think under the pleadings that this point is available to appellant. The complaint of plaintiffs and the cross-complaint of the defendant bank alleged that, because of default in the payment of interest on said \$60,000 note, they had both

elected to exercise the option provided for therein, and had declared the whole of said note principal, and interest due and payable. These allegations were not denied by the appellant, either in its answer to the complaint or cross-complaint, so that neither evidence in their support, nor finding upon them, was necessary. As we understand the briefs of appellant, it is not claimed that there was any specific denial of these allegations as to the exercise of the option. Its position is that, taking the allegations of the complaint and the cross-complaint in connection with the averments in the answer of the tender of interest to the bank at the dates therein alleged, an issue was raised as to the right of plaintiffs and the cross-complainant bank to exercise the option, and was equivalent to a denial of its exercise prior to the tender. But this position of appellant can only be sustained upon the theory that the allegations in the complaint and the cross-complaint, as to the exercise of the option maturing the indebtedness, must be construed to mean that at the time of and by the filing the complaint and cross-complaint only (on September 5 and October 5, 1905, respectively), the plaintiffs and the cross-complainant bank elected to exercise the option; that these allegations do not amount to a statement that the option had been exercised prior to that date. But the allegations in the complaint and cross-complaint are not subject to that construction. In *Fletcher v. Dennison*, 101 Cal. 292, 35 Pac. 868, an action to foreclose a mortgage, it was alleged 'that on the failure of the defendants to pay the installments of interest which by the terms of said promissory note and said indebtedness became and was due on the 21st day of October, 1902, the plaintiffs elected to declare and did declare the said principal and the interest thereon due and payable.' The action was brought some 39 days after default in payment of interest, and when the option might have been exercised. A general demurrer to the complaint was interposed and overruled. On appeal from the judgment by the defendants it was urged that the option to declare the whole note due under the allegations of the complaint was not exercised until the filing of that pleading; and, as the complaint was not filed until 39 days after the right to exercise the option had accrued, the plaintiff had waited an unreasonable time, and hence had waived his right to exercise the option. It was held by this court that the allegation of the complaint which we have quoted, 'as against a demurrer, was a sufficient averment of election at the time the interest became due.' The allegations in the complaint and cross-complaint as to the exercise of the option are in no respect materially different from the allegation construed in the case cited. Here plaintiffs alleged that because of default in the payment of interest, plaintiffs and the cross-complainant bank have elected

to exercise the option, and have declared all the indebtedness due, and, under the authority of the case cited, this was a sufficient averment of the exercise of the option at the time the interest became due and when default was made in its payment. As this was the effect of the allegations, it was incumbent upon the appellant, in order to raise an issue as to the exercise of such option, to deny the allegations as broadly, at least, as they were made. This, it is clear, it did not do. While it is true that a tender of interest by appellant, prior to the exercise of the option provided for in the note in question, would, if properly pleaded, have defeated any right of the plaintiffs or cross-complainant to subsequently elect for that default to exercise such option (*Trinity County Bank v. Haas*, 91 Pac. 385), still the answer here, as framed, does not present that defense. It does not aver that the tender of interest was made prior to the exercise of the option. The allegations being, as we have seen, a sufficient averment of the election to exercise the option at the time default was made in the payment of the interest, it is clear that the answer makes no denial of such alleged election at that time, nor do the averments of tenders of interest, which appellant contends amounts to a denial of the right to exercise such option, have that effect. The averments in the answer are that the appellant tendered the interest on the 20th of July, 1905, and again on the 25th of that month—8 and 13 days, respectively, after the interest fell due and when the right to exercise the option accrued. Such averments clearly raise no issue upon the allegation of the exercise of the option as made by the complaint. In fact they show that these tenders were subsequent to the exercise of the option, which, under the allegations of the complaint, must be taken to have been exercised as of the date when default in the payment of interest occurred. It was incumbent on the appellant, if it desired to interpose as a defense the tender of interest prior to the option as alleged in the complaint and cross-complaint, to have averred that such tenders were made prior to the alleged exercise of such option. No such averment was made, and hence no issue upon the subject was raised by the pleading. There was no necessity of introducing evidence upon an allegation which was not denied, as it was clearly unnecessary for the court to have found upon it.

"We now approach the last point made by appellant, which we think merits consideration. It insists that the exercise of the option provided for in the note imposed terms upon the appellant, in the nature of a penalty or forfeiture, which should not be enforced by a court of equity, and from the effect of which, under the evidence in the case, the trial court should have relieved it. As to this contention, it may be said in passing that it is quite apparent, from the averments of the answer relating to the tender of the

interest by appellant and the other averments setting forth matters in excuse of its non-payment, when due, that these averments were made in support of its prayer for relief from the option, alleged in the complaint and cross-complaint to have been exercised, and were not intended to raise an issue as to whether the exercise of the option was, in fact, made as alleged, which latter point we have just had under consideration. However, as to the right of appellant to be relieved from what it denominates the penalty or forfeiture imposed under the option provided for in the note, it insists that it should have been accorded such relief under the general principles of equity, and under section 3275 of the Civil Code, which provides that: 'Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.' Now, if it be conceded that the option provided for in the note was such a penalty or forfeiture, from the effect of which the appellant might be relieved, still before it could be entitled to relief it was essential to support, by proof, the averments in its answer, under which it sought to bring itself within the provisions of the section. In this regard it alleged that the defendant bank had, in February, 1905, expressed to appellant its intention of being indulgent in the matter of the payment of the note and mortgage, which expressions lulled appellant into a sense of security; and that, by reason of circumstances over which it had no control it was prevented from paying the interest due July 12, 1905, until it made the tender thereof on July 20th and again on July 25th of that year. The court, however, found that no tender of interest was made by the appellant until July 28, 1905. It also found against the other averments of the answer as to the alleged expression of a desire, by the bank, to be indulgent to appellant, and against the appellant upon its claim that it was prevented from making the payment of the interest by circumstances which it could not control. As to the latter averment the court found 'the fact to be that the appellant carelessly and negligently omitted to pay said interest on said 12th of July, 1905, and forgot to attend to the payment thereof.' Hence it will be observed that, as to all the averments upon which appellant bases its application for relief, the court found against it, and the evidence sustains the findings. Under these circumstances appellant was entitled to no relief. It showed no justification or excuse at all for its omission to make payment when due. But it is claimed by appellant that, as the finding does not show that its failure to pay the interest when due was the result of a 'grossly negligent, willful, or fraudulent breach of duty,' it was entitled,

as of right under the section, to relief. The exception in the section, prohibiting the granting of relief when noncompliance with the provisions of an obligation occurs through gross negligence, or willful or fraudulent breach of duty, is not to be construed as entitling a party to relief under all other circumstances. There must be some showing of matters which afford some substantial excuse for the omission, and none was made here. Aside from this, we think that the evidence shows that the omission to pay the interest was willful, as that word was used in the section; that the finding that appellant was careless and negligent and forgot to pay it had that effect. A variety of meanings has been given to the word 'willful,' depending a great deal upon the nature of the statute in which it is found, whether penal or not. It is construed in different senses, depending upon the connection in which it is used, and as used in the section in our Code in question, we think it was intended to mean where the omission is without sufficient justification or excuse.

"These are the only points which we deem necessary to discuss on the appeal of the defendant Pepper Hotel Company. We have examined the other points which are made, and are satisfied that they are without merit.

"As to the appeal of the plaintiffs from that portion of the judgment allowing them attorney's fees to the extent of \$600 only. No evidence was introduced as to what would be a reasonable attorney's fee. That matter was left to the determination of the court, with the above result. It is claimed that it was an abuse of discretion, on the part of the court, not to have made a larger allowance. We do not perceive in the record anything which discloses any abuse of discretion, and before we would be warranted in interfering with the award, that must affirmatively appear. The amount which will be allowed as attorney's fees on the foreclosure of a mortgage rests peculiarly in the discretion of the trial court. That court is familiar with the pleadings and proceedings on the trial, and is in the best position to determine what is, in the light of the facts, a reasonable amount of compensation to be paid for attorney's fees. From the record before us it appears that the pleadings were simple, and that the actual trial of the issues in the case could have taken but a short time. It is true, as stated by appellant, that a large amount of money was involved, and that this should be taken into consideration in determining the amount of compensation. So it should, and doubtless was, but the compensation to be awarded is not to be determined by a percentage calculation on the amount of the mortgage debt. It is the extent of the responsibility, which an attorney assumes by reason of the amount involved in foreclosure proceedings which he is conducting, that is to be taken into con-

sideration, together with his actual services in the foreclosure proceedings, for the purpose of fixing his compensation. These matters were all taken into consideration by the trial court, and it cannot be said on the record before us that the allowance as made was unreasonably low, or that there was any abuse of discretion in fixing it at the amount which the court did.

"The judgment and order appealed from by the Pepper Hotel Company are affirmed, as is also that portion of the judgment appealed from by the plaintiffs."

In L. A. 1973: Enoch Pepper and E. C. Bower, for appellant. W. B. Mathews and Percy B. Lloyd, for respondents.

In L. A. 1993: W. B. Mathews and Percy B. Lloyd, for appellant. Enoch Pepper and E. C. Bower, for respondents.

PER CURIAM. The petition for a rehearing, filed by the Pepper Hotel Company, is denied.

The opinion disposing of the appeals is modified by striking therefrom the following paragraphs:

First: "As to the latter averment, the court found 'the fact to be that the appellant carelessly and negligently omitted to pay said interest on said 12th of July, 1905, and forgot to attend to the payment thereof.'"

Second: "But it is claimed by appellant that, as the finding does not show that its failure to pay the interest when due was the result of a 'grossly negligent, willful, or fraudulent breach of duty,' it was entitled, as of right under the section, to relief. The exception in the section prohibiting the granting of relief when noncompliance with the provisions of an obligation occurs through gross negligence, or willful or fraudulent breach of duty, is not to be construed as entitling a party to relief under all other circumstances. There must be some showing of matters which affords some substantial excuse for the omission, and none was made here. Aside from this, we think that the evidence shows that the omission to pay the interest was willful, as that word was used in the section; that the finding that appellant was careless and negligent and forgot to pay it, had that effect. A variety of meanings has been given to the word 'willful,' depending a great deal upon the nature of the statute in which it is found, whether penal or not. It is construed in different senses depending upon the connection in which it is used; and, as used in the section in our Code in question, we think it was intended to mean where the omission is without sufficient justification or excuse."

The first portion stricken out was the portion of a finding made by the trial court, which was entirely outside the issues. The second portion is stricken out because the construction of the language of section 3275 of the Civil Code, which is there discussed,

was not involved in the disposition of the case, and is eliminated in order that any future consideration of the matter may not be affected by its presence in the opinion.

BEATTY, C. J. (dissenting). Having dissented from the order of the court denying a rehearing of this cause, I desire very briefly to state the grounds of my dissent. The case of *Fletcher v. Dennison*, 101 Cal. 292, 35 Pac. 868, does not, in my opinion, support the construction given to the allegations of the complaint and cross-complaint in this action, as to the date of the election to treat the whole amount of the mortgage debt as due for default in the payment of interest. The allegation, in respect to this matter in the case cited, is quoted in the opinion of the court. The allegations of the complaint and cross-complaint in this action are simply (in the first) that, "these plaintiffs have elected to exercise the option in said note contained, and have declared and hereby do declare the whole of the principal of said \$60,000 note * * * due and payable"; and (in the second) "that default has been made in the payment of interest on said \$60,000 note, and because thereof this cross-complainant has, as the owner and holder of said note last mentioned, elected to exercise," etc. These allegations, according to their grammatical and logical construction, mean nothing more than that the option of the respective assignees of the mortgage was exercised at the time of filing their several complaints, and by that means. So construed, it was impossible to deny them, and the hotel company did all that it could do, and all that was necessary to raise the material issue, by alleging a tender on the 25th of July, which was more than a month before the commencement of the action. The evidence very clearly shows that the tender was made as early as the 28th of July, and prior to any notice of an election to treat the whole debt as due. This was a complete defense to the action. *Trinity County Bank v. Abrahm & Karsky Co.*, 91 Pac. 385.

I think, also, that if section 3275 of the Civil Code applies to cases of this character, the offer to pay at the time it was made should have been held to relieve the penalty or forfeiture of the credit. The court found the neglect to pay the interest on the day it was due to have resulted from carelessness and forgetfulness, but it did not find that the negligence was gross, and, if not, it would not uphold the forfeiture, or justify the imposition of the penalty.

153 Cal. 638

MARINOVICH v. KILBURN. (S. F. 4,692.) (Supreme Court of California. May 26, 1908.)

1. CONTRACTS—CONSTRUCTION—INDEPENDENT STIPULATIONS.

Defendant sold plaintiff certain shares of stock and agreed, if the stock did not pay a certain annual dividend, to pay plaintiff that sum,

and further agreed, upon default in the payment of such dividend stated, to purchase the stock from plaintiff at the price paid therefor. *Held*, that defendant was bound absolutely by the contract to purchase the stock, upon the failure of the company to pay the dividend stated, if requested to do so, and not merely upon the failure to pay the dividend and his own failure to make it good, as the two provisions in the contract related to different events and were independent of each other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 762, 763.]

2. SAME—CONSIDERATION—PRE-EXISTING LIABILITY.

Civ. Code, § 1605, provides that any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise. Plaintiff bought certain stock and paid part of the purchase price, but refused to pay the rest, whereupon defendant, a director of the company, to induce plaintiff to pay the balance on his stock, agreed to pay him a certain sum if the yearly dividends did not amount to that sum, and further agreed to repurchase the stock from plaintiff if the dividends did not amount to the sum stated. *Held*, that there was no consideration to support defendant's agreement to repurchase the stock or guarantee the dividends, since plaintiff was already bound to pay the purchase price therefor, and the statute did not apply, since no benefit would accrue to defendant by the payment of plaintiff's subscription beyond that to which he was already entitled, and no prejudice would have been suffered by plaintiff by the payment of his subscription except that which he was then obliged by the contract to suffer.

3. SAME—INSTRUCTIONS.

Plaintiff purchased certain stock from a company in which defendant was a director, paying part of the purchase price, and defendant thereafter, to induce him to pay the remainder, guaranteed that the stock would pay certain dividends and to repurchase it if it did not. There was some testimony that defendant represented at the time that no promotion stock would be issued, and that plaintiff refused to pay the remainder on the stock because the company had issued such stock. The trial court instructed that, if defendant made such representations to plaintiff, which he believed and acted upon, and would not have otherwise subscribed for the stock, and if the promotion stock was thereafter issued by the corporation, then there was a sufficient consideration for defendant's agreement by which he induced plaintiff to pay the remainder on his stock. *Held*, that the instruction was erroneous in that it directed the jury that the mere fact that plaintiff was induced to buy the stock by defendant's misrepresentations constituted a sufficient consideration for defendant's subsequent agreement, as the proper question for the jury was whether plaintiff's refusal to pay for the stock was based on his complaint of fraud in inducing him to purchase it, or upon other reasons not connected with the fraud.

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by F. P. Marinovich against F. A. Kilburn. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded for new trial.

H. C. Wyckoff and J. E. Gardner, for appellant. Chas. M. Cassin, for respondent.

SHAW, J. Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

On July 21, 1903, the defendant executed the following contract in writing: "Whereas, F. P. Marinovich is the owner of fifty shares of the capital stock of the Watsonville Transportation Company, for which he has paid the sum of \$3,000.00, or \$60.00 per share, in full payment therefor: Now, these presents witnesseth: That in the event of the nonpayment of an annual dividend of not less than three and one-half per cent. upon the purchase price of said stock, I hereby agree to pay to F. P. Marinovich that sum, viz., three and one-half per cent. upon his investment of \$3,000.00, in said stock, myself. I further agree that in the case of any default in the payment of an annual dividend of not less than three and one-half per cent. upon each of the fifty shares of said stock owned by said F. P. Marinovich, to purchase the same at any time he may request me to do so, after such default, and to pay therefor the sum of \$60.00 per share spot cash, upon the delivery to me of the certificate of stock properly indorsed." The company never paid any dividend upon the stock, whereupon, on March 30, 1905, the plaintiff tendered to defendant his certificate of stock, properly indorsed, and demanded that defendant then and there repurchase said stock and pay plaintiff \$3,000 therefor. Defendant refused, and the plaintiff began this action to recover the price so agreed upon. The action was tried by a jury, which returned a verdict for the plaintiff for \$3,000.

The complaint declared upon the above contract according to its legal effect, averring, in substance, that the defendant thereby agreed to purchase the 50 shares of stock in question at the price of \$3,000, if the company did not pay an annual dividend of not less than $3\frac{1}{2}$ per cent. upon said stock. Upon the trial, the introduction of the contract in evidence, in support of the allegation, was objected to on the ground that there was a variance between the contract alleged and that offered in proof, and the objection was overruled. The claim that there is a variance is made upon the theory that the agreement does not bind Kilburn to buy the stock, except upon the failure of the company to pay an annual dividend equal to \$105, and his own failure to make it good. It cannot properly be so construed. Kilburn agreed to make the yearly dividend good to the extent of \$105, or $3\frac{1}{2}$ per cent. of \$3,000, in the event that the company failed to pay a dividend of that amount upon plaintiff's stock of the par value of \$5,000. He agreed to buy plaintiff's stock, not upon the failure of the company to pay an annual dividend of \$105 upon that stock, coupled with his own failure to make it good, but upon plaintiff's request "in the case of any default in the payment of an annual dividend of not less than three and one-half per cent. upon each of the fifty shares of said stock owned by" plaintiff,

without any reference to the added failure of Kilburn to make it good to the extent of \$105. The two provisions relate to different events and are independent of each other. The payment claimed to have been made by Kilburn of a sum equal to $3\frac{1}{2}$ per cent. upon the \$3,000 invested by Marinovich, on failure of dividends by the company, as provided in the first clause of the agreement, did not relieve him of his obligation to buy the stock, imposed on him by the last clause in case of such failure by the company. Plaintiff's right to insist on the sale to Kilburn was made to depend solely on the failure of the company to pay the required dividend, and not at all upon the added failure of Kilburn to make good the company's default. There was no variance.

The defense chiefly relied on was want of consideration. The plaintiff had bought the stock from the company, at the price of \$3,000, paying therefor at the time of purchase the sum of \$750. In July, 1903, the company was urging Marinovich to pay the \$2,250 remaining unpaid upon the purchase price, and plaintiff refused to pay it, stating as his reason that he had heard that there was going to be promoters' stock issued. The defendant was a director of the company and much interested therein. He thereupon, in order to induce plaintiff to pay to the company the balance of his stock subscription, executed the contract sued on, and plaintiff, in consideration thereof, paid said sum of \$2,250 to the company and thereupon his certificate was by the company indorsed as full-paid stock. The principal contention of the plaintiff, upon this appeal, is that the fact that the plaintiff was unwilling to perform his contract to pay to the company the balance of his subscription, and was refusing to do so, and the fact that he agreed to, and did, perform it because of the agreement sued on, constituted a sufficient consideration for the agreement on the part of Kilburn to buy the stock and pay him \$3,000 therefor. We think this proposition is not tenable. This court has said: "It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract." *Sullivan v. Sullivan*, 99 Cal. 193, 33 Pac. 862. In *Ellison v. Jackson Water Company et al.*, 12 Cal. 553, Ellison was bound by contract to do certain work for the Jackson Water Company. Thereafter one Bayerque, a defendant in the action, promised that, if Ellison would proceed with the work he (Bayerque) would pay to Ellison the amount due under the contract. The court says: "A promise to Bayerque to perform this contract could furnish no consideration for a promise by him. The consideration of the original contract could not attach to the subsequent promise." (The italics are ours.) In *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 165, the principle is thus stated: "An agreement to do, or the doing of, that which one is already bound to do,

does not constitute a consideration for a new promise." To the same effect, see 6 Am. & Eng. Ency. of Law, 752, 9 Cyc. 354, and many cases cited therein. In the case at bar the plaintiff was already under obligation to the company to pay the balance of his subscription. According to this contention, all he agreed to do in consideration of the agreement of Kilburn was to pay the obligation to which he was already bound. The case comes precisely within the principle above stated. We cannot perceive anything in section 1605 of the Civil Code contrary to the principle just stated. Upon the theory we are now discussing, no benefit would accrue to Kilburn by the payment of the stock subscription, beyond that which he was already entitled to as a stockholder in the company, and no prejudice would be suffered by Marinovich by such payment of his stock subscription except that which he was already bound to suffer. The plaintiff, in support of his contention, cites the case of *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, and other cases in Massachusetts and in England. These cases support the proposition as contended for, but they are contrary to the general current of authority and to the decisions above quoted in this state. 9 Cyc. 354; 6 Am. & Eng. Ency. of Law, 752.

Plaintiff further claims that the evidence shows that he was induced by fraud to buy the stock from the company; that he was claiming a right to refuse to complete his purchase because of this fraud; that Kilburn by the agreement sued on induced him to waive his objections and any defense founded on such fraud and forthwith to pay the balance due on his subscription; and that upon this theory there was good consideration for the agreement. It may be conceded that there was some foundation in the evidence for this claim. It is not necessary here to recite the evidence nor to consider its sufficiency upon the subject, for we find that the court gave the jury an erroneous instruction relating thereto. After correctly stating to the jury that, if the only consideration for Kilburn's contract to buy the stock of plaintiff was the payment by plaintiff to the company of the balance of his stock subscription for which he was already bound, then there was no sufficient consideration for Kilburn's agreement, the court added the following: "However, if you find that the defendant represented to the plaintiff, before the plaintiff subscribed for any stock of the Watsonville Transportation Company, that there would not be issued any promotion stock, and that said plaintiff believed said representation and acted upon it and by reason thereof subscribed for said 50 shares of stock, and would not have subscribed for them but on account of said representations, and if you further believe that a large amount of promotion stock was issued and delivered by said corporation to different persons, then I instruct you that there was a sufficient consideration for the execution

of said agreement." The vice in this instruction is that it directs the jury that the mere existence of the fact that plaintiff was induced to buy the stock from the company solely by the fraud of the defendant constituted a sufficient consideration for the defendant's subsequent agreement to buy the stock from plaintiff. This could not be a correct proposition of law as applied to this case unless the fraud referred to was in some way connected with Kilburn's agreement, as, for example, that plaintiff, in consideration of that agreement, waived his claim that he had a good defense against his obligation to pay for his stock and made such payment accordingly. But upon this point the evidence was conflicting. The testimony of the plaintiff tended in some degree to support the proposition, but there was other evidence to the effect that the plaintiff based his refusal to pay for the stock solely upon the ground that he thought it was a poor investment. Conceding, but not deciding, that there was evidence sufficient to establish the fraud referred to, the question whether or not his refusal to complete the contract was based on his complaint of fraud in inducing him to purchase it, or upon other reasons not connected with the fraud, should have been submitted to the jury.

Certain errors in rulings upon the admission and rejection of evidence are complained of; but in view of the fact that the case must be reversed and remanded for a new trial, and it is not probable that the rulings will be repeated, so we think it unnecessary to consider them.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

MONTGOMERY v. DE PICOT et al.
(L. A. 1,994.)

153 Cal. 509

(Supreme Court of California. May 5, 1908.
On Rehearing, June 4, 1908.)

1. SPECIFIC PERFORMANCE—ACTION BY VENDEE'S ASSIGNEE.

Under Civ. Code, § 1457, providing that the burden of an obligation may not be transferred without the consent of the party entitled to its benefit, where a contract for the sale of land calls for the delivery of the purchaser's notes for deferred payments, the purchaser's personal liability is a controlling element, and the tender of notes of an assignee of the purchaser does not satisfy the contract; but under a contract for a conveyance to the purchaser, his assigns, etc., upon an additional payment of \$10,000, \$1,500 having been paid by the purchaser, or his assigns, the remaining \$33,500 to be evidenced by "a promissory note" secured by a mortgage on the premises, the purchaser's assignee could enforce the contract by making the required payment and tendering her note secured by the required mortgage, though she was not financially responsible.

2. ASSIGNMENTS—CONTRACTS—CONSTRUCTION.

The intention of the parties to a contract must be gathered from a consideration of the terms and the tenor of the entire contract, and if it appears that the contract calls for the performance of an obligation purely personal in its nature, the general rule is that the obliga-

tion cannot be assigned without the consent of the party to be benefited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 28-31.]

3. VENDOR AND PURCHASER—CONTRACT TO PURCHASE—TENDER—SUFFICIENCY—ESTOPPEL.

Under Code Civ. Proc. § 2076, providing that one to whom an instrument is tendered must specify any objection to it, or be deemed to have waived it, and that if an objection be to the terms of the instrument, he must specify the terms he requires, or be precluded from objecting afterwards, where, on the assignee of the purchaser under a contract for a conveyance of land tendering a note, partial payment of the price, etc., as required by the contract as a condition precedent to the conveyance, the vendors did not specifically object to the tender, and assigned no other reason for refusing it than that they did not want the money, they could not thereafter, on the assignee suing to specifically perform the contract, question the sufficiency of the tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 345.]

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by S. V. Montgomery against Susana O. De Picot and another. From a judgment for plaintiff, and from an order denying their motion for a different judgment, defendants appeal. Affirmed.

Denis & Loewenthal, for appellants. W. R. Hervey, for respondent.

LORIGAN, J. This is an action for specific performance of a contract for the sale of real estate. The contract, which was the basis of the action, related to a purchase by W. G. Bradshaw of a tract of land in Los Angeles county owned by defendants, and was executed by defendants and said Bradshaw on November 25, 1904, the defendants being designated therein as the parties of the first part, and Bradshaw as party of the second part. The portions of the contract material for consideration on this appeal are as follows: "That in consideration of the payment to them by the party of the second part of the sum of \$1,500.00, receipt whereof is hereby acknowledged, the said parties of the first part hereby agree to sell and convey * * * unto the said party of the second part, his heirs, executors and assigns, all that certain real property situated in the county of Los Angeles, state of California, described as follows, to wit: * * * upon the following terms and conditions: For the total price of \$45,000.00, \$1,500.00 of which has been paid by the party of the second part as above recited, \$10,000.00 to be paid by the said party of the second part, or his heirs, executors or assigns, on or before May 31, 1905, * * * and the remainder of the said purchase price, to wit: the sum of \$33,500.00 on or before May 31, 1910, the said last mentioned sum to bear interest at the rate of 9 per cent. per annum, interest to be paid quarterly. And the said last deferred payment, to wit: the sum of \$33,500.-

00 to be evidenced by a promissory note dated June 1, 1905, bearing interest at the rate aforesaid, to wit: 9 per cent. per annum until paid, payable on or before May 31, 1910, secured by a mortgage upon the above described property * * * deed of said property to be delivered by the first parties to the second or assigns concurrently with the said second payment of \$10,000.00."

Subsequent to the execution of this contract Bradshaw assigned nine-tenths of his interest therein to divers other parties, who, with himself, thereafter assigned the same to plaintiff. It is conceded that the plaintiff was a stenographer in the office of Mr. Hervey, an attorney at law, who in the transactions relative to said contract represented Bradshaw, his assignees, and plaintiff, and that the assignment to plaintiff of said contract was for the convenience of Bradshaw and his assignees, and that plaintiff claimed no ownership or beneficial interest under the assignment, and was not financially responsible. Sometime before the date fixed in the contract therefor, Mr. Hervey, in the interest of the plaintiff and her assignors, and accompanied by the latter, went to the residence of defendants, and there tendered the personal note of plaintiff, secured by a mortgage on the land, conditioned as and for the amount provided in the contract, and likewise tendered defendants at the same time the \$10,000 in coin which the contract provided should be paid. The defendants refused to accept either the note or the mortgage or the money tendered. Thereafter, this action was commenced by plaintiff against the defendants to obtain a decree of specific performance. A demurrer to the complaint—general and special—was interposed by the defendants and overruled. They answered, and after trial judgment was entered in favor of plaintiff for the relief prayed for. The defendants appeal from the judgment, and from an order denying their motion for a different judgment made under sections 663 and 663½ of the Code of Civil Procedure, and also from an order denying their motion for a new trial.

It is insisted by appellants that their demurrer to the complaint should have been sustained, on the ground that the facts alleged showed that the plaintiff was not entitled to the relief prayed for. In other words, that the complaint does not show that the plaintiff offered to observe or comply with the terms of the contract upon which suit is brought. In support of this contention it is claimed that the contract did not provide that the note of plaintiff should be given in satisfaction of it as tendered; that the contract provided and meant that the note of Bradshaw, and no other person, should be given; that it called for the personal obligation and liability of Bradshaw himself, and that his assignee could not substitute her personal liability for that of Bradshaw, and

compel specific performance upon tender of her own note. It is undoubtedly true that where a contract for the sale of land calls for the delivery of notes on the part of the vendee for deferred payments of the purchase price, the personal liability of the latter enters as a controlling element into the contract, and the offer or tender of notes of an assignee of the original vendee does not satisfy the terms of the contract, nor warrant such assignee in asserting a right of specific performance based upon such a tender. As said in *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246: "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" And, as declared in our Code, the burden of an obligation may not be transferred without the consent of the party entitled to the benefit. Civ. Code, § 1457. Whether a given contract is assignable or not is a question of construction. Now, as to the contract at bar. The reading of it discloses that by its terms it was assignable. It provides for a conveyance by defendants of the property to "said party of the second part [Bradshaw], his heirs, executors and assigns" upon the fulfillment of certain conditions by Bradshaw or his "heirs, executors or assigns." These, however, are general provisions of the contract, and are not conclusive upon the subject of assignability. The use of such language in a contract is not in every case absolutely determinative of its character. *Swarts v. Electric Light Co.*, 26 R. I. 436, 59 Atl. 111. Notwithstanding its use the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract, and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation, if personal, cannot be assigned without the consent of the party to be benefited. *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas, etc., v. Belden Mining Co.*, supra.

In *Rice v. Gibbs et al.*, 33 Neb. 460, 50 N. W. 436, an optional contract for the sale of land was involved, wherein it was provided that the covenants and agreements should extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties. The contract provided for a deed to be made by the vendor on the payment of a certain specified amount in money, other payments to be made within one and two years after the making of the deed, such deferred payments to bear interest. An assignee of the original vendee tendered the

money in due time, and notes for the deferred payments, but not made by the original vendee. It was held that, notwithstanding the language of the contract, an assignee, financially irresponsible, could not substitute his own personal liability for that of the original vendee; that in a contract of sale, where payment of a portion of the purchase price is deferred, and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement of the contract, and the contract cannot be assigned so as to permit the assignee to enforce it, and compel the vendor to substitute the obligation of any other person than the one with whom the contract was made. In that case, however, the notes for the deferred payments were not to be secured by any lien or mortgage upon the property to be conveyed. The contract did not so provide. The vendors obligated themselves to an absolute disposition of the property on the execution simply of promissory notes for the deferred payments, and obviously the financial responsibility of the original vendee must have entered as a controlling inducement to the contract. In this very essential respect that case differs from the case at bar. In the contract here, notwithstanding the provisions for assignability, if it appeared from a consideration of the whole contract that the personal financial responsibility of Bradshaw was a distinctive feature of it, and appeared to be the material inducement to the contract, then under the general rule it would not be assignable without the consent of the vendors, and the assignee would have no right to enforce it. But it seems quite plain from an examination of the contract that the personal financial responsibility of Bradshaw was not a material inducement for its execution. What was really relied upon was a mortgage upon the property for the unpaid portion of the purchase price, and "a promissory note" evidencing this indebtedness was to be given. It is matter of general knowledge that, upon sales of real estate, a mortgage back for a portion of the purchase price is one of the most common methods of dealing in such transactions. The mortgage is the main thing relied on, and when a substantial prior payment, as in this case, is made on the purchase price, the financial responsibility of the vendee, on the note itself evidencing the debt for the balance, is a matter of very little importance to the vendor. And in contracts for the sale of real property, which in terms run in favor of assignees, and which provide for a promissory note and mortgage to secure the balance of the purchase price, the general construction will be that the promissory note is a mere incident to the transaction, and that the principal thing relied on is the mortgage. It is a very easy matter, when reliance is intended to be placed on the financial responsibility of the orig-

inal vendee, to specify in the contract that, in addition to the mortgage, his personal obligation shall be given. When this is not done, and a mortgage to secure "a promissory note" is alone called for, as in the contract here, such provision will be construed as making the giving of a mortgage, not the giving of a note, the material inducement to the contract; that under such circumstances the obligation is not personal, and may be assigned, and specific performance on proper tender had at the suit of the assignee.

Aside from this, however, it appears from the record that the defendants are estopped from questioning the sufficiency of the tender made by plaintiff. The evidence in that regard is that the agents and attorney of plaintiff within the time limited in the option—in fact fully eight days before it would have expired—made a tender at the residence of defendants some miles outside of the city of Los Angeles, in which they complied in all respects with the conditions of the contract, save that the note tendered was that of the plaintiff, and not of Bradshaw. They not only made an actual tender, but delivered also to defendants a written offer, notice, and demand covering the terms of the contract. When the actual tender was being made, defendants said they did not want the money, and did not want to hear the papers read—the note, mortgage, and deed—but at last consented to have the matter explained to them. The upshot of the effort on the part of plaintiff to have the defendants accept the tender was that they flatly refused to accept anything, or to do anything in the matter. After refusing to do so they requested Mr. Hervey, representing plaintiff, to take the papers to Mr. Denis, who was their attorney. On the following day Mr. Hervey left the papers with the latter. Subsequently, and during the eight days prior to the date limiting the exercise of the option, no word was heard concerning the matter from either appellants or their attorney. When the tender was made to the defendants at their residence, no objection to it was made on account of any noncompliance with the terms of the contract; it was not claimed or intimated that the promissory note should have been signed by Bradshaw, or that the defendants were entitled to or wanted Bradshaw's note, or that they refused the tender because the note offered was that of plaintiff, and not Bradshaw. They simply refused to accept the note or mortgage or make the deed, without assigning any other reason than that they did not want the money, and would not do so. It is provided that "the person to whom a tender is made must at the time specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it, and if the objection be to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amount,

terms or kind he requires or be precluded from objecting afterwards." Code Civ. Proc. § 2076. This section is applicable to the facts recited, and defendants were estopped from asserting any objection to the tender which they could or should have made at the time it was offered. Had the objection now urged been asserted then, and the tender refused on that ground, it might have been possible for the plaintiff to have obtained a tender of the note of Bradshaw. There was ample time after the tender, and before the option expired, to have done so. It appears, too, as a certainty from the record that she could have done so had it been objected that she did not. No objection having been made on that score when it should have been made, the defendants were precluded from asserting it upon the trial, or from insisting upon it now.

No other points urged for a reversal are in our judgment tenable.

The judgment and orders appealed from are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

On Rehearing.

PER CURIAM. The petition for rehearing is denied, but in disposing of it it may be said that the offer of the note of an insolvent person, made with design to escape personal responsibility, would perhaps make the contract unfair to the extent that equity would not enforce it. But this objection was fully removed by the tender of the note of Bradshaw, the original vendee, which was made at the trial, and the defendant having then refused to accept the same, the court below was fully justified in rendering the decree for performance upon making of the cash payment and giving the note of the plaintiff.

153 Cal. 680

HOME & FARM CO. OF CALIFORNIA v. FREITAS. (S. F. 4,667.)

(Supreme Court of California. May 29, 1908.)

1. DEEDS—REFORMATION—MISTAKE—EVIDENCE—SUFFICIENCY.

Evidence, in an action to reform a deed, *held* to show a mutual mistake whereby more land than contemplated was conveyed by an erroneous description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 643.]

2. REFORMATION OF INSTRUMENTS—EVIDENCE.

While, to justify a court of equity in decreeing reformation of an instrument for mistake, proof of the mistake must be clear and convincing, a mere conflict of testimony does not necessitate a denial of the relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 157-193.]

3. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence on an issue of mistake in an instrument sought to be reformed for such mistake is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

4. REFORMATION OF INSTRUMENTS—DEEDS—DESCRIPTION—EFFECT.

Though a description by metes and bounds in a deed conveys the legal title to all land embraced thereby, regardless of the acreage specified, such description does not preclude a court of equity from reforming the deed so as to express the true intent of the parties.

5. SAME—DEMAND—NECESSITY FOR.

Defendant, having refused to reconvey to plaintiff land deeded to him by mistake on the ground no mistake was made, cannot complain that a demand for reformation was necessary before plaintiff could sue to reform its deed to defendant.

Department 2. Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by the Home & Farm Company of California against M. T. Freitas. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

James W. Cochrane and James C. Sims, for appellant. William Singer, Jr., and Guy Sharp, for respondent.

HENSHAW, J. This action was brought to correct and reform a deed to certain lands situate in the county of Marin, upon the ground of a mutual mistake of the parties, whereby some 16 acres of land more than contemplated by the parties were conveyed by erroneous description. Judgment passed for plaintiff, and from that judgment, and from an order denying his motion for a new trial, defendant appeals.

His principal contention upon appeal is that the mistake was not mutual; that whatever may have been in the mind of the grantor, as to himself, the grantee, he received only such land as he understood he was to receive. Plaintiff most satisfactorily established the following facts, many of them from the mouth of defendant himself, others undisputed by him: Defendant had negotiated with Mr. Chatfield, a real estate agent, for the purchase of certain of plaintiff's lands. The negotiations resulted in an agreement for the purchase and sale of the following lands, at the prices given:

140.25 acres, lot 11, division B, at \$54 per acre	\$7,573 50
30 acres, hill land, division B, at \$12 per acre	360 00
60 acres, lot 12, division C, at \$12 per acre	720 00
Total	\$8,653 50

After this agreement had been entered into, it was discovered by Mr. Chatfield that there had been sold to other persons part of the 30-acre tract of hill land in division B, which reduced the acreage of that tract about half. Then, in order to make up the 171 acres in division B which Mr. Freitas desired, the surveyor was instructed to take an equivalent quantity of adjoining lands in division B. This he did, but in so doing it was necessary to substitute for the 15 or 16

acres of hill land at \$12 per acre an equal amount of level reclaimed land valued at \$54 per acre. Plaintiff then caused its deed to be prepared upon March 31st, conveying to defendant:

156.71 acres at \$54, division B	\$8,462 34
14.29 acres at \$12, division B	171 48
60.00 acres at \$12, division C	720 00

Total \$9,353 82

While under the deed thus tendered defendant Freitas was to have received the exact amount of acreage provided for by his contract with Mr. Chatfield, the cost of the land, by reason of the substitution of 15 acres of reclaimed land for the hill land was \$700.32 more than the purchase price originally agreed upon. Upon this Mr. Freitas refused to accept the deed and pay the money, demanding title to the land for which he had originally contracted. Plaintiff explained its inability to make conveyance because of the sale of 15 acres of the hill land, and offered to restore the deposit paid by Freitas, which he refused to accept. Eventually, and at Mr. Freitas' demand, the matter was adjusted. In Mr. Freitas' own language: "I got to thinking the matter over, and I says: 'You got 55 acres of land there adjoining lot 12, division C. If you would sell me that land for \$12 per acre, just as I paid for the 60 acres adjoining, I would take that extra land of that survey and pay you the price, and I don't want any more difficulty about the surveys.' * * * Mr. Perkins requested me to wait a few minutes; that he would communicate with Mr. Mills again. I did so, and his reply was that Mr. Mills refused to sign such an agreement, and then I told Mr. Sims I wanted him to file a complaint compelling those people to live up to their agreement. * * * The next day Mr. Sims telephoned me that he had a message from Mr. Mills stating that rather than go to law he would let me have this land as it was surveyed off by Mr. Lepoids, and the 60 acres, and 55 acres of lots 12 and 13, division C, for the lump sum of \$10,013 and some odd cents, according to the proposition which I made to Mr. Perkins. He wanted to know if it was satisfactory to me. I said: 'Yes, go ahead and have deeds made to that effect.'" It thus appears from the defendant's testimony that he agreed to take the following land at the following prices:

156.71 acres, division B, at \$54 per acre	\$ 8,462 34
14.29 acres, division B, at \$12 per acre	171 48
60.00 acres, division C, at \$12 per acre	720 00
55.00 acres, division C, at \$12 per acre	660 00
286.00	Total.... \$10,013 82

In accordance with this agreement a deed was prepared and executed by the Home & Farm Company to Freitas, which was accepted by him. In the map, however, which

was used, and which was supposed accurately to follow the survey by Mr. Lepoids, plaintiff's engineer, a false line had been drawn, not in accordance with the surveyor's notes. The description in the deed followed the boundaries as shown upon the map, and in so doing included some 15 or 16 acres more than was called for by the true survey—more than the 286 acres actually purchased by defendant. This error in delineating the course, lines, and distances of the survey upon the map is clearly shown and established by a comparison between the field notes and the map, and by the testimony of Mr. Gibbs, who actually drew the map. The result was that in division B, of which division under his deed Freitas was to take 156.71 acres at \$54 an acre, and 14.29 acres at \$12 an acre, there was an excess over this amount of land of 15 or 16 acres. This is admitted by appellant. The location of the faulty line is shown also by the evidence, and thus is established the situs of the excess acreage. This error was soon discovered by plaintiff, and it prepared and presented to Mr. Freitas a deed for his execution, reconveying this excess land so by mistake conveyed to him. Mr. Lepoids, the engineer of plaintiff, saw Mr. Freitas and explained to him the mistake. He was referred by Mr. Freitas to Mr. Sims, his attorney. Mr. Lepoids with his map and deed went to Mr. Sims, explained the matter, and offered the correction deed. The defendant's answer does not deny that he refused to correct the mistake, but expressly alleges that no mistake was made.

That the statement above given establishes a clear case of mistake is at once apparent. The only question upon this point is whether there was such mutuality in the mistake as to authorize a court of equity to correct it. But in this connection it is to be remembered, as was said by this court in *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796, that while, to justify a court of equity in decreeing the reformation of a written instrument on the ground of mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, "yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief (*Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823; *Wilson v. Moriarity*, 88 Cal. 211, 26 Pac. 85), and the decision of the trial court upon such conflict of evidence is conclusive upon this court." The most that can be said for Freitas' position, which is to the effect that no mistake was made, and that he "paid the balance of that \$700.32 for the extra acreage they claimed was on lot 11, division B," is that it is against the weight of evidence. Plaintiff was not claiming extra acreage in division B. It was asking for the substitution of an equivalent acreage of greater value. It is a mere coincidence that this substituted acreage amounted to about

15 acres, while the deed actually made conveyed about 15 acres excess. It is shown throughout that the tracts, pieces, and parcels of land were not valued as a whole, but were specifically and differently valued in acreage valuations in accordance with the quality and location of the land. Mr. Freitas' own testimony is that it was agreed that he was to have the land "as it was surveyed off by Mr. Lepoids." Mr. Lepoids' survey was correct. The error that occurred originated in the draftman's mistake which was carried into the deed. As shown by the transaction, Mr. Freitas had never sought for nor contracted for more than 171 acres in division B, and yet he is seeking to hold 16 acres more than it was ever in contemplation that he should purchase. In emphasizing the fact that the defendant obtained more than the exact acreage which he had contracted to purchase, we are not unmindful of the principle that a description of land in a deed by metes and bounds conveys the legal title to all of the land embraced within such boundaries, regardless of the acreage which may be specified in the deed; but nevertheless it is true that such a description does not preclude a court of equity from reforming such a deed so as to express the true intent of the parties. 20 Am. & Eng. Ency. of Law (2d Ed.) 826; *Kocher v. Hayford*, 59 Cal. 316; *Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216; *Capelli v. Dondero*, 123 Cal. 324, 55 Pac. 1057. The court's finding of the mistake and of its mutuality is well supported and will not be disturbed. Where a defendant in such an action is seeking to hold more than he is justly entitled to, and where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence, and, if a mere denial of the defendant that he was mistaken is to suffice, it must result in every case that where such denial is made the plaintiff must fail of relief. Such, as has been above shown, however, is not the law.

As to the further propositions advanced by defendant, the one that a demand for reformation was necessary before action commenced (*Black v. Stone*, 33 Ala. 327; *Brainerd v. Arnold*, 27 Conn. 617), it is sufficient to say, as pointed out above, that a request for a correction deed reconveying the property was made by the engineer and surveyor of plaintiff upon defendant, by defendant referred to his attorney, and by both refused, as appears by the answer, upon the ground that no mistake had been made. As to the final proposition advanced, that the court in reforming and correcting the deed erred in segregating the specific tract of land which it decreed had been erroneously conveyed, it is made apparent by the pleading just what the error in the deed was and the exact description of the land erroneously conveyed. These allegations of the com-

plaint are abundantly supported by the evidence, so that the specific acreage was clearly shown. It was this acreage as to which the court decreed a reformation of the deed.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

(153 Cal. 603)

In re WICKERSHAM'S ESTATE.

(S. F. 4,720.)

(Supreme Court of California. May 19, 1908.)

1. PLEADING—LIBERAL CONSTRUCTION.

By the express provision of Code Civ. Proc. § 452, in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 66-75.]

2. SAME—CONCLUSIONS.

A pleading showing the consideration of a contract need not aver that it was full and adequate, as this would be but the conclusion of the pleader, and useless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 12-28½.]

3. CONTRACTS—SUFFICIENCY OF CONSIDERATION.

The will of one leaving a widow and four children and an estate of \$612,000 gave to his son F. only \$5, and recited that he had advanced to him \$100,000, which was to be in full of all his interest in the estate. F. instituted a contest on the ground of incompetency of testator, and undue influence. Outside of her interest in her husband's estate the widow had only \$15,000. In consideration of the release of a claim for \$15,000 owed by F. to his father, and of one for \$3,500 owed his mother, and the payment to him of \$28,000 by his mother, brother, and sisters, he surrendered all interest in his father's estate, and all prospective interest in his mother's estate, and agreed not to contest any testamentary disposition of her property. *Held*, on a contest of her will by his heirs, that the consideration was adequate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 231, 232, 291-295.]

4. WILLS—CONTEST—CONTINUANCE—DISCRETION OF COURT.

The matter of postponing hearing of a will contest till final distribution of the estate of another is in the discretion of the trial court.

5. SAME—JURISDICTION—PROBATE COURT.

The trial of the question of whether one petitioning for revocation of probate of a will is interested, and so entitled, under Code Civ. Proc. § 1327, to contest the will, or whether he lost all by a conveyance of his expectant estate, is within the jurisdiction of the probate court.

6. CONTRACTS—VALIDITY—PUBLIC POLICY.

A conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest a testamentary disposition thereof by the ancestor, is not against public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 498-509.]

7. JURY—WAIVER OF RIGHT—DELAY IN REQUEST.

A request for a jury after the trial of the issue had begun is too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 159-165.]

8. APPEAL AND ERROR—HARMLESS ERROR.

The court having subsequently rightly concluded that one petitioning for revocation of

probate of a will had no interest in the estate, and so was not entitled to contest the will, there could be no error in its denial of his application for a jury to try the validity of the will.

9. CONTRACTS—CONSIDERATION—EVIDENCE.

A contract reciting very fully the negotiations leading to its execution, and its consideration and purpose, is prima facie evidence of all the facts necessary to its validity, including its consideration.

10. TRIAL—FINDINGS OF FACT.

A finding of the facts bearing thereon, without an express finding on the question of consideration, is sufficient.

11. APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.

That the evidence is conflicting, as to the making of false representations, is sufficient to prevent revision of the finding thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

12. JUDGMENT.

Any adjudication on appeal from a decree of distribution of the estate of W. as to the right of his son F. in that estate cannot be res judicata as to his right to inherit from his mother.

13. APPEAL AND ERROR—LAW OF THE CASE.

Any remarks in the opinion on appeal from decree of distribution of the estate of W. cannot be the law of the case in a proceeding to contest the will of his widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4369-4379.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by Cora L. Wickersham and another against Lizzie C. Maclay and others, proponents of the will of Lydia C. Wickersham, deceased, to revoke probate of the will. From an adverse judgment, petitioners appeal. Affirmed.

Francis J. Heney and Cowan & Julliard, for appellants. Lippitt & Lippitt, Campbell, Metson & Campbell, Thomas J. Geary, and Thomas H. Breeze, for respondents.

SHAW, J. This is an appeal from a judgment declaring the appellants estopped from asserting any interest in the estate of the deceased, adjudging that they are not interested in said estate, and dismissing their petitions to revoke the probate of the will of said deceased.

Lydia C. Wickersham died on February 10, 1900, leaving as next of kin four children, namely, Frank P. Wickersham, Frederick A. Wickersham, Lizzie C. Wickersham, and May L. Bergevin. On March 27, 1900, the will of said deceased was duly admitted to probate by the superior court. Frank P. Wickersham died on March 14, 1900, leaving surviving as his sole heirs at law the appellants Cora L. Wickersham, his widow, and I. G. Wickersham, his minor son. Thereafter petitions of the appellants to revoke said probate were filed, and the respondents filed answers thereto. The questions for decision upon this appeal arise out of the allegations of the paragraphs numbered 1 in the answers to the respective petitions of the appellants to revoke such probate, and upon the judgment of the court rendered

upon the trial of the issues presented by said paragraphs. The purport of the part of the answers in question is that the appellants are not persons interested in the estate of the deceased Lydia C. Wickersham, because of the fact alleged that Frank P. Wickersham, prior to the death of his mother, executed to his mother Lydia C. Wickersham and to his brother and sisters, the respondents herein, a contract whereby he conveyed to his said brother and sisters all his prospective right, title, interest, and estate as heir, legatee, or devisee of Lydia C. Wickersham in and to all of the property of which she might die possessed, and agreed with all of said parties that he would not thereafter assert any right, title, or interest as heir or otherwise of the said Lydia C. Wickersham to the estate owned or possessed by her at her death, nor in any manner or to any extent question, dispute, or contest any disposition of her property made by her by deed, contract, or will. The due execution of this contract was admitted. The court found that it was valid and binding upon the appellants, and thereupon it adjudged that they were not persons interested in the estate of Lydia C. Wickersham, deceased, and entered the judgment above mentioned, dismissing their petitions.

The appellants demurred to this paragraph of the answer on the ground that it did not state facts sufficient to constitute a defense or to show that the appellants are not persons interested in said estate. The principal defect urged to the sufficiency of this part of the answer is that it does not appear therefrom that the consideration paid to said Frank P. Wickersham for the contract set forth therein was adequate. Their contention is that a contract of this kind, whereby an heir conveys his prospective interest in the estate of his ancestor, or agrees not to contest or question the disposition thereof made by the will, is invalid unless it is founded upon a full and adequate consideration, and is entered into fairly and freely by the party against whom it is asserted, and that a person who seeks to enforce such a contract against an heir or his successors, or to estop such heir or successors from claiming their share of the estate, or from contesting a disposition by will, must allege and prove that the consideration was full and adequate, and that the contract was fairly obtained. It must be conceded that this is the general rule applicable to ordinary cases where the heir conveys his expectancy to a third person, or agrees with the other heirs before the death of the ancestor not to contest a testamentary disposition. 2 Pom. Equity, § 953; 5 Am. & Eng. Ency. of Law, 769. The leading case on the subject in this state is *Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. In that case the particular point of the inadequacy of the con-

sideration was not raised, but in the discussion the necessity of an adequate consideration is fully recognized. We think, however, that upon a fair construction of the portion of the answer relating to this subject it will be found sufficient in that respect. It is often said that a pleading is to be construed most strongly against the pleader. This is the usual expression of the rule, but the true and accurate statement thereof, and the one binding upon courts, is that contained in section 452 of the Code of Civil Procedure: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." There is no direct averment that the consideration to Frank P. Wickersham was full and adequate. Such a statement would have been useless, for it would have been a mere conclusion of the pleader. The adequacy of the consideration must appear from the facts stated. *White v. Sage*, 149 Cal. 616, 87 Pac. 193; *Stiles v. Cain*, 134 Cal. 171, 66 Pac. 231.

The answer relating to this estoppel shows that the entire estate of Lydia C. Wickersham, with the exception of some \$15,000, which was her separate property, consisted of her interest in the estate of her husband, I. G. Wickersham, who died on June 20, 1899, leaving an estate of the value of \$612,163. He left a will bequeathing to Frank P. Wickersham the sum of \$5, and declaring that he had advanced to him about \$100,000, which was to be in full of all his interest in his father's estate. On June 26, 1899, this will was filed for probate, and on July 10, 1899, Frank initiated a contest thereof, upon the grounds that I. G. Wickersham was incompetent, of unsound mind, and under the undue influence of his brother Fred and his sister Lizzie at the time the will was executed. His mother, brother, and sisters were much grieved and mortified at the allegations of his written opposition to the probate of the will, and eager and desirous to avoid publicity and the notoriety which would result from the trial of the contest and the scandal of a family quarrel. Frank was at that time indebted to his father's estate in the sum of \$15,000 and to his mother in the sum of \$3,500. Thereupon negotiations were entered into between him and his mother, brother and sisters to compromise the contest of the will of his father and to effect a final settlement and adjustment of all title of Frank to the property constituting the estate of his father and all his prospective interest in the estate of his mother, to avoid a family quarrel and dissension, to preserve and protect the name and memory of the father, to avoid the expense of protracted litigation, to secure the speedy distribution of the estate of his father, and to guard against similar attacks by Frank or his heirs upon any disposition that

might then or thereafter be made by Lydia C. Wickersham, his mother, of her estate. Frank took an active part in the negotiations, was assisted therein by the appellant Cora L. Wickersham and by the attorney he had employed to prosecute his contest, and at all times consulted with them. All the data, memoranda, books of account, records, facts, and things whereby he could ascertain the nature and situation of the property constituting the estate of his father and of his mother and could ascertain the value thereof were at all times during and pending said negotiations at the disposal and subject to the inspection of Frank and his attorney, and they made careful and diligent search and inquiry concerning the same, and knew the exact nature, location, and value of each piece and parcel of property belonging to both of said estates. As a result of these negotiations, the compromise and family settlement of all the matters under consideration was effected. Lydia C. Wickersham agreed to release to Frank his indebtedness to her and to the estate of his father, and to surrender and deliver the notes given by him for said debts, and to pay him \$28,000 in cash, upon condition that he would dismiss his opposition to the probate of his father's will, and accept said release, surrenders, and moneys in full and complete satisfaction and settlement of all right, title, and interest in his father's estate, would grant, bargain, and sell unto his mother, brother, and sisters whatever interest he had therein, and all prospective interest in the estate of his mother, and would agree not to question, dispute, or contest any testamentary or other disposition of her property made by her. In pursuance of this agreement the contract in question was executed on August 29, 1899, embodying the terms agreed on as above stated. This contract is made a part of the answer, and is set forth in full therein. It declares that at the time of executing it Frank P. Wickersham was not under duress, menace, or in any wise coerced or forced into the making thereof by any cause or person whatever, and that he made the same with a full knowledge of the value of the property conveyed. Thereupon he dismissed his opposition to the probate of the will of his father, the indebtedness owing by him was released, and his mother, brother, and sisters paid him the sum of \$28,000 as agreed upon. No part or portion of the money thus paid has ever been restored or offered to the respondents, or to Lydia C. Wickersham, or to her personal representatives. At the time the answer in question was filed the time for filing claims against Frank's estate had expired, and no claim for the indebtedness above mentioned had ever been filed or presented. His estate was, therefore, effectually released from the payment of the said debts.

The total amount received by Frank P. Wickersham as a consideration for this con-

veyance and agreement was \$46,500, aside from the accrued interest upon his debts. Adding to the estate of the father the \$100,000 advanced to him would make \$713,000 for division among the four children in the event that both his father and mother had died intestate. His one-fourth interest in this would be \$178,000, of which there would be due him, after deducting his advancements, \$78,000. The amount he received was therefore some \$31,500 less than he might have received had he been successful in contesting the wills of his father and mother respectively. In this adjustment the two estates are considered as one, the advancement added to the total, and charged against Frank in the division. It is just and equitable to do this for the purpose of determining the sufficiency of the consideration. If nothing more were to be considered than these bare figures, it would be obvious that the consideration received by him was not adequate. But very much more than this is involved. His father had made a will practically disinheriting him. He was fully advised of all the facts relating to his proposed contest, and must be presumed to have been well advised by his attorney as to his prospect of success. His mother was living and had the full right to follow her husband's example, and dispose of her property without giving him any share thereof. The answer does not contain any averments as to the mother's disposition towards him, aside from the fact that she agreed to the compromise that was made, and presumably insisted upon the terms there stated. It may be assumed, therefore, that this contribution from her estate to him was all that she desired to give him. His chance of obtaining any part of her estate was, at best, remote and contingent. He had in advance received \$11,000 more than his due share as heir of his father. He was about to enter upon a protracted and expensive litigation, involving all the bitterness and feeling, passion, and strife usually engendered by such family contests, and this settlement was intended, not only to give him a share of the estate, but to settle all these disputes, to end litigation, and prevent further dissension, bad feeling, and quarrels. It appears from the allegations that it was satisfactory to him, that he had full knowledge of all the facts, and that he acted freely and without coercion. It is claimed by the respondents that it is not necessary to show the adequacy of the consideration in cases where the contract is made with the ancestor, and in support of this position they cite the decision of *Estate of Edelman*, 148 Cal. 237, 82 Pac. 962, 113 Am. St. Rep. 231. This seems to be the effect of the decision in that case, but it is not necessary to rest our decision upon that ground, inasmuch as we think that, under the circumstances, it must be conceded that the answer sufficiently shows a reasonably adequate and full consideration for the conveyance of his interest in his mother's estate and for his

agreement not to dispute the validity of her will. The demurrer was properly overruled.

The appellants contend that the court abused its discretion in denying their application to postpone the hearing of the contest until after the determination of the proceedings then pending for the final distribution of the estate of I. G. Wickersham, deceased. This was a matter that was entirely within the discretion of the trial court. We can see nothing in the facts which show any abuse of that discretion. There is nothing in the contention that the court had no jurisdiction to try the issue of estoppel based upon the conveyance of the expectant interest of Frank P. Wickersham to the respondents. The Code provides that, when a will has been admitted to probate, "any person interested may, at any time within one year, after such probate, contest the same or the validity of the will." Code Civ. Proc. § 1327. In order to be entitled to make this contest, therefore, the petitioner must show that he is interested in the estate of the deceased. This statement that he is interested may be denied by the respondents and an issue will thus be raised, which the court must necessarily decide, either immediately before proceeding with the contest, or simultaneously with the decision of the issues raised as to the validity of the will. It is within the discretion of the court to control the order of proof and require the contestant first to establish his interest. *Estate of Edelman*, 148 Cal. 236, 82 Pac. 962, 113 Am. St. Rep. 231. The court had jurisdiction of the contest of the will, and it must, therefore, have jurisdiction to determine all preliminary matters relating thereto and concerning the right and interest of the contestant. The opinion in *Estate of Ryder*, 141 Cal. 368, 74 Pac. 993, is not contrary to this proposition. That case related to the power of the court in proceedings upon distribution of an estate to determine an issue attempted to be made between the grantee of an heir apparent and an heir as to the validity of the deed under which the grantee claimed. It was there held that the jurisdiction of the superior court in probate was entirely statutory, and that the statute relating to distribution did not give the court power to entertain or decide such questions in connection with the making of distribution; that the statutory method was to distribute the estate to the heir apparent, and leave him and his grantee to settle the question of the validity of the conveyance of his interest in any appropriate manner, by a distinct suit in a court of competent jurisdiction. The proposition that a conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest any disposition thereof made by the will of such ancestor, is not against public policy, but is valid and binding, if founded on an adequate consideration, was fully settled by this court by the decision in *Estate of Garcelon*, supra.

After the court had begun the trial of the preliminary issue as to the interest of the contestants and the evidence of the proponents on that question was closed, the contestants demanded a trial by jury of the issues arising upon the petition of the contestants and the answer thereto. The court denied the application, and this ruling is assigned as error. If the contestants intended thereby to obtain a trial by jury of the issues with respect to their interest in the estate, the request was properly denied, because it came after the trial had begun. If their purpose was to secure a trial by jury of the issues arising with respect to the validity of the will of the deceased, there could be no error in refusing it, inasmuch as the court rightfully, as we have concluded, held that they had no interest, and that there would be no trial of the contest attempted to be initiated by them.

The proponents, upon the trial of their answer in estoppel, introduced in evidence the contract set up therein, and thereupon rested their case upon that issue. The contestants then moved for judgment in their favor upon the plea of estoppel, upon the ground that it had not been shown that the consideration paid by the contract was adequate, or that it was fair, just, and equitable as to Frank P. Wickersham, or fairly obtained from him. The motion was denied, and this ruling was also assigned as error. We think there was no error in this ruling. The contract recited very fully the negotiations leading up to its execution and the consideration, purposes, and intention of the agreement, and was prima facie evidence of all the facts necessary to give it validity and effect.

It is earnestly contended by the contestants that the evidence is insufficient to justify the finding of the court that the contract was fairly obtained, or that it was just and reasonable and founded upon an adequate consideration. There was in our opinion sufficient evidence to support the findings in these particulars. There is no express finding that there was an adequate consideration for the contract. The facts alleged in the answer bearing upon that subject are repeated in the findings, however, and this, as before stated, makes a sufficient showing on that point. It is claimed that the evidence shows, without conflict, that the contract was obtained by means of false representations made to Frank to the effect that his mother had at that time executed a will, and that his father's estate was separate property. The evidence is conflicting as to the making of the representations referred to, and this is sufficient to prevent a revision of the finding of the court on the subject. Furthermore, there is evidence tending to show that Frank did not make the agreement on the theory that his father's property was separate estate, but that, for the purpose of adjusting the amount to be paid him, all the parties assumed that it was community property. There

is also sufficient evidence to show that at the time of the negotiations leading up to the contract his mother had in fact made an oligraphic will disinheriting him.

It is contended that the statements of this court in the opinion in the case of Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437, constitute some sort of an adjudication that Frank in his lifetime and after his mother's death still held the legal title to his interest as heir in her estate, notwithstanding his previous conveyance thereof to his brother and sisters. The point is not very important, inasmuch as it is the equitable right thereto and not the legal title which is here in controversy. But it is impossible that the opinion in that case could have the effect claimed. That case was an appeal from a decree of distribution of the estate of I. G. Wickersham, and the only right involved, so far as Frank was concerned, was his right to that estate. His right of inheritance from his mother was not involved and could not be adjudicated. Nor could any remarks in the opinion in that case constitute the law of this case, so as to be binding on this court regardless of its legal soundness. Not being a former appeal in the same case, the doctrine of the law of the case does not apply.

The judgment appealed from is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

(153 Cal. 524)

NILSON v. SARMENT. (S. F. 4,530.)

(Supreme Court of California. May 11, 1908.)

1. HUSBAND AND WIFE—"COMMUNITY PROPERTY"—CONVEYANCE TO WIFE—PRESUMPTION—"SEPARATE PROPERTY."

Civ. Code, §§ 162, 163, define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterwards by gift, bequest, devise, or descent, and section 164 declares that all other property acquired after marriage by a husband or wife or both is community property. This section was amended in 1889 (St. 1889, p. 328, c. 219) by the addition of a provision that, whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title vests in her as her separate property. *Held* that, prior to the amendment, the presumption was that the property conveyed to either husband or wife after marriage by a conveyance other than a deed of gift vested the title in the community.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 913-914.]

For other definitions, see Words and Phrases, vol. 2, pp. 1343, 1344; vol. 8, p. 7608; vol. 7, pp. 6415, 6417; vol. 8, p. 7797.]

2. SAME—STATUTES—RETROACTIVE OPERATION. St. 1889, p. 328, c. 219, amending Civil Code, § 164, providing that, whenever property is conveyed to a married woman by an instrument in writing, the presumption is that the title is vested in her as her separate property, was not retroactive and had no application to property acquired by husband or wife before its enactment.

3. SAME—CONVEYANCE TO WIFE—REQUISITES. To make land conveyed to a married woman her separate property, it is necessary either that it should have been acquired with

her separate funds or should have been given to her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 424-429.]

4. SAME—EVIDENCE—RECITALS IN DEED.

Where land in controversy was purchased by a husband for a home for himself and family, the title being taken in the name of the wife, the fact that the deed described the land as incumbered by a mortgage on which \$2,900 (the entire purchase price) was due and to be paid by the wife was insufficient to show an intention on the part of the husband to give the land to the wife or that the land was the wife's separate property, it appearing that no part of such consideration was ever paid by the wife, and that in fact \$1,200 of the amount had been paid by the husband before the deed was delivered.

5. SAME—INSURANCE—DEEDS OF TRUST—RECITALS.

Where property in question was conveyed to a wife, the fact that insurance was effected thereon by the husband and the loss made payable to the wife, and that deeds of trust made by the husband and wife to secure loans of money provided for a reconveyance to the wife on payment of the loans, was not evidence that the husband recognized the property as the separate property of the wife, rather than as belonging to the community.

6. SAME—CLAIMS OF WIFE.

A wife's claims of ownership of land as her separate property were not binding on the husband except in so far as made with his knowledge and assented to by him.

7. SAME—ADMISSIONS.

That plaintiff's wife owning title to certain land in her own name told him within a year before the sale to defendant that she would like or was about to sell the property, to which plaintiff objected, saying she could not sell it unless he signed the deeds, was not an admission by plaintiff that the land was the wife's separate property, or that she had any right to sell it.

8. SAME—EVIDENCE—FINDINGS.

Evidence *held* insufficient to warrant a finding that a husband directed a conveyance of land purchased with community funds to be made to his wife with intent to vest her with the title as her separate property.

9. SAME—ESTOPPEL.

A provision in a deed of trust of land, the title to which stood in the name of a wife, but which was, in fact, community property, that, in case of a sale of the land on foreclosure of the deed, a surplus of the proceeds, if any, should be paid to the wife, was insufficient to estop the husband, as against the purchaser of the land from the wife with notice that she was a married woman, to claim that the land was community property.

10. VENDOR AND PURCHASER—BONA FIDE PURCHASER.

Where, after separation of husband and wife, she conveyed the homestead, the title to which was in her name, to defendant, who had notice that she was a married woman, and that the husband was actually residing on the property, but made no inquiry from him as to the state of the title, taking, instead, a warranty deed from the wife which was unusual, he was not a bona fide purchaser.

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Carl August Nilson against Antonio A. Sarment. From a decree in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Fred L. Stewart and C. E. Arnold, for appellant. Sam Bell McKee (F. L. De Freitas, of counsel), for respondent.

SLOSS, J. This is an action to quiet title to a parcel of land in the city of Oakland. The complaint alleges that plaintiff and Emma Christina Nilson were married in 1877, and ever since have been husband and wife; that in July, 1884, plaintiff purchased the land in question from one John Ziegenbein; that the deed from Ziegenbein named Emma Christina Nilson, as sole grantee, but that the whole consideration for the conveyance was paid by plaintiff out of moneys earned by him during his marriage; and that the deed was taken in the name of Emma Christina Nilson, as grantee, for the marital community of plaintiff and his said wife. It is further alleged that in January, 1905, Emma Christina Nilson executed and delivered to defendant an instrument purporting to convey said land to him, and that defendant claims an interest in the land by virtue of said instrument. The answer alleges that Emma Christina Nilson purchased the property with her separate funds, that the deed to her was made with plaintiff's consent; and that plaintiff, at the time of the purchase from Ziegenbein, gave to his wife whatever interest he had in the property. It is further averred that Emma Christina Nilson entered into possession and retained possession of the property until her deed to defendant; that during all that time she, with plaintiff's knowledge, approval, and consent, asserted her separate ownership of the land and dealt with it as her separate property; that she insured the building on the land, and had the loss mentioned in the policies made payable to her; and that on various occasions she borrowed money, giving as security therefor deeds of trust executed by herself and the plaintiff, such deeds of trust providing that, in the event of payment, the property should be reconveyed to her, and, in case of default and sale, any surplus of the proceeds should be paid to her. The defendant alleges that the plaintiff's wife represented to him that the property was her separate property, that he caused the title to be searched and was advised that the title was in her, and, upon careful inquiry as to the ownership, learned that she had, with plaintiff's consent, claimed the property as her own and dealt with it as her separate property, whereupon the defendant purchased it of her, paying her the sum of \$2,300. The defendant also filed a cross-complaint, asking judgment for the possession of the property and damages for its withholding. The court found against plaintiff's allegation that the land was, or ever had been, the community property of himself and his wife. It found that the whole consideration was paid by plaintiff out of moneys earned by him during his marriage with his said wife, but that plaintiff directed Ziegenbein to execute the deed to Emma Chris-

tina Nilson and gave to her whatever interest he had in said property. Judgment in favor of defendant quieting his title against plaintiff and awarding him the possession of the premises, together with the value of their use and occupation, followed. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The principal point urged by appellant is that the evidence is insufficient to justify the finding that the property was not community property, but that it was the separate property of plaintiff's wife. Sections 162 and 163 of the Civil Code define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterward by gift, bequest, devise, or descent. By section 164 all other property acquired after marriage by husband or wife, or both, is declared to be community property. In 1889 this section was amended by the addition of the words, "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Prior to the adoption of this amendment the presumption was just the opposite; that is to say, property conveyed to either husband or wife after their marriage by a conveyance (other than a deed of gift) was presumed to have vested the title in the marital community. *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Smith v. Smith*, 12 Cal. 224, 73 Am. Dec. 533; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538; *Ramsdell v. Fuller*, 28 Cal. 38, 87 Am. Dec. 103; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132. The property in question was acquired by the Nilsons (or one of them) in 1884. It is thoroughly settled that the amendment of 1889 is not retroactive, and has no application to property acquired by husband or wife before its enactment. *Jordan v. Fay*, supra; *Gwynn v. Dierssen*, supra; *Lewis v. Burns*, supra. In *Jordan v. Fay* the court, speaking of this amendment, said: "But the rule declared by the statute was more than a rule of evidence. It was a rule of property as well; and we do not think the Legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested."

Was the finding as to the separate character of the property in question supported by any substantial evidence tending to overthrow the presumption resulting from the conveyance to a married person? To make the land the separate property of the wife, it was necessary, either that it should have been acquired with her separate funds or that it should have been given to her. It is to be remembered that the court finds, contrary to the averment of the answer, that the property was paid for with community funds, and the conclusion that it became the

separate property of the wife must, therefore, rest upon the further finding that plaintiff gave to his wife whatever interest he had in said property. There is nothing in the evidence before the court to show that any such gift was ever made. It appears that plaintiff's wife left his home about the time she made her deed to defendant, and she was not a witness at the trial. Nor was any testimony given by Ziegenbein, the original grantor. The only witnesses who could give direct testimony regarding the circumstances surrounding the making of the deed in 1884 were the plaintiff and his brother. Both testified that the deed was made to run to Emma Christina Nilson at the suggestion of Ziegenbein, who said that "it would make no difference," and that neither she nor the plaintiff could sell the land without the signature of the other. This explanation, which is not in itself improbable, was not contradicted, but, even if we disregard it, we are left with the deed itself, which, if unexplained, raises the presumption that the land became community property, notwithstanding the fact that the wife was named as grantee. The plaintiff testified that he bought the property for a home for himself and his family, and that it was not his intention to make a gift of it to his wife. This clear and positive testimony regarding the transaction is not directly contradicted, and there is no support for the finding against it unless it can be found in some circumstances which are claimed to justify the inference that the land became the separate property of the wife.

Much stress is laid on the fact that Ziegenbein's conveyance described the land as "incumbered by a mortgage * * * on which there is now due the sum of \$2,900 to be paid by the party of the second part." The party of the second part was the wife, and it is argued that this shows that the wife became bound to pay the mortgage, and thus tends to support the contention that the husband intended to make the property hers. It appears however, that the entire purchase price was only \$2,900. Nothing was to be paid over and above the face of the mortgage, and, in fact, \$1,200 of this had been paid by plaintiff before he ever received the deed. The most that can be claimed for the clause quoted is that it shows that the consideration was to be paid by the wife from her separate property. In view of the uncontradicted evidence that no part of the consideration was so paid, but that the plaintiff paid part of it before the execution of the deed, and eventually paid it all with community property (as is found by the court), the insertion of this clause by the grantor cannot be regarded as supporting the finding that the land was the separate property of the wife. It certainly does not tend to show a gift, which alone can be contended for under the findings. No greater force is to be attributed to the evidence that insurance was effected by the plaintiff, and

that by the policies the loss was made payable to the wife. In view of the fact that the title stood of record in her name, this was the natural and ordinary course to pursue. If the house and lot, although standing in her name, were not her separate property, the circumstance that insurance money would have been payable to her in the event of loss by fire would not make that money her separate property any more than the burnt house was. In *Lewis v. Burns*, supra, assessment lists, assessing certain lots to the wife, were sworn to by the husband. This was held not to be an admission that they were her separate property. The method of insuring in this case stands on the same ground. The same reasoning applies to the deeds of trust made by plaintiff and his wife to secure loans of money. The provision for reconveyance, or any reconveyance actually made, had no legal effect beyond that of making the record title clear, since upon payment of the debt the purposes of the trust ceased, and the property at once, without any reconveyance, re-vested in the party or parties who had owned it before. *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319; *MacLeod v. Moran* (Cal.) 94 Pac. 604. The provisions for reconveyance or payment of surplus, contained in these deeds of trust, like the mode of effecting insurance, merely indicated that it was not desired to change the record title. That title was in the wife, but these instruments are no evidence that she held it, or that her husband recognized her as holding it, as separate rather than as community property.

The only other circumstance relied on by respondent is that the wife claimed the land as her separate property. Her claims are, of course, in no way binding on the plaintiff, except in so far as they may have been made with his knowledge and assented to by him. All that appears in this connection is that plaintiff's wife told him several times within a year or two before her sale to defendant that she would like or was about to sell the property, to which he had objected, saying that she could not sell it unless he signed the deed. This cannot be construed as an admission on his part that the land was her separate property or that she had the right to sell it. It is not questioned that where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate. *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195; *Woods v. Whitney*, 42 Cal. 358; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. But, to have that effect, there must in the case of a deed executed before the amendment of 1889 have been something more than the mere fact that the wife was named as grantee. There must be something appearing either in the deed or elsewhere to show an intent

to make the property the separate estate of the wife. Here we find that the plaintiff, desiring to purchase a home for himself and family, bought the land in question, there being a house upon it; that, at the suggestion of the vendor he took the deed in the name of his wife; that, with his family he occupied the premises continuously from the time of the purchase; that he paid, out of his earnings the purchase price of the property, the premiums on insurance, and all loans secured by the property. He testifies that he never intended to make a gift to his wife. His dealings with the property were such as would, in the ordinary course of business, be dictated by the fact that the record title stood in his wife's name, and were in no way inconsistent with the community character of the property. There is no substantial evidence tending to show that he made a gift to his wife of his interest in the property, and the presumption that it was community property, aided, as it was, by the undisputed testimony of a party to the transaction, cannot therefore be said to have been overthrown.

It is urged that plaintiff is estopped, as against defendant, to show that the property is community property. This contention is based in part on the provision in the deeds of trust that, in case of sale, the surplus, if any, should be paid to the wife. Such provision was held, in *Hoeck v. Greif*, 142 Cal. 119, 75 Pac. 670, to constitute an estoppel in favor of the wife. But this ruling was not necessary to the decision, and this court in denying a rehearing in *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319, so stated, adding that in its opinion what was said in this connection in *Hoeck v. Greif*, was "not a correct statement of the law." Indeed, it seems clear that neither the execution of the deed of trust nor any of the other dealings of plaintiff with the property should be held to estop him from asserting its character as community property. Apart from other considerations, two essential elements of an estoppel are, first, that the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them; and, second, that he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279. Neither of these elements existed in this case. The respondent knew from the *Ziegenbein* deed, which was of record, that his grantor was a woman. He had actual notice that she was a married woman. This was enough to put him on inquiry, and to compel him to ascertain, at his peril, whether the property was community property. *Ramsdell v. Fuller*, 28 Cal. 44, 87 Am. Dec. 103; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347. Furthermore, plaintiff was actually residing on the property, but defendant, before purchasing, made

no inquiry of him as to the state of the title. Nor did the defendant in fact rely upon any supposed admissions of plaintiff that the property belonged to his wife in her separate right. He took from Mrs. Nilson a deed containing a covenant of warranty of title. It is a matter of common knowledge that such deeds are unusual in this state. A real estate agent who represented the defendant in the transaction with Mrs. Nilson testified that he had drawn the deed, and that the reason he had made it in the form of a warranty deed was because Mr. Nilson did not sign it. There could be no stronger proof that the defendant (who was bound by the knowledge and the acts of his agent) knew that Mrs. Nilson had a husband who might have some claim upon the property, and that, instead of relying upon any representation that she was the sole owner of the property, he tried to protect himself against a possible claim on the part of her husband by taking a warranty deed. Under these circumstances there is no ground for a claim of estoppel.

It is unnecessary to consider the other points made by appellant.

The judgment and order appealed from are reversed.

ANGELLOTTI, J. I concur.

SHAW, J. (concurring) I concur solely because under the decision in *Tolman v. Smith*, and the other cases cited in the opinion of Judge SLOSS, it has become settled law that the presumption was that property conveyed to the wife with the knowledge and consent of the husband was community property; that the fact that the conveyance was so made to her with his consent did not raise an inference that it was intended by him as a gift to her, or, at all events, that such inference was not sufficient to overcome the said presumption; that this had become a rule of property; and that the amendment of 1889 (St. 1889, p. 328, c. 219) to section 164 of the Civil Code, declaring that a conveyance to the wife should be presumptive evidence that the property conveyed is her separate estate, is not retroactive, and does not apply to conveyances previously made. Were it an original question, I should say the rule, prior to the amendment, should have been that such conveyance to the wife with the husband's consent was prima facie evidence that he intended the property to be a gift to her, and that the property thereby vested in her as her separate estate, that this was a rule of evidence, and that the effect and purpose of the amendment of 1889 was to declare the correct rule of evidence and abrogate the false rule previously followed by the courts, and hence that said amendment was applicable to prior transactions and was so intended. If the law had not thus been settled, it seems clear that the natural inference that a

gift was intended, arising from the conveyance to the wife in this case would be presumptive evidence thereof and would support the conclusion of the trial court, notwithstanding the testimony of the husband, manifestly to his interest, that it was not so intended.

153 Cal. 585

GERMAIN FRUIT CO. v. J. K. ARMSBY CO. (L. A. 2,132, 2,139.)

(Supreme Court of California. May 15, 1908.)

1. SALES—REMEDIES OF BUYER—ACTIONS FOR BREACH OF CONTRACT—DAMAGES—PROFITS.

Plaintiff purchased of defendant a quantity of apricots, for shipment to and sale in Philadelphia, for the sum of \$4,352.25. On arrival in Philadelphia the apricots proved not to be up to sample, and were sold in the market for \$3,225.78 over and above the freight and expenses of making the sale. Had the apricots been according to sample, they would have sold in Philadelphia at the time they were sold for \$4,974 in excess of freight and expenses. In an action to recover damages, the court found that plaintiff had been damaged in the sum of \$1,748.22, \$1,126.47 being actual loss, and \$621.75 being the profits which would have been made on resale if the apricots had been as warranted, and judgment was given for the actual loss and denied as to the profits. *Held*, that the segregation of the damages into actual loss and profits was not necessary, and that, under Civ. Code, § 3300, making damages for breach of an obligation the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, and section 3313, providing that the detriment caused by the breach of warranty of the quality of personal property is the excess of the value which the property would have had at the time to which the warranty referred over its actual value at that time, plaintiff was entitled to recover for loss of profits if the quality of the apricots was warranted to be up to sample.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1284-1301.]

2. SAME—PLEADING.

As a purchaser of personal property who purchases for the purpose of selling the same may recover from the seller, if the property is warranted as to quality, not only the actual loss between the amount paid the seller and the amount for which the property sold, but may also recover the loss of profit, and recover both as general damages, it is not necessary that he allege a specific amount as profits in an action to recover damages for breach of warranty.

3. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—ADDING TO TERMS OF WRITING—CONTRACTS OF SALE—WARRANTY.

Plaintiff purchased a quantity of apricots from defendant under the following written agreement: "This agreement made by and between the J. K. Armsby Co. and the Germain Fruit Company, witnesseth: That the said J. K. Armsby Co. has this day sold and the said Germain Fruit Company has this day bought twenty-five hundred boxes apricots, more or less, consisting of: Lot A, 287 boxes, Lot K, 104 boxes, Lot C, 1400 boxes, Lot E, 715 boxes, at seven (7) cents per pound plus one per cent net cash f. o. b. cars at Pomona, on surrender of bill of lading; shipment to be made during the month of October, 1901." *Held*, in an action to recover damages for breach of warranty as to quality, that parol evidence that it was agreed that the apricots were to be equal in quality to the sample used in making the sale was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Evidence, §§ 1778-1793.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Germain Fruit Company against the J. K. Armsby Company. Judgment for plaintiff, and plaintiff appeals from an order denying its motion to vacate the judgment and enter a judgment for an increased amount, and defendant appeals from the judgment, and from an order denying its motion for a new trial. Judgment reversed on appeal of defendant.

L. A. No. 2,132: Herbert Cutler Brown, for appellant. Max Loewenthal, for respondent.

L. A. No. 2,139: Max Loewenthal, for appellant. Herbert Cutler Brown, for respondent.

PER CURIAM. The appeals in this case, of which there are two, were originally presented to the district court of appeal for the Second Appellate District, but, the judges thereof being unable to agree in a judgment therein, the appeals were ordered to this court for disposition. Accompanying such order are the opinions filed by the respective judges of the district court of appeal. One of said opinions is as follows:

"Judgment was for plaintiff and both parties appeal. In view of the conclusion reached and the order made, it is deemed advisable to consider the two appeals together. Plaintiff's appeal (No. 149) is from an order denying its motion to vacate and set aside the judgment in the cause and to enter a different judgment, increasing the amount thereof. Defendant's appeal No. 154 is from the whole judgment and from an order denying its motion for a new trial. The action was brought to recover damages for breach of warranty of quality of dried apricots sold by defendant to plaintiff. The damages claimed (\$1,748.22) were alleged in the amended complaint to be \$1,126.47 for the loss actually sustained by the breach complained of, and \$621.75, profits which plaintiff alleges it would have made if the goods had been as warranted. The contract between the parties, which was reduced to writing, was silent as to any warranty of the goods, but parol evidence was admitted by the court, on behalf of plaintiff, for the purpose of establishing that the sale was made upon an express warranty by sample. It is claimed by defendant that this was error, and that the findings upon which the judgment is based are unsupported without this parol evidence.

"The findings material here show: The plaintiff purchased a lot of dried apricots from defendant to be resold in the markets in cities east of the Rocky Mountains. The defendant, knowing such purpose, warranted said fruit to be according to certain samples delivered to plaintiff. The fruit was in Pomona and the sale took place in Los Angeles and plaintiff relied upon such samples for quality and weight (the number of boxes being given) and had no opportunity to inspect the bulk of the fruit. Plaintiff paid to de-

fendant the full amount of the purchase price, to wit, \$4,352.25, and delivery for shipment was made f. o. b. cars at Pomona, as agreed. Plaintiff, without examination, shipped the fruit to the city of Philadelphia for sale, where its representative, on inspection, discovered it to be inferior in quality to the samples shown, and light in weight. After notice to defendant and the refusal of the latter to take any action in the matter, plaintiff sold the apricots in the market at Philadelphia for \$3,225.78 over and above the freight and usual and necessary expenses of making the sale, which was the best price obtainable for such apricots. Had the apricots been of the quality of the samples exhibited to plaintiff, they could and would have been sold by it in Philadelphia for the sum of \$4,974, in excess of freight and expenses of sale. As an inference from these facts, the court finds that by reason of such breach of warranty plaintiff has been damaged in the sum of \$1,748.22; \$1,126.47 being actual loss and \$621.75 being the profits which would have been made on resale if the apricots had been as warranted. Judgment is then given for \$1,126.47 and denied as to the \$621.75, profits. Argumentatively, and as a conclusion of law based on specific findings made, the reason for not including the 'profits' in the judgment is stated by the court in its findings to be 'that defendant did not have notice that plaintiff intended to sell said apricots in any specific market, or at any definite price.' Plaintiff claims that on the findings of fact made it was entitled to a judgment for \$1,748.22.

"Plaintiff's Appeal (No. 149).

"Considering first the plaintiff's appeal (No. 149), which involves but one question and must be determined from the judgment roll, we are of the opinion that the segregation of the damages into actual loss and profits in such a case as this is not necessary under the statute. 'Speculative' profits are one thing and that portion of the price of goods having an actual value in the market above what was paid for them is another. The goods delivered in Philadelphia were actually worth only \$3,225.78 over and above freight and expenses of sale. Had they been according to sample, they would have been of the value of \$4,974 over freight and expenses at the same place. That is, the same quantity of apricots purchased by plaintiff of defendant of the quality of the samples shown were actually worth \$4,974 in Philadelphia at the time the ones delivered to plaintiff by defendant were sold for the smaller sum named. There is nothing 'speculative' about these differences of value. The findings to this effect are express, and may be considered independent of the finding upon the theory of a resale which also fixes the last-mentioned value at the same amount (\$4,974) for that purpose. Defendant sold goods to plaintiff which it knew the latter would have no opportunity to inspect un-

til they reached some Eastern market. The court finds Philadelphia to be one of the places that must be included in the term 'Eastern market.' The inspection at that place disclosed goods worth \$3,225.78, instead of \$4,974. The reason for the difference was the failure and breach of defendant's warranty. If there had been any element of special additional damage by reason of plaintiff's inability to make good some contract of sale made by it, at the time of, or prior to, the purchase from defendant, and the fulfillment of such contract had been dependent upon the goods being up to sample, notice to defendant of such special sale at a definite price would have been necessary in order to hold it for such special damages. No damages are asked here for profits on a contract for resale at an advanced price. Damages for breach of an obligation are measured by the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things will be likely to result therefrom. Civ. Code, § 3300. 'The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.' Civ. Code, § 3313.

"The cases cited by both parties relating to the interference with, discontinuance of, or destruction of a business, or the prevention of one from pursuing a vocation, and dealing with the question of what profits are too remote, or speculative or uncertain to be included in an action for damages for such interference or destruction, only indirectly aid in solving the question here under consideration and are to be distinguished from this case. In *Hughes v Bray*, 60 Cal. 284, an instruction to a jury was sustained which uses the following language: 'You should ascertain * * * what portion of the barley delivered, if any, was of an inferior quality, and, in the second place, you should award to the plaintiff the difference between the market value of such portion, and the market value of an equal quantity of barley of the same quality as the sample, at the time of delivery.' In *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125, the time of the breach of warranty was held to mean the time at which the breach was discovered, or with ordinary care and attention might have been discovered by the purchaser. That is, at the time at which, under the circumstances of the case, it reasonably should have been discovered. In the case at bar this could not have been expected to occur until the goods reached the place to which they were shipped. The same rule has been applied in this state in case of an implied warranty, under section 1771 of the Civil Code, that merchandise inaccessible to the examination of the buyer is warranted

to be merchantable. *Silberhorn v. Wheaton* (Cal. Sup.) 51 Pac. 689. If the opinion in *English v. Spokane Com. Co.*, 57 Fed. 451, 6 C. C. A. 416, be in conflict with this, it must give way to the local authority decided under our statute. But I think the same rule of damages is declared in that case, and the same distinction made as to 'profits on resale.' The rule adopted in *English v. Spokane* is from *Schouler's Personal Property*, and is quoted as follows: "The measure of damages recoverable for breach of warranty of quality is, in general, the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon. * * * The rule of damages for breach of warranty is the difference between the sound value of the thing as warranted and its actual value." The federal court, in considering the place at which the value was to be ascertained, says: 'As the sale was made at Omaha and the goods were to be delivered at Spokane, the defendant was entitled to recover the difference between the contract price and the value of the goods in the market at Spokane at the time of the delivery.' The place of delivery being the same as the place of inspection and resale, there was no reason for the application of the rule declared in *Shearer v. Park Nursery Co.*, supra. The damages which plaintiff sues for in this case may all be recovered as general damages, and it is not necessary that the 'profits' be specially alleged. *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 249, 41 Pac. 1020. As the conclusion reached on defendant's appeal will require a new trial of the case, it is not necessary for us to consider whether or not the amended complaint and the findings of fact would support the judgment here indicated as proper on the case made. The foregoing opinion will suffice to guide the parties as to all matters affected by this appeal, if a new trial be had. By the opinion filed in appeal No. 154, it being held that the evidence was insufficient to support the findings made in the case, it would be idle to make an order overruling the trial court's action in denying plaintiff's motion. This appeal, therefore must be governed by the order made in No. 154.

"Defendant's Appeal (No. 154).

"The real question to be determined on this appeal relates to the admissibility of the parol evidence to affect the terms of the writing executed by the parties at the time said dried apricots were sold. This writing was as follows:

"Los Angeles, Cal., Oct. 19, 1901.

"This agreement made by and between the J. K. Armsby Co. and the Germain Fruit Company, Witnesseth:

"That the said J. K. Armsby Co. has this day sold and the said Germain Fruit Company has this day bought twenty-five hun-

dred boxes apricots, more or less, consisting of:

Lot A	287 boxes
Lot K	104 boxes
Lot C	1400 boxes
Lot E	715 boxes

at seven (7) cents per pound plus one per cent net cash f. o. b. cars at Pomona, on surrender of bill of lading; shipment to be made during the month of October, 1901.

"Signed in duplicate.

"The J. K. Armsby Company

"By A. B. Miner.

"Germain Fruit Company,

"By Eugene Germain."

"Measured by the criterion that the completeness of a written contract, as a full expression of the parties, is the writing itself, the writing appears upon its face to contain all the necessary elements of a complete contract of sale. The description of the property sold is admittedly incorrect, and it contains no express warranty of quality of the goods sold, but contracts of sale may be complete without the latter. The contract calls for apricots, while the evidence shows and both parties admit that dried apricots were the subject of the agreement. It is conceded that this defect of description may be supplied by parol. Respondent contends that the same rule warrants the introduction of parol evidence to determine what apricots were intended to be described by lot 'A,' lot 'K,' lot 'C,' and lot 'E,' and also to identify them by sample. There is no question as to the former proposition, and in a proper case and under proper circumstances the latter would no doubt be true. For instance, if the fruit itself, the label on the box, the package, or the method of packing were peculiar, or so different in character from other fruit or packages of dried apricots, as generally prepared for market, that the sample box would serve to identify or aid in identifying the goods from which the box was taken, such evidence might be admissible for the purpose of identifying the subject-matter of the written contract. 'Lot A, 287 boxes,' does not so clearly describe the goods sold as to preclude the admission of evidence for purposes of identification, if necessary. *Ontario D. F. G. Ass'n v. Cutting F. P. Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231.

"No effort, however, was made to show such circumstances as would warrant the introduction of the samples or the testimony in relation thereto upon this theory. If the facts had been such as to make the evidence proper upon this theory alone, the purpose of its introduction should have been limited so as to exclude its consideration in connection with the question of warranty of quality. On the contrary, the very purpose of its introduction was apparently to add to the written contract of sale another term, a parol warranty of quality by sample. The court permitted the introduction of parol evidence

as to sample, and applied it on the theory that it was competent proof of a warranty. It expressly found such a warranty, and the judgment for damages rests upon its breach. There is no other evidence to support the finding, except the inferences to be drawn from plaintiff's Exhibit 5. This was a receipted bill showing on its face words and figures, which taken with plaintiff's explanation of them served to corroborate plaintiff's testimony that the sale was made by sample. Alone it was insufficient as evidence in writing to justify a finding to that effect. The finding and judgment therefore rest on the parol evidence.

"It is urged by respondent in support of the court's action that an ambiguity or uncertainty appearing in the language of the instrument by the use of the terms 'Lot A, 287 boxes,' etc., the matter is open for explanation by parol evidence; and that such ambiguity or uncertainty may as well be removed by showing the term was intended to mean 'according to sample A' as by showing that it was intended to mean some certain pile of 287 boxes marked 'A,' or designated as 'A' in some other manner for purposes of description or identification. In other words, that the term being ambiguous, there is no good reason why such ambiguity may not be resolved upon the assumption of an ambiguity in expressing the warranty as well as upon the theory of an ambiguity in description. There is much weight in this contention. We must, however, bear in mind that the law permits no new term to be introduced into a written contract by parol, while it does permit such evidence for the purpose of making certain an ambiguous description or for purposes of identification. To hold that the words, 'Lot A, 287 boxes,' considered either in their ordinary use or as used in a commercial way, relate to warranty rather than identification, would do violence to the use of language. It would amount to what the rule does not permit even in cases of description the supplying by parol of something not expressed in the instrument in any manner. Neither the grammatical construction of the language used in the contract nor the definition given to the word 'lot' by the lexicographers justifies attributing to it a meaning which imports quality or warranty. While from the parol evidence introduced the inference may be drawn that the parties intended the sale should be on a warranty by sample, we cannot permit any bias or knowledge of the fact to lend weight to the construction of the instrument. Admitting that such was the intention, an examination of the writing shows that, if this were the case, there was an entire failure to embody such intention in the contract. The language used was unfit and inappropriate to express a warranty of quality by sample or otherwise, being language importing description and identity only. 'Lot' is not an ambiguous word of

warranty, but a word used solely to describe and identify. All definitions of the word display its derivation from 'share, portion or parcel.' See Century Dictionary. There are well-considered cases holding that an express warranty can be proven by parol evidence where the contract of sale is silent in this respect. The decisions in these cases are based upon the principle that a warranty is not one of the essential elements of a sale, but is a mere collateral undertaking. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Dec. 512.

"This view, however, is not in harmony with the cases upon which the latest declarations of the law on this subject by our Supreme Court rest. In *Thompson v. Libby*, 34 Minn. 377, 26 N. W. 2, it is said: 'When made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, on a sale of personal property a warranty is given, it is one of the terms of the sale and not a separate and independent contract.' To justify the admission of parol evidence on the ground that it is collateral, it must relate to a subject distinct from that to which the writing relates. Where the written sale contains no warranty or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case or to extend it in the latter. *Johnson v. Powers*, 65 Cal. 181, 3 Pac. 625; citing *Benj. on Sales*, 621. 'If it [the writing] imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which parol evidence is directed. The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks.' *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; citing *Thompson v. Libby*, supra, and *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380. The effect and limitations of *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786, and *Sivers v. Sivers*, 97 Cal. 518, and the cases citing them, have been clearly distinguished in *Bradford Inv. Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083, and they are not authority here. See, also, *Board of Education v. Grant*, 118 Cal. 44, 50 Pac. 5. The rule declared in *Harrison v. McCormick* was affirmed in *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964, and finds abundant support elsewhere. *Wilson v. New U. S. Co.*, 20 C. C. A. 241, 73 Fed. 994; *Union Selling Co. v. Jones*, 63 C. C. A. 224, 128 Fed. 672; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533, 104 N. W. 797.

"Even Mr. Wigmore, who in his work on Evidence argues most strenuously for an extension of the rule relating to the admission

of parol evidence, so that, what he calls 'all the terms of the contract' may be considered by the court, recognizes a distinction in the application of the rule to the matter of warranty and its application to matters of description. Sections 2401, 2434, and 2465. We cannot help suggesting, however, that in his discussion on this subject Mr. Wigmore has not given sufficient weight to the possibility, or rather probability, that the extension urged might result in the admission not only of 'all the terms of the contract,' but some additional ones, and, in rare cases, might even result in removing from the written contract some of the most important terms that had been formally, carefully, and intentionally put down therein. To hold parties to diligence and care in reducing their negotiations to writing, and to hold the writing to be subject to attack only by specific allegations of fraud or mistake, appears to be the better rule, and is now supported by the weight of authority. Like the statute of frauds, this rule is founded upon long and convincing experience that written evidence is more certain and accurate than 'slippery memory.' So long as the rule is applied, the actual contract made can be preserved without fear of its being affected in its terms by the frailties of an interested human recollection. That sometimes the written contract does not include all the terms intended by reason of neglect or oversight, and injustice is thereby done in particular cases, does not justify the abandonment of the rule. To construe it away is to destroy one of the greatest barriers against fraud and perjury. Without specially indicating the rulings to which this opinion is applicable, it is sufficient to say that the admission of testimony to show a sale by sample for the purpose of establishing an express warranty of quality of the apricots sold was error. The finding of such a warranty was without competent evidence to sustain it, and the case was tried on an erroneous theory inconsistent with the rule declared in *Gardiner v. McDonogh*, supra.

"The other points made by appellant on this appeal need not be considered further than they come within the reasoning in appeal No. 149."

We are satisfied that the foregoing opinion correctly states the law applicable to the points presented on both appeals, and we adopt it as the opinion of this court.

The judgment and order appealed from are reversed.

SHAW, J. I concur in the judgment, on the authority of the decision in *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964. I do not agree to all that is said in the opinion adopted by the court, as I understand it. I can conceive of a sale of goods in bulk, of varying quality, in which the different qualities might be represented by samples

shown to the purchaser, the goods being absent, and in which an estimate would be made by the seller of the quantities of each kind comprised in the whole bulk corresponding to the samples shown, the samples being marked as "lot A," "lot B," etc. In such a case a writing, such as that here in question, purporting to agree to sell "500 boxes lot A, and 600 boxes lot B" if construed with reference to the circumstances attending its execution, would properly be held to mean that a sale was made of 500 boxes of the quality of the sample marked as lot A and 600 boxes of the quality of the sample marked as lot B. Such evidence would, in my opinion, be competent to point the meaning of the writing. I do not understand that the opinion intends to express anything contrary to this, but I think some of its language might be so understood. The evidence admitted by the court below and here held incompetent, however, shows a mere sale by sample, and, according to that evidence, the designations "lot A," etc., refer to certain lots stored in a warehouse, and not to the respective samples exhibited to the purchaser. The case falls precisely within the rule established in *Gardiner v. McDonogh*, which is now to be considered as the settled rule of this court.

153 Cal. 502

O'SULLIVAN v. GRIFFITH. (S. F. 4,621.)
(Supreme Court of California. June 12, 1908.)

Application for rehearing. Denied.

For opinion in department, see 95 Pac. 873.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). Having dissented from the order denying a rehearing of this cause, I will here briefly state the grounds of such dissent: A street railway franchise is created and granted by the same act. If, in a case like this, no franchise is granted, it is because no franchise is created. The defense to the action was not merely that the assignors of plaintiff had no title to the franchise, but that there had never been a franchise, and this was what the defendant offered to prove. If he had been allowed to make, and had succeeded in making, the proof that no franchise ever came into existence, the case would have been materially different from that arising upon the conveyance of all one's right, title, and interest in a tract of land. There would have been the wide difference between the conveyance of a thing in existence, and of a thing nonexistent, and the authorities cited to the proposition that the purchaser of a possible title to a tract of land cannot avoid payment of the agreed price by proving that the vendor had no title seem to me to have no application to an action to recover the agreed price of a thing which the vendor represented to be in existence, but which in fact never did exist.

8 Cal. App. 103

NONREFILLABLE BOTTLE CO. v. ROBERTSON (Civ. 438.)

(Court of Appeal, Third District, California.
April 14, 1908.)

1. TRIAL — MOTION FOR NONSUIT — QUESTION FOR COURT.

A motion for a nonsuit, practically operating as a demurrer to the evidence, must assume the truth of the evidence supporting the material allegations of the complaint, and hence presents for the decision of the court a pure question of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 372.]

2. SAME.

A motion for a nonsuit, made at the close of plaintiff's case, must be denied, if the evidence tends to establish the averments of the complaint, or makes out a prima facie case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 373, 374.]

3. SAME.

Upon a motion for a nonsuit at the close of plaintiff's case, all the relevant evidence received must be given the effect of its full probative force, regardless of whether it has been erroneously admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 373, 374.]

4. BILLS AND NOTES — ACTION ON NOTE — PLAINTIFF'S OWNERSHIP — EVIDENCE — SUFFICIENCY.

In an action on a note, evidence that it was executed by defendant at the time, and for the sum indicated upon its face, for 100 shares of stock in plaintiff corporation; that after its execution the payee assigned it by indorsement, and delivered it to plaintiff; that the payee was plaintiff's general manager, that the stock was sold from plaintiff's treasury stock for the corporation; that the payee accepted the note as plaintiff's property, and that he was authorized to sell the stock by resolution adopted by plaintiff, made out a prima facie case for plaintiff as to its ownership.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Nonrefillable Bottle Company against Helen H. Robertson. From a judgment of nonsuit, plaintiff appeals. Reversed.

F. A. Berlin, for appellant. Lucius L. Solomons, for respondent.

HART, J. This is an action on a promissory note, negotiable in form, for the sum of \$500, executed by the defendant in favor of and delivered to one Max Axelrood, in the city of San Francisco, on the 12th day of August, 1904. Said note called for interest on the principal sum at the rate of 6 per cent. per annum, and was made payable after the 19th day of August, 1904. The complaint alleges that on the 17th day of August, 1904, for value received, said Axelrood "duly indorsed, assigned, transferred, and set over to the plaintiff the said promissory note, and all moneys due, or to become due, thereon, and that the said plaintiff is now the owner and holder thereof." The plaintiff is alleged to be a corporation duly incorporated, organized, and existing under and in pursuance of

the laws of the state of California, having its office and principal place of business in the city of San Francisco. The defendant at the trial admitted this allegation to be true. A jury was impaneled and sworn to try the issues; but, upon the close of plaintiff's case, the court, on motion of the defendant, granted a nonsuit. It is from the judgment of nonsuit that this appeal is taken. The ground upon which the court granted the nonsuit was that "the plaintiff had not proved that it was the owner of the said promissory note, and that it had no right to sue thereon."

In her answer the defendant admits the execution of the note, and that it was given in consideration of an indebtedness due from her to Axelrood, in the sum appearing upon the face thereof, for 100 shares of stock purchased by her from said Axelrood in the plaintiff corporation; but she sets up the special defense of want of consideration, in that said note was obtained through misrepresentation and deception, etc. In support of this defense she alleges that Axelrood represented to her that the stock in plaintiff corporation was very valuable, and that a certain nonrefillable bottle, for which the plaintiff had secured a patent right from the United States government, was of great value, and that a large sum of money had been offered by different parties for the same; that Axelrood represented to her that he contemplated going to Canada, where he intended to introduce the patent, and that he would give defendant's son a lucrative position with plaintiff if she would buy the 100 shares, which he declared represented nearly all the stock that was then for sale. She alleges that, within 12 days after the execution and delivery of the note, she learned that she had been deceived, defrauded, and imposed upon, and that, immediately thereafter, "and long before this action was commenced, to wit, on the 24th day of August, 1904, she offered, in writing, to return said stock and the certificate given in evidence therefor," and demanded of said Axelrood a return of said note, and a rescission of the contract of purchase and sale of said stock, "and did thereupon rescind the same, but the said Axelrood and said corporation refused to deliver up said note, and refused to accept said certificate of stock, or consent to said rescission of the contract of sale." Defendant then "offers to return said stock to plaintiff or to said Axelrood."

The only question presented here is, was the court justified under the evidence, as presented by plaintiff, in granting defendant's motion for a nonsuit? "A motion for a nonsuit, in purpose and effect, practically operates as a demurrer to the evidence, and must therefore assume that all the facts given in evidence to support the material allegations of the complaint speak the truth. The consequence of the rule as thus stated is that a motion for a nonsuit presents for the decision of the court, a pure question of law."

Archibald's Estate v. Matteson (Cal. App.) 90 Pac. 725; Cravens v. Dewey, 13 Cal. 41; Donahue v. Gallavan, 43 Cal. 576; Schroeder v. Schmidt, 74 Cal. 460, 31 Pac. 243; Warner v. Darrow, 91 Cal. 311, 27 Pac. 737; Goldstone v. Merchants' etc., Co., 123 Cal. 631, 56 Pac. 776; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336. The settled rule is that, upon a motion for a nonsuit made upon the close of plaintiff's case, if the evidence tends to establish the averments of the complaint, or is sufficient to make out a prima facie case under the allegations of the complaint, it is the duty of the court to deny the same. Janin v. London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. It is also a rule that, upon a motion for a nonsuit on the close of plaintiff's case, all the relevant testimony received must be given the effect of its full probative force. This is true, whether the evidence has been erroneously admitted or not, if it bears relevantly upon the issues, for error in admitting evidence for the plaintiff cannot be reviewed on a motion for a nonsuit (Archibald's Estate v. Matteson, supra, and O'Connor v. Hoffer, 102 Cal. 528, 36 Pac. 939), and must, as suggested, for the purposes of the motion, be considered as evidence properly admitted, and be given the full benefit of its probative power.

Measured by the foregoing well-settled rules, was the court justified in its decision that, as a matter of law, the evidence of plaintiff does not tend to prove the material allegations of the complaint? Or, to reduce the proposition to the exact point upon which the motion was granted, does or does not the evidence tend to prove that plaintiff was the owner of the note upon which suit was brought? The respondent has not filed a brief, the case having been submitted on the record and the brief of appellant, and we are therefore without light upon the precise position of respondent in the case. The evidence, however, briefly presented, shows: That the note was executed by the defendant at the time and for the amount indicated upon the face thereof; that it was given as evidence of the sum of \$500 due Axelrood in consideration of the sale and delivery to the defendant of 100 shares of stock in the plaintiff corporation; that it was executed in favor of Axelrood; that after its execution Axelrood assigned and transferred by indorsement, and delivered the note to the plaintiff; that Axelrood was the general manager of the plaintiff; that the stock sold to defendant by him was from the treasury stock of the plaintiff, and that the sale was, as a matter of fact, made for said corporation; that the note was made in Axelrood's name, and he accepted the same as the property of the company; that he (Axelrood) had been given authority to sell the stock by a resolution adopted by the plaintiff. Axelrood further testified that he did not own the stock, but that he sold it

for the plaintiff, and for that reason transferred the note to the plaintiff; it being the real owner thereof. Axelrood, who was one of only two witnesses for plaintiff, was cross-examined quite fully as to the circumstances of the transaction by which the defendant executed and delivered to him the note, and declared that there was no fraud, no deceit, no misrepresentation, involved in the transaction on his part; that he told the defendant the truth about the affairs of the plaintiff, etc. We think the evidence was sufficient to and did make out a prima facie case for plaintiff. That the note was duly assigned and transferred to plaintiff by Axelrood, and that at the time of the commencement of the action and at the trial plaintiff was the owner thereof, there is no room for doubt under the testimony.

The motion for a nonsuit should not have been granted.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 124

NEEDHAM v. CHANDLER. (Civ. 450.)

(Court of Appeal, First District, California.
April 16, 1908.)

1. CONTRACTS—RECORD—NECESSITY.

A contract, whereby plaintiff agreed to construct a building, to exceed \$1,000 in cost, for defendant, in consideration of a commission of 10 per cent. of the cost of construction, was, in effect, merely an authorization in writing, by which plaintiff was to act as defendant's agent, and was not required to be recorded.

2. SAME — PLEADING — PERFORMANCE — STATUTORY PROVISIONS.

Under the express provisions of Code Civ. Proc. § 457, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and, if such allegations be controverted, the party pleading must establish on the trial facts showing such performance.

3. SAME—FINDINGS—SUFFICIENCY.

A finding that all the allegations of the complaint are true is sufficient, such finding negating the denials of the answer as to the allegations of the complaint, and if the effect of an affirmative allegation, following and in connection with a denial, is but to emphasize the denial of the answer, it is not necessary that there should be a finding on such affirmative allegation; and hence, where in an action on a contract, whereby plaintiff agreed to draw the plans and construct a building for defendant in consideration of a commission on the cost of construction, plaintiff alleged that he had complied with all the terms and conditions of the agreement, etc., and the answer denied that plaintiff complied with the contract on his part, and averred that plaintiff employed unskilled workmen, and left unfinished certain portions of the building, that the floors were improperly laid, etc., specifying certain defects, such averments were but another way of denying that plaintiff complied with the contract, and a finding that the allegations of the complaint were true was sufficient.

4. TRIAL—FINDINGS—CONSTRUCTION.

Findings should be so construed as to support the judgment where it can be done, and

if apparently consistent, they should be reconciled if reasonably possible to do so. If on an immaterial issue they should be disregarded, and if, taking them as a whole, in view of the entire record, they fairly dispose of the material issues raised by the pleadings on which evidence was offered, the judgment will be upheld.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by W. G. Needham against Jessie A. Chandler. Judgment for plaintiff, and defendant appeals. Affirmed.

N. H. Hurd, for appellant. Waite, Keyes & Martin, for respondent.

COOPER, P. J. This action was brought to recover a balance of \$1,559.17 for money paid out and expended and commissions earned by plaintiff, under a contract for the construction of a building for defendant. The case was tried before the court, findings filed, and judgment entered thereon in favor of plaintiff. This appeal is from the judgment.

The contract, out of which the controversy arose, was made May 29, 1905, and was in writing. It provided that, in consideration of a commission of 10 per cent. of the cost of construction of the building, the plaintiff would draw all plans and specifications, and, when completed, turn over all bills properly signed; that plaintiff would procure all materials at the lowest possible cost to defendant, and in every way possible save expense to defendant; that the defendant should advance the money in four payments of about \$1,000 each, the first payment to be made when the frame was up, the second payment when the brown mortar was on, the third payment when the building was completed, and the fourth payment when all bills were paid. There was in the contract no limitation in the cost of the structure, except the reference to the four payments of about \$1,000 each, as before stated. It was clearly agreed that the plaintiff was to be paid by a percentage of the actual cost of the building. It is stated in defendant's brief that plaintiff "offered and introduced in evidence the contract set forth in his amended complaint, and testified that he had complied with all the terms and conditions of the same, and performed all of his obligations thereunder. He also introduced evidence and vouchers, showing on their face the payment of the various sums testified to by him." We have found no testimony, and none has been pointed out to us, tending to contradict the payment of the amounts as stated in the vouchers, or that the several amounts so paid were not the reasonable value of the items represented by the vouchers.

It is claimed that the court should have found upon the defense set up by defendant, to the effect that the contract was in writing, exceeded \$1,000 in amount, and that it was not recorded. In our opinion it was wholly immaterial as to whether or not the contract was filed for record. The controver-

sy is between the original parties to the agreement. It does not involve any question as to a lien for material, labor, or the claim of a third party. The contract, in effect, was merely an authorization in writing, by which plaintiff was to act as agent for defendant for a compensation named in the writing. The law does not require such contract to be recorded. *Camp v. Behlow*, 2 Cal. App. 699, 84 Pac. 251.

It is claimed that the court failed to find upon the issues raised by certain affirmative allegations contained in the answer. It is not clearly pointed out as to the issues raised by the answer on which the court should have found. We have very carefully examined the answer, and we find that, after denying that the plaintiff complied with the contract on his part, or that he completed or fulfilled the terms and conditions of the contract, the defendant avers: "That plaintiff employed unskilled and incompetent workmen to perform the work and labor of constructing said building, and left unfinished and carelessly done certain portions of said building, and through incompetence and mismanagement made it necessary that a certain stairway and rooms be altered and rearranged at great delay and much additional expense; that the floors in certain rooms were improperly laid and roughly made; that the basement was not hard-coated on the outside, and, in consequence thereof, leaked and became damp and useless; that he did not build a fence about said premises." The court found that all the allegations of the amended complaint are true, except as to the amount alleged to have been paid out and expended by plaintiff under his contract with defendant, which amount the court found to be \$23 less than that named in the complaint. The complaint alleges that plaintiff, in accordance with the terms of the agreement, contracted for, purchased, and used materials and labor in the erection and construction of the building, the value of which was \$4,959.36; that the building was completed, and occupied by defendant, on or about the 9th day of September, 1905; that after deducting the amounts paid by defendant, there remained due to plaintiff from defendant the sum of \$1,063.23, for money actually expended by plaintiff for materials and labor used and employed in the erection of the building, together with \$495.94 due as commission under the contract; "that plaintiff has complied with all the terms and conditions of the said agreement, has completed and fulfilled his part thereof in every way whatsoever." It is provided in the Code that, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish on the trial facts showing such performance. Code Civ. Proc., § 457.

In the case at bar the plaintiff complied with the above-quoted section in his pleading. The allegations were controverted by defendant by a positive denial that the plaintiff had "complied with all the terms and conditions of his contract, or that he has completed or fulfilled his part thereof in every way whatsoever or in any manner or at all"; and in the same paragraph of the answer containing the above denial occur the quoted, affirmative averments upon which it is claimed the court failed to find.

In our opinion the affirmative averments were but another way of denying that the plaintiff had complied with the terms and conditions of the contract. The answer was sufficient without the affirmative matters stated, and the issue was squarely made as to whether or not the plaintiff had properly completed the building, and expended the money as alleged. If the plaintiff complied with all the terms and conditions of his contract (which the court finds that he did do), it necessarily follows that he did not employ unskilled and incompetent workmen; that he did not leave the building unfinished; that the floors in certain rooms were not improperly laid and roughly made, and so of the other alleged failures to comply with the contract. A finding that all the allegations of the complaint are true is sufficient. Such finding has always been held to negative the denials of the answer as to the allegations of the complaint. If the effect of an affirmative allegation, following and in connection with a denial, is but to emphasize the denial of the answer, it is not necessary that there should be a finding on such affirmative allegation. The object of pleadings is to arrive at the issue or issues on which the cause of action or the defense thereto depends. The object of findings is to determine such issue or issues. Findings should be so construed as to support the judgment where it can be done. If apparently inconsistent, they should be reconciled if reasonably possible to do so. If upon an immaterial issue, they should be disregarded. If, taking them as a whole, in view of the entire record, they fairly dispose of the material issues raised by the pleadings on which evidence was offered, the judgment will be upheld.

Applying the above principles to the case at bar we are of the opinion that the findings are sufficient. The evidence was conflicting as to certain portions of the work and finish of the building, and as to whether or not it was done in a workmanlike manner. The trial court heard the evidence, saw the witnesses, and appears to have patiently and carefully considered the case. It found in favor of the plaintiff against the defendant on such conflicting testimony. The defendant understood the findings, and they support the judgment.

The judgment is therefore affirmed.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 146

LEWIS v. AGOURE. (Civ. 476.)

(Court of Appeal, Second District, California.
April 21, 1908. Rehearing Denied
June 18, 1908.)

1. LANDLORD AND TENANT—SALE OF PROPERTY—CANCELLATION OF LEASE

An option to cancel a lease, in the event of a sale during the term, may be exercised by the lessors by giving the required notice and tendering the amount agreed to be paid, notwithstanding they no longer had the title, which was conveyed to the purchaser.

2. SAME—LACHES.

Prior to the date when it was possible for the lessors to put a purchaser in possession by the exercise of an option to cancel a subsequent lease, by giving notice and tendering an agreed amount, the purchaser informed the lessee that he would want possession, and would cancel the subsequent lease, so that it would never take effect, and requested lessee to retain the amount necessary to make good the exercise of the option out of the rent due on the old lease, under which the lessee then held, and lessee stated that there would be no trouble about it, and they would settle up in the fall. Thereafter the required notice was served by the lessors and their grantee, and the required amount tendered pursuant to the terms of the subsequent lease. *Held*, that there was no waiver and no laches to defeat the right of the lessors to exercise their option to make good their transfer.

Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by Joseph F. Lewis against Pierre Agoure. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Clarke & Farrand and Wellborn & Wellborn, for appellant. I. W. Stewart and Orestes Orr, for respondent.

TAGGART, J. Action to quiet title against tenant in possession of real property, under lease claimed to have been canceled. Judgment for plaintiff and defendant appeals from judgment and order denying motion for a new trial.

Plaintiff holds title in fee simple to about 8,000 acres of the Rancho Guadalupe, situate in the county of Ventura, acquired by him from M. L. Wolff et ux., by deed dated February 27, 1906. Wolff acquired title from Sarah Sloss and Hannah Gerstle, by deed dated February 19, 1906. On the 21st day of August, 1905, said Sarah Sloss and Hannah Gerstle executed to defendant (who was then in possession of said premises under a prior lease) a lease of said lands for the term of three years, from January 1, 1907, to December 31, 1909, at an annual rental of \$3,000, payable semiannually in advance. This lease contained a stipulation that the lease might be declared null and void "at the option of the parties of the first part, in the event that said parties of the first part shall sell the within-described property or any portion thereof at any time during the existence of this lease." Upon cancellation of the lease the first parties agreed to pay to the second party, if canceled during the first year, \$1,000, if during the second year, \$750, and

during the third year, \$500. In the event of such cancellation "the party of the second part agrees to vacate the premises herein demised within ninety (90) days after receipt of written notice from the parties of the first part." In addition to the deeds mentioned the lessors (Sloss and Gerstle) assigned the lease and their rights thereunder by indorsement to Wolff, and Wolff transferred his right therein to plaintiff in the same manner. On June 1, 1906, plaintiff notified defendant orally that he would cancel the lease and want possession of the premises on January 1, 1907. On or about July 1, 1906, defendant paid to plaintiff the last semiannual installment of rent due on the "prior lease," at which time plaintiff advised defendant he need pay only \$500, and suggested that he retain the other \$1,000 in consideration of the cancellation of the lease, to take effect on the 1st day of January following. Defendant declined to do this, and paid the \$1,500 in full. On December 6, 1906, plaintiff served on defendant a written notice, signed by Sarah Sloss, Hannah Gerstle, M. L. Wolff, and himself, declaring the lease canceled under the option above mentioned, and demanding possession of the premises, and, on the 21st day of December, 1906, tendered to defendant the \$1,000 provided to be paid upon cancellation of the lease. The latter refused to receive the money, and also refused to deliver possession of said lands to plaintiff, hence this action.

Appellant contends that the option to cancel the lease cannot be exercised, because it was a collateral covenant, and not one running with the land, and, the covenantees having conveyed the property without exercising the right, they no longer had any interest in the premises, and could not give the notice provided to be given—citing *Griffin v. Barton*, 22 Misc. Rep. 228, 49 N. Y. Supp. 1021; *Wheeler v. Dascomb*, 3 Cush. (Mass.) 285. Furthermore, that even if the parties to the lease intend to create a covenant to run with the land, the effort was ineffectual, as such a covenant could not be created by agreement of parties; the law having declared that only certain enumerated covenants shall run with the land. Civ. Code, § 1460 et seq. The rights of the parties under the lease must be determined by their intentions and purpose in making it, and in entering into its respective covenants, if such purpose were not illegal nor in contravention of public policy. The evident purpose of the clause in the lease in question was to confer upon the lessors, upon sale of the premises, the right to deliver possession to the purchasers. The option could be exercised only in the event of a sale. Not until the sale had been consummated could the lessee be compelled to relinquish possession upon notice and payment of the amount provided to be paid. Unless a sale had actually been made, which necessarily included a conveyance of the ranch, the lessee might well deny

the right of the lessors to cancel his lease, and compel him to deliver up the possession of the premises. To say then that the covenant could not be exercised after the conveyance by the lessors would be to hold that such an agreement could not be made, and that the clause was mere surplusage in the contract. The event, upon the happening of which the lessors would be entitled to possession, after 90 days' notice, occurred, and they exercised their option by giving the notice and tendering the amount, agreed to be paid "during the first year of the lease," \$1,000. That they no longer held the title was not material, since by the terms of the agreement that was the time fixed for exercising the option. The title and possession were presumed to pass by the conveyance, and if the grantee failed to acquire the latter by reason of any act or omission of the grantors, the latter would be liable; and the contract was a reasonable and proper one for them to enter into with the lessee in order to protect themselves against the liability resulting from such a condition. It was a contract to deliver the possession of real property, for a valuable consideration agreed upon, and could be enforced. By the exercise of the option and the tender of the money the cancellation became complete, leaving only the 90 days after notice in which to deliver possession.

There was no waiver and no laches to defeat the right of the lessors to exercise their option and make good their transfer to their grantee and his successor. The evidence shows that, seven months before the defendant could have taken possession under the lease, the purchaser of the property informed him that he would want possession of the property, and would cancel the lease, so that it would never take effect. A month later he again informed him of his intention, and requested him to retain the amount necessary to make good the exercise of the option during the first year of the lease, out of the semiannual rent then due on the old lease, under which defendant then held. At both of these times defendant stated that there would be no trouble about the matter (possession), and they would settle it up in the fall. Thus, action on the part of plaintiff, in requiring the lessors to exercise their option for plaintiff's benefit, was tolled along until December 6, 1906, when a written notice was served, and on December 21, 1906, the \$1,000 tendered, in accordance with the requirements of the lease. All this was done prior to the date that it was possible for the lessors to put plaintiff, their grantee, in possession, since the defendant held under a prior lease containing no provision for the surrender of possession upon notice. There was no laches in asserting the right. The lease having been canceled, and no right thereunder remaining in the lessee, the plaintiff, being the owner of the legal title, and entitled to the possession of the land, was entitled to

a decree. The decree entered on the 2d day of April, 1907, recognized the right of defendant to remain in possession of the premises until March 6th, 90 days after service of the notice required by the lease, and quieted plaintiff's title subject to this right of defendant. A supplemental complaint was, by leave of the court, filed on the 19th day of March, and issues as to the rights of the parties, as of that date, were included in the trial of the cause.

There is evidence to sustain the finding attacked, and the decree is supported by the findings. Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 179

DICKINSON v. KINGSBURY. (Civ. 474.)
(Court of Appeal, Third District, California.
April 24, 1908.)

RECORDS—TAKING FROM FILES—INJUNCTION.

Where the only interest claimed by petitioner in public records proposed to be temporarily removed from the state for use in a federal court, and the only damage averred was that she and all other citizens and taxpayers of the state would be deprived of their use and of the right to inspect them, and that petitioner desired to examine and inspect them in order to show the deraignment of title to lands, and that there was no other method whereby she could secure the facts and information contained in the records, she was not entitled to an injunction restraining their removal.

Original application by S. Dickinson for an injunction to restrain W. W. Kingsbury, as surveyor general and ex officio register of the State Land Office, from removing certain public records from the state, and to compel him to permit petitioner to inspect them. Writ denied.

Chas. H. Fairall, Archibald Yell, and A. M. Seymour, for petitioner. U. S. Webb, Atty. Gen., Malcolm S. Glenn, and Robert T. Devlin, for respondent.

PER CURIAM. This is an application for an alternative writ commanding the defendant, as surveyor general of the state of California and ex officio register of the State Land Office, to desist from removing certain public records from the state and to permit plaintiff to inspect the same.

It appeared at the hearing that certain criminal actions are now in progress of trial at the city of Washington, District of Columbia, before a United States court, wherein the United States is plaintiff and certain citizens thereof are defendants, in which said actions the defendants are charged with violating certain of the laws of the United States; that the United States made application to the said court, pursuant to the practice in said court in such cases made and provided, that a subpoena duces tecum issue to the defendant in the present proceeding commanding him to appear before said court, as a witness in said criminal actions, and

bring with him certain official documents, papers and records in said subpoena designated and also referred to in the petition herein, and that at the hearing of said application the parties to said criminal action appeared, and that said court, after due deliberation, duly made and entered its order directing said subpoena to issue; that the defendant herein is about to and will obey said subpoena unless restrained from so doing by this court.

At the hearing of the petition herein, the Attorney General of the state appeared and opposed the granting of said writ, and made no objection to the defendant's proceeding at once to obey said subpoena. The only interest in said records which plaintiff alleges she has, and the only damage averred in her petition that she will suffer by their temporary removal, are set forth as follows: "That plaintiff and all other citizens and taxpayers of the state of California will be deprived of the use of said records and of the right to inspect the same;" and also that "plaintiff desires to examine and inspect said records in order to show the deraignment of title to said lands and that there is no other method or means known whereby the plaintiff can secure the facts and information contained in said records."

It may well be doubted whether under any circumstances this court should interpose to arrest, in the way here proposed, the orderly procedure in a United States court, acting within its powers conferred by the Constitution of the United States and the laws of Congress. But, however this may be, we are fully satisfied that we should not do so upon the showing here made.

The writ is denied.

7 Cal. Unrep. 353

GIANELLA v. GRAY et al. (Civ. 457.)
(Court of Appeal, Third District, California.
April 25, 1908. Rehearing Denied by
Supreme Court June 24, 1908.)

INJUNCTION — COMPLAINT — SUFFICIENCY OF ALLEGATIONS—GENERAL DEMURRER.

A complaint alleged plaintiff's right to the exclusive use and occupation of land bordering on a navigable river and extending to low-water mark; that defendants had entered thereon, though prohibited to do so by plaintiff's agent, and had occupied the land above low-water mark, taken down fences, and had threatened to do so, and camped thereon, and had crossed over the land, leaving gates open, and made preparations to remain thereon, in violation of plaintiff's rights; that owing to the great number of defendants, and their repeated acts of trespass, the law furnished plaintiff no adequate protection, and that he was compelled to resort to equity to avoid a multiplicity of actions. Defendants' insolvency was alleged, and that, unless restrained by injunction, they would enter upon and occupy the land in violation of plaintiff's rights, causing irreparable injury to the lands, and compel plaintiff to bring a multiplicity of actions. It was also rather vaguely averred that the low lands lying immediately along the river bank overflow at times of high water, and are separated from the higher land by fences, and that at such times plaintiff's

stock would drown unless removed to the higher land. *Held*, that, though the complaint was not clear and distinct in its averments, from which the court might determine whether the threatened injury complained of was likely to be irreparable, or that an adequate remedy at law was not available, it was good as against a general demurrer.

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by V. Gianella against Charles Gray and others. Judgment for plaintiff restraining defendants from committing alleged acts of trespass, and from an order denying a motion to dissolve the injunction, defendants appeal. Affirmed.

Joseph T. Matlock, Jr., for appellants. Guy R. Kennedy, for respondent.

CHIPMAN, P. J. This is an action to restrain defendants from trespassing upon plaintiff's land. The amended complaint alleges plaintiff's right to the exclusive use and occupation of certain land, particularly described in the complaint, bordering on the Sacramento river at a point where the same is navigable, and that his said right extends to low-water mark of said river; that defendants heretofore "have entered upon the above-described land, though prohibited so to do by the agent and attorney of the plaintiff, have taken down fences, and camped and occupied said land above low-water mark of said Sacramento river, and that they, and each of them, threaten to remain and use said land and premises, in violation of the rights of the plaintiff, and have built and are maintaining camp and camps thereon, and have taken down fences thereon, and have threatened so to do, and have taken a horse across said land, and have said horse now on said land, above low-water mark of said Sacramento river, and have crossed through and over, and have left gates open, and are maintaining and making preparations to remain on said above-described land above low-water mark of said Sacramento river, in violation of the rights of plaintiff herein; that owing to the great number of defendants, and their constant, continuous, and repeated acts of trespass, the law furnishes plaintiff no adequate protection through the ordinary process, and he is compelled to resort to equity for relief, so as to avoid the bringing of a multiplicity of actions." Insolvency of defendants is alleged, and it is alleged that, "unless restrained by injunction, the defendants will enter upon, use, and occupy said lands and premises in violation of the rights of plaintiff, causing irreparable injury to said lands, and to the property of the plaintiff used in connection with said lands, and compel plaintiff to bring a multiplicity of actions against said defendants, and each of said defendants." It also appears from the complaint, by rather vague averments, that the low lands lying immediately along the river bank overflow in times of high water, and are separated

from the higher land by fences, and that in times of high water plaintiff's stock would drown unless removed to said higher land. The court made and entered its order, restraining defendants from committing the alleged acts of trespass, on March 14, 1907, and on the same day entered its judgment to like effect. The amended complaint was filed April 11, 1907, and on the 12th defendants filed a general demurrer thereto, and on the same day served and filed a notice of motion to dissolve said injunction on the grounds set forth in the demurrer. On April 15th the court overruled the demurrer, with 20 days' leave to answer, and on April 24th the court denied defendants' motion to dissolve the injunction. Defendants made no answer, and the appeal is from this latter order. Appellants cite *Bishop v Owens* (Cal. App.) 89 Pac. page 844, and other cases in which the principles governing this class of cases are fully stated and applied; and it is claimed that, when these principles are properly considered, the complaint will be found to be wholly insufficient. It must be conceded that the complaint is not only artificially drawn, but is not clear and distinct in its averments from which the court must determine whether the threatened injury complained of is likely to be irreparable, or that an adequate remedy at law is not available to plaintiff. A special demurrer pointing out the deficiencies in the complaint would doubtless have been sustained, but we cannot say that, upon general demurrer, it should be held to be wholly insufficient. For like reason we cannot say that the injunction is without support in the complaint.

The order denying the motion to dissolve the injunction is affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 175

BURKE v. DITTUS et al. (Civ. 470.)

(Court of Appeal, First District, California. April 23, 1908.)

1. MECHANICS' LIENS — ENFORCEMENT — GIST OF ACTION.

The gist of an action to foreclose a mechanic's lien for money due upon the building contract is the breach of the contract, and unless there is an allegation of nonpayment the complaint is demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 504.]

2. PLEADING—WAIVER OF OBJECTIONS—FAILURE TO STATE CAUSE OF ACTION—TIME FOR OBJECTION.

If a complaint makes no attempt to aver a necessary allegation the objection that it does not state a cause of action may be urged at any time even without demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1366.]

3. SAME — DEMURRER — SPECIAL DEMURRER — DEFECTIVE STATEMENT OF NECESSARY ALLEGATION.

Where a complaint in an action to foreclose a mechanic's lien for money due on the building

contract does not entirely fail to make the necessary allegation of nonpayment, but makes a defective averment thereof, the defect can be reached only by special demurrer directed to that point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 513.]

4. CONTRACTS — BUILDING CONTRACTS — SUBMISSION OF DISPUTES TO ARBITRATION — WAIVER OF RIGHT

If a building contract provides for the submission to arbitration of disputes between the contractors and the owner, the owner waives his right to such submission by accepting the building.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1317.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by E. V. Burke against F. M. Dittus and others to foreclose a mechanic's lien. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

William H. Johnson, for appellants. Will M. Beggs, for respondent.

KERRIGAN, J. This is an action to foreclose a mechanic's lien. A special demurrer to the complaint was overruled, after which the defendant answered. Thereafter a jury trial was demanded, and the court, at the request of the defendant, submitted to the jury one issue—"Was the building contract as modified, between plaintiff's assignors and the defendant F. M. Dittus substantially performed on the part of plaintiff's assignors prior to the 31st day of August, 1905?" The jury brought in a verdict in favor of plaintiff, and the court thereafter adopted this verdict, and, upon the hearing of further testimony, rendered its judgment in favor of the plaintiff and against the defendant F. M. Dittus. From this judgment, and from an order denying the motion for a new trial, this appeal is prosecuted.

The appellant contends that the complaint is fatally defective for a number of reasons, the first of which is that the complaint, being for money due upon contract, does not aver nonpayment, the allegation in that behalf being that "the whole amount due * * * is the sum of twenty-four hundred and forty dollars." Appellant's position is that this allegation is not equivalent to an averment of nonpayment; that it is a mere conclusion of law and not an averment of fact. In an action of this character the gist of the action is the breach of the contract, and unless there is an allegation of nonpayment the complaint is demurrable.

The demurrer in this case, however, is special, and does not embody as one of its grounds this particular defect. If there had been no attempt to aver nonpayment, either by an allegation amounting only to a conclusion of law, or otherwise, the complaint would not have stated a cause of action; and this could be urged at any time, even without demurrer. *Rickards v. Travelers'*

Ins. Co., 80 Cal. 505, 22 Pac. 939; *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20; *Dodge v. Kimple*, 121 Cal. 581, 54 Pac. 94; *Code Civ. Proc.* § 434. But where, as here, there is not an entire failure to state nonpayment, the averment is simply defective, and can be reached only by special demurrer directed to that point. *Grant v. Sheerin*, 84 Cal. 199, 23 Pac. 1094; *Bliss v. Sneath*, 103 Cal. 44, 36 Pac. 1029.

To support his contention appellant cites *Ryan v. Holliday*, 110 Cal. 337, 42 Pac. 891, and *Knox v. Buckman Contracting Co.*, 139 Cal. 598, 73 Pac. 428. In the former of these cases the allegation was that a specified sum "is now due," etc., and the court held that this allegation was a mere conclusion of law and not a statement of fact, and held that it was insufficient to support even a default judgment. But this case was overruled in *Penrose v. Winter*, 135 Cal. 290, 67 Pac. 772, where it was held that an averment that a specific sum "is now due and owing," etc., though a statement of a legal conclusion, was sufficient to support a judgment by default. In *Knox v. Buckman Contracting Co.*, supra, the action was upon several promissory notes. The only allegation of a failure to pay one of these notes was "that the whole of said note is owing from said defendants to said plaintiff." The demurrer interposed was general. The court held that the complaint did not state facts sufficient to constitute a cause of action, and stated that the case of *Ryan v. Holliday*, supra, was overruled by *Penrose v. Winter*, supra, "only so far as it applied * * * to a default judgment," which, the court says, "is different from a case where a plaintiff had been put on his guard by a demurrer to his complaint." The statement of the breach of the contract in that case was a conclusion of law; yet, as from it the material allegation of nonpayment was inferable, and as the defect was not raised by a special demurrer, the case would seem to be in conflict with the cases of *Bliss v. Sneath* and *Grant v. Sheerin*, supra. Here, however, the pleader was not, as in the case of *Knox v. Buckman Contracting Co.*, put upon his guard by the demurrer, but on the contrary the demurrer being special, and directing the attention of the pleader to other matters exclusively, led him to believe that in all other matters the complaint was good. Moreover, the circumstances of this case bring it within the rule laid down in *Bliss v. Sneath* and *Grant v. Sheerin*, supra.

The contract sued on provides that, if any dispute shall arise between the parties thereto regarding the completion, construction or acceptance of the building, or the value of any extra work, such matters should be submitted to arbitration; and appellant contends that there is no allegation in the complaint showing a compliance with this provision of the contract, and that, without such an allegation, the complaint fails to state a cause of action. There is no doubt in re-

spect to such agreements, that the rule is "that if the agreement is in such terms that a reference is a condition precedent to the right of a party to maintain an action, he is not entitled to maintain it until the condition is complied with." 3 Cyc. p. 595; also *Holmes v. Richet*, 56 Cal. 311, 38 Am. Rep. 54. In this connection, however, the complaint here avers in substance that immediately after entering into the contract plaintiff's assignor went to work upon the same, and furnished all the materials necessary to fully complete and carry out said contract, and that the contract was completed, whereupon the buildings were accepted by the defendant. The complaint does not disclose that any dispute ever arose between the contractors and owner about any matter which was required by the terms of the contract to be submitted to arbitration. Furthermore, if there was such a dispute appellant waived his right to have it settled by arbitration by accepting the buildings.

There are other objections to the complaint pointed out in the brief of appellant; but they are all without merit, and discussion of them in detail is unnecessary. The same may be said of the contention that several of the findings are not sustained by the evidence. We have carefully examined the record, and conclude that there is sufficient evidence to support the findings attacked.

From what has been said, it follows that the judgment and order should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 135

WILEY v. McNAB & SMITH. (Civ. 446.)

(Court of Appeal, Third District, California.
April 17, 1908.)

1. NEGLIGENCE — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action by a gate keeper for injuries from the fall on him of the gate and adjoining fence which were broken down by the negligent driving by defendant, where it is fairly debatable whether the conduct of plaintiff under the circumstances was that of a reasonably prudent and cautious person, the question of contributory negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

2. APPEAL AND ERROR—QUESTIONS OF FACT—CONCLUSIVENESS OF VERDICT.

The verdict of the jury on a question of fact is binding on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3912-3924.]

3. SAME — GIVING AND REFUSING INSTRUCTIONS—EXCEPTION TO RULINGS.

The giving or refusing of instructions to which no exception was taken in the trial court cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1516.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by G. H. Wiley against McNab & Smith, a corporation, for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas, Gerstle & Frick, for appellant.
Francis Dunn and Beatty & Sanderson, for respondent.

BURNETT, J. This is an action for damages, the gist of which is shown by the following allegation of the complaint; "That on the 10th day of July, 1904, defendant was the owner of a certain truck and team of horses; that on said day, while passing through a gateway, on Bryant street, near Tenth, San Francisco, defendant managed said truck and team negligently and with want of ordinary care and skill, so that, by reason of its negligence and want of ordinary care and skill, defendant knocked the gate and adjoining fence down upon plaintiff." Plaintiff was quite severely injured, but the jury found a verdict in his favor for only \$250.

The only question seriously discussed by appellant involves the contention that plaintiff was guilty of contributory negligence. We think it is fairly debatable whether the conduct of said plaintiff under the circumstances was that of a reasonably prudent and cautious person, and therefore its determination was properly submitted to the jury, whose conclusion is binding here.

It cannot be said as a matter of law that the position behind the gate assumed by respondent was one of danger. As declared in his brief: "He had worked seven days continuously as gate keeper. During that time many teams passed in and out daily, and no accident occurred. He concluded that any reasonably skillful and careful driver could enter the gate without accident. A position is not one of danger if a person occupying it can come to harm only through lack of ordinary skill and care on the part of another." It is true that the gate had been struck by other vehicles, but there is nothing to show that it was not the result of carelessness or inefficiency on the part of the driver, and plaintiff had no knowledge of such an occurrence. The gate was wide enough for the easy entry of the truck. Respondent was at a convenient place for the discharge of his duties as gate keeper, and where he was accustomed to stand while the gate was being used, and we cannot say that an ordinarily prudent and cautious person would have taken his station at some other point or would have anticipated such an accident.

Some criticism is made of the action of the court in giving and refusing instructions. But from the condition of the record we have a right to assume that all the instructions given were requested by appellant and that no requested instruction was refused. Besides, no exception seems to have been tak-

en, and hence the point suggested cannot be considered.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 567

WRIGHT v. COUNTY OF SONOMA.
(Civ. 392.)

(Court of Appeal, Third District, California.
February 18, 1908.)

**COURTS—JURISDICTION OF APPELLATE COURT
—TRANSFER OF APPEAL TO SUPREME COURT.**

Where the ad damnum clause of the complaint in an action to recover for supplying water asks for judgment in the sum of \$8,600, the cause is beyond the jurisdiction of the appellate court as conferred by Const. art. 6, § 4, and the appeal will be transferred to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Sampson B. Wright against the county of Sonoma. From a judgment for defendant, plaintiff appeals. Appeal transferred to Supreme Court.

T. J. Butts, for appellant. Clarence F. Lea and G. W. Hoyle, for respondent.

HART, J. This is a direct appeal to this court from the judgment and the order denying a motion for a new trial. The plaintiff brought the action to recover judgment for the sum of \$8,600, alleged to be due him from the defendant for supplying the latter with water to be used on certain public highways in said Sonoma county during certain seasons of the years 1903 and 1904. It is plainly apparent from the ad damnum clause of the complaint that the case is, by direct appeal, beyond the appellate jurisdiction of this court. Article 6, § 4, Const.

It follows that we are required to transfer the appeal to the Supreme Court. Such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 129

BECKER v. NYE, Controller. (Civ. 440.)

(Court of Appeal, Third District, California.
April 17, 1908.)

1. TAXATION—LEGACY OR INHERITANCE TAX—PAYMENT.

Inheritance Tax Act (St. 1905, p. 345, c. 314), § 11, requires the administrator or executor to pay to the county treasurer all money coming into his hands as tax on property, and it is the duty of the treasurer to give the administrator or executor duplicate receipts for such payment, one of which the executor or administrator shall send to the State Controller, whose duty it shall be to charge the treasurer receiving the tax with the amount thereof, the Controller being required to seal said receipt and countersign the same, and return it to the executor or administrator, whereupon it shall be a proper voucher in the settlement of his ac-

count, and the estate shall not be distributed until the executor or administrator shall produce a receipt so sealed and countersigned by the Controller. Section 16 (page 347) provides that the superior court shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act. *Held*, that where the court has heard and determined the matter as to the amount of inheritance tax, its order or judgment is conclusive, and the State Controller has no discretion in the matter, and cannot refuse to seal and countersign a receipt by a county treasurer made pursuant to an order of court.

**2. SAME—DETERMINATION OF AMOUNT OF TAX
—APPEAL.**

The state, being an interested party, may appeal from the determination by the superior court of the amount of an inheritance tax.

Petition by Amelle Auguste Mathilde Becker, executrix of Chas. H. Becker, deceased, against A. B. Nye, State Controller, for a writ of mandate to compel defendant to countersign a receipt for inheritance tax. Writ granted.

B. F. Driver and Wm. M. Sims, for appellant. U. S. Webb, Atty. Gen., and Malcolm C. Glenn, for respondent.

CHIPMAN, P. J. Petition for writ of mandate to compel defendant to countersign receipt for inheritance tax. The facts appearing by the petition are as follows: Charles H. Becker, plaintiff's testate, died in April, 1906, naming plaintiff as executrix of his will. All his property was community property, and plaintiff was named as sole devisee. She was duly appointed and is now the acting executrix of said will. The final account of the executrix was filed on August 13, 1907, and was settled and allowed on September 10, 1907, and "the total amount of said estate, which came into the hand of said executrix as per said final account, is the sum of \$63,402.74," and on August 13, 1907, she filed a petition for distribution of the estate. This petition came on to be heard on October 7, 1907, and on that day the court made and entered its order, reciting, among other things, that in her said petition for distribution the executrix "asked the court to fix the amount of inheritance tax due from those entitled to distribution of said estate," and that the amount of said estate coming into the hands of the executrix was as above stated. The court, at the hearing and by its order, made on October 7, 1907, fixed the amount of the tax, but refused to distribute the estate until the executrix had presented her receipt for the tax duly countersigned by the Controller. It further appeared from this order that the amount of \$63,402.74 came into the hands of the executrix, as shown by her final account, and that before the settlement and allowance of said final account, the sum of \$3,360 was allowed the widow for support and maintenance; that the item of real property in said account (describing the land), "valued in said account and the inventory and appraisement at the sum of \$19,200, together with the im-

provements thereon, valued in said account and in said appraisalment at the sum of \$3,500, was set aside to her as a probate homestead, and excluded from further administration; that among the items in said account the item of \$1,376.04 was for grain planted, raised, and harvested on the real property of said estate after the death of decedent"; that the costs of administration, including attorney's fees, also the debts of decedent paid by said executrix, including funeral expenses of deceased and expenses of last illness, amounted to the sum of \$2,133.80. After reciting the foregoing facts, the court adjudged that the real property set aside as a homestead, with its improvements, amounting to \$22,700, the family allowance of \$3,360, the costs of administration, etc., \$2,133.80, the grain planted and harvested, \$1,376.04, and the exemption of \$10,000 allowed by the inheritance tax law, making in all \$39,569.84, should be and are exempt from the payment of inheritance tax, leaving the sum of \$23,832.90 subject thereto, as follows:

\$15,000.00 at one per cent.....	\$150 00
8,832.90 at one and one-half per cent.	132 50
Total	\$282 50

It was further ordered that the said Amelie, the person entitled to have the residue of said estate distributed to her, pay to the county treasurer of Solano county the said sum of \$282.50, as the inheritance tax, and that the hearing of the petition for distribution be continued to the 14th day of October, 1907. It further appears that said executrix, in accordance with the terms of said order, on October 7, 1907, paid to the county treasurer of said county the said sum, and he accepted the same as the amount of inheritance tax due to the state from said legatee, and issued to her, as executrix of said estate, a receipt therefor in duplicate, as required by law; that thereafter, on October 12, 1907, the said executrix presented said receipt to said Controller with the request that he countersign the same, and place the seal of his office thereon, but said Controller refused, and still refuses, to comply with said request.

The plaintiff contends: First. That the superior court having adjudged the question as to the amount of the inheritance tax, its judgment is conclusive upon all persons, including the State Controller, and that the Controller has no power to question the action of the court, but must sign the receipt of the county treasurer when presented to him; his duty being merely ministerial. Second. That the grain planted and harvested after the death of the decedent, the family allowance, the expenses of administration, the probate homestead set aside to the widow, and the \$10,000 exempted by the statute, must be excluded from the total value of the property of decedent coming into the possession of the executrix, in

computing the tax thereon. It appeared that the court did not fix the amount of the tax upon any appraisalment of the value of the estate, as provided for in the inheritance tax act of 1905 (St. 1905, p. 341, c. 314), nor was it fixed prior to or at the time of settling and allowing the final account, but it was determined some time later, when the petition for distribution was noticed for hearing, and then only upon the showing made in the previously settled final account, and apparently upon values as shown in the inventory and appraisalment of the estate, made under the general provisions of the probate law.

Section 11 of the act of 1905 provides: " * * * An executor, administrator, or trustee shall not be entitled to credits in his account nor be discharged from liability for such tax, nor shall said estate be distributed unless he shall produce a receipt so sealed and countersigned by the Controller, or a copy thereof, certified by him, and file the same with the court."

Section 1669 of the Code of Civil Procedure, as amended in 1905 (St. 1905, p. 83, c. 85), provides: "Before any decree of distribution of an estate is made, the court must be satisfied, * * * that all state, county and municipal taxes * * * and any inheritance tax which is due and payable, have been fully paid."

Before distribution can be had the tax must be paid, and until that is done the estate is not in a condition to be closed. Est. of Lander (Cal. App.) 93 Pac. 202. The final account must be rendered, settled, and allowed before final distribution, and we do not see how such an account can be rendered and settled until after the amount of the tax is finally determined, so that its payment can be made to appear in the final account. And at the time the account is settled, the receipt for such payment should show that it has been countersigned by the Controller. A settlement and approval of the final account, without such action by the Controller, would, in our opinion, be premature.

Section 5 of the inheritance tax law of 1905 provides for the ascertainment of the taxable value of life estates, and estates determinable upon future events, by an appraiser to be appointed by the court. As to all other property or interests, no provision is made to determine the value of the estate, except where it is uncertain, in which case an appraiser is to be appointed by the court to determine such value. Section 14. Section 11 of the act of 1893 (St. 1893, p. 196, c. 168) seems to have required appraisalment in all cases. Why this change in the statute is not apparent. The practice throughout the state has not been uniform—some judges taking the inventory and appraisalment as the basis, while others cause an appraisalment to be made under the inheritance tax law, and still others resort to both methods. It would seem to be the better and more equitable course

to appoint appraisers, for by that means all interested parties, including the state, are served with notice, and are given opportunity to be heard in the important matter of fixing a basis for the tax. But however this may be, section 16 of the act provides that the superior court "shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act," and when the court has heard and determined the matter, its order or judgment has the qualities of other orders or judgments, and is conclusive, subject only to be reviewed on appeal. That an appeal may be taken from such order was decided in *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815; and that the state, through the district attorney or Attorney General may avail itself of the appeal we do not doubt, since the state is an interested party. Whether the question presented by counsel may still be reached by appeal from the order fixing the amount of the tax, or from the order settling the final account, or from the decree of distribution when entered, is not for us to say.

Section 11 of the act of 1905 requires the administrator or executor to pay to the county treasurer all money coming into his hands as tax on property, and it is made the duty of the treasurer to give the administrator or executor duplicate receipts for such payment, "one of which receipts said executor * * * shall immediately send to the Controller of the state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said Controller shall seal said receipt with the seal of his office, and countersign the same, and return it to the executor, * * * whereupon it shall be a proper voucher in the settlement of his accounts." The law contemplates the payment of the tax by any legatee or heir of the amount due from him, so that he may presently come into possession of his legacy or inheritance, and the receipt attesting its payment should be countersigned by the Controller and should be allowed in the executor's account. In other words, the law does not require that all the taxes from all beneficiaries should be paid at one time, and the payment represented in one receipt, as is the case here. But this section of the statute confers no judicial discretion upon the Controller by which he may exercise the right to refuse to countersign a receipt, as therein directed. Nor is there any other provision by which any revisory power is given to the Controller in the matter of fixing the amount of the tax or determining whether the court has rightly fixed it. In countersigning the receipt he decides nothing, nor should the receipt be so framed as to bind the state or conclude its right to have the question reviewed on appeal, should the state desire to appeal from the action of the court. The receipt is and should be only for so much money on account of the tax.

The object in requiring this officer to countersign the receipt is probably to give him a check upon the county treasurer, and to aid in the settlement of the latter's accounts. Ample provisions are made in sections 17 and 18 for the collection of the tax should there be failure in payment, but the duty is devolved upon the county treasurer and the district attorney; and by section 23 the county treasurer is given authority to appoint a special attorney, "who shall have all the authority conferred upon the district attorney by sections seventeen and eighteen." The Controller is given no authority anywhere in the act beyond that already pointed out, and does not figure in any part of the machinery provided for the collection of the tax or its enforcement.

The question as to whether the homestead, family allowance, expenses of administration, and debts of decedent—either or all—should be excluded from the value of the estate, and the balance only made the subject of the tax, is much argued in the briefs. The question is one of construction of the statute, and has never been decided by our Supreme Court. The decisions in other states, influenced, no doubt, by divergencies in the statutes themselves, are not harmonious, some holding that only the exemptions enumerated in the statute should be deducted, others holding that debts, but not the other items, should be exempt, and still others that all the above items should be exempt. There is likewise some disagreement as to whether the rents, issues, and profits should be taken into account, and the state given a tax upon accumulations. There is also a question as to what point of time should be taken for the valuation of the estate—whether at the death of decedent, at which time the right of the state is vested, under our law, or at the time of the appraisal. All these questions may arise in the proceedings now pending in the probate court, and as the appeal in all probate proceedings is to the Supreme Court, and not to this court, we deem it best to express no opinion upon them.

Our conclusion is that the Controller should countersign and affix his seal to a receipt showing a payment to the county treasurer of \$282.50, on account of inheritance tax in the matter of said estate, bearing date October 7, 1907. Such is the effect of the receipt shown in the petition.

Let the writ issue.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 181

WORCESTER v. KITTS et al. (Civ. 462,
(Court of Appeal, Third District, California.
April 25, 1908. On Rehearing, May
25, 1908.)

1. PUBLIC LANDS — PATENTS FROM STATE — CONCLUSIVENESS—COLLATERAL ATTACK.

A state patent under which one claims land is conclusive as to the character and condi-

tion of the land, and cannot be collaterally attacked.

2. QUIETING TITLE—CROSS-COMPLAINT—ISSUES.

In a suit to quiet title to land claimed by plaintiff under a state patent, title to land claimed by defendant, not included in the patent, cannot be litigated by way of cross-complaint.

3. SAME—JUDGMENT.

In a suit to quiet title to land claimed by plaintiff under a state patent, which conclusively established title in him as against a collateral attack, defendant could not complain of the failure of the court to include in the judgment certain of the patented lands.

On Rehearing.

4. APPEAL AND ERROR—RECORD—JUDGMENT—CORRECTION.

Where, in a suit to quiet title, it appeared that the judgment copied into the transcript did not correctly describe the land, as shown by the judgment rendered and entered, and that the latter correctly described the land claimed by plaintiff in his complaint, the judgment in the transcript would be amended, so as to describe the land mentioned in the complaint.

Appeal from Superior Court, Nevada County; F. F. Nilon, Judge.

Action by Joseph Worcester against Charles W. Kitts and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles W. Kitts, for appellants. Thos. S. Ford, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to quiet his title to certain portions of section 16, township 16 north, range 8 east, Mount Diablo base and meridian, alleging that defendants claim an interest therein adverse to plaintiff, without right, etc. Defendants, answering, deny plaintiff's alleged ownership to said lands, and aver title in defendants to certain particularly described portions thereof, and pray that they may be adjudged to be the owners of the land claimed by them, and that plaintiff has no right, title, interest, or estate in or to the same. Plaintiff had judgment in his favor as to a portion, not all the lands claimed by him, but the judgment included some of the lands claimed by defendants. Defendants appeal from the judgment, on the judgment roll alone.

The judgment contains the following recital: "The above-entitled cause was heard upon the plaintiff's complaint, filed October 4, 1904, and the amendment thereto, filed November 29, 1904, and the amended answer to the amended complaint, filed June 26, 1905, and the court, being fully advised in the premises, decrees and adjudges as follows." The judgment then describes certain of the land mentioned in the complaint, adjudging plaintiff to be the owner thereof. "It is further adjudged that defendants, and each of them, are hereby enjoined from setting up or claiming any title, possession, or right of possession to said property." It is claimed by defendants that the cause was submitted to the court, and was heard and decided upon the pleadings alone. Plaintiff denies this,

and claims that the record does not show this to be the fact, and defendants cannot assume it to be as claimed by them. There is nothing in the record, except the recitals of the judgment, from which the fact can be determined. We think the record sufficiently shows that the cause was heard upon the pleadings.

In his original complaint plaintiff pleaded patent from the state to one Farrar, and deed from Farrar to plaintiff, also patent from the state to plaintiff, but did not otherwise show title. These instruments are set out in the complaint, and their execution is not denied.

The sole question in the case is, are the state patents, under which plaintiff claims, conclusive as to the character and condition of the land? Concededly, the learned trial judge decided the case upon the authority of *Saunders v. La Purisima, etc., Co.*, 125 Cal. 159, 57 Pac. 656. In that case the land had been surveyed in 1870, and the survey approved and official plat filed. In this official plat the section was marked, and returned as agricultural land and unoccupied. In 1884 the United States certified, through its proper officer, to the state of California, that the land was unoccupied, and that there were no valid claims thereto adverse to the state. The land had been surveyed and returned by the government as agricultural in character, and so certified by the government, 20 years before the state sold it, and the purchaser had occupied it for six years before any claim was made that it was mineral. The case referred to decided that it was too late to inquire into the character of the land, and that, upon the facts as shown, the patent was a conclusive determination of the question. The facts here are wholly different. Without stating all the allegations of the answer, it was shown that most of the land in question was mineral land, and well known so to be before the grant to the state; that when it was surveyed in 1867 some of the land was occupied, and being mined for gold under mineral locations; that the survey and report and plat filed in the United States land office showed the land to be mineral; that subsequently many mineral locations were made, and were being worked up to the time this action was commenced, and after the patents issued; that the land never was certified to the state as nonmineral or agricultural, and has never been listed to the state as school land, or at all. The case, then, is altogether different in its facts from the facts in *Saunders v. La Purisima, etc., Co.*, supra, and it is contended, therefore, that it should not be governed by the latter case.

But this is a collateral attack upon a state patent, which takes it out of the rule in *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611, relied on by appellants. Besides, that case was practically overruled in *Saunders v. La Purisima, etc., Co.*, and it was therein pointed out that a very important question

was overlooked in *Hermocilla v. Hubbell*, namely: "By whom, and at what time, are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or nonmineral? And another question of equal importance is as to the effect of the patent, issued by competent authority, purporting to convey the land." The court proceeds to show, by adopting the rule laid down in *Dreyfus v. Badger*, 108 Cal. 58, 41 Pac. 279, and other cases quite fully commented upon, that "where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for a disposal of the land patented, upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. And this rule applies to the determination of the particular character of the land which is the subject of the patent." In the *Dreyfus* Case the issue was between a state patent to lieu land and a claim under the pre-emption and homestead acts. Mr. Lindley states that "the land department of the government, in recent years at least, by a uniform line of decisions, has held that mineral lands did not pass to the state under the school grants." 1 *Lindley on Mines*, § 136. Still, the question must be determined by appropriate proceedings, and may not be by collateral attack. Strong as the facts are as set forth in the answer, and conclusive as they might be if shown to be true, on a direct attack, we do not think they can be advanced in this action to overthrow the state patent. *Saunders v. La Purisima, etc., Co.* seems to so hold, and if the doctrine of that case is to be modified, it must be by the court that enunciated it.

An examination of the pleadings and judgment shows the following condition of the record: The plaintiff claims the north half of section 16, the north half of the south half and 30 acres in the south half of the south half, to wit, the north half of the southwest quarter and the southeast quarter of the southeast quarter of the southwest quarter, in all 450 acres. The judgment gives him but 130 acres, all in the southwest quarter of the section, and makes no disposition of plaintiff's claim to the north half of the section. In the description of land included in the judgment, 20 acres are twice described, to wit, the north half of the southeast quarter of the southwest quarter, and in the southeast quarter of the southwest quarter is included a tract of 10 acres, which is not included in plaintiff's patents, to wit, the southwest quarter of the southeast quarter of the southwest quarter. It also appears that defendants claim some lands which are not included in plaintiff's patents, to wit,

the south half of the southwest quarter of the southwest quarter, and also claim the 10-acre tract above mentioned, to which plaintiff is given judgment, but which is not included in plaintiff's patents. It appears, also, that defendants claim most of the land in the north half of the section to which plaintiff has patent, but of which the judgment makes no disposition. The title to lands claimed by defendants, not included in plaintiff's patents, cannot be litigated by way of cross-complaint in this action. The title set up by defendants to lands included in plaintiff's patents presents no issue, because defendants' alleged title cannot be asserted against plaintiff's patents, which latter we hold to be conclusive upon a collateral attack; and it is immaterial that the court did not give plaintiff judgment for all his patented lands. Plaintiff is not appealing, and defendants are not injured by the failure of the court to include in the judgment certain of the patented lands, since, as we have just remarked, defendants cannot in this action be heard to attack the patents.

For the reason that the court awarded land to the plaintiff not included in his patent, the judgment is reversed.

We concur: HART, J.; BURNETT, J.

On Rehearing.

PER CURIAM. Upon petition for rehearing our attention is called to the fact that the judgment copied into the transcript, by inadvertence did not correctly describe the land as shown by the judgment in fact rendered and entered by the trial court, and that the latter correctly describes the land claimed by plaintiff in his complaint and none other. These facts appear by the certificate of the clerk of the lower court. In view of the foregoing it is ordered that the judgment as shown in the transcript be so amended as to describe the land mentioned in the complaint and that the last paragraph of the opinion filed April 25, 1908, be stricken out and the following inserted in lieu thereof, to wit: The judgment is affirmed.

(153 Cal. 692)

ANGLO-CALIFORNIAN BANK, Limited, v.
GRISWOLD et al. (S. F. 4,689.)(Supreme Court of California. June 4, 1908.
Rehearing Denied July 2, 1908.)**1. DISMISSAL AND NONSUIT—WANT OF JURISDICTION.**

Where defendants served with process executed and delivered to plaintiff within three months after the commencement of the action an instrument reciting: "To the Clerk of Said Court: You will please take notice that we and each of us herewith enter our appearance * * * and consent that judgment may be entered in favor of plaintiff * * * as prayed for in said complaint"—an appearance was made within Code Civ. Proc. § 1014, declaring that a defendant appears in an action when he gives plaintiff written notice of his appearance, and a failure to file the appearance within three years did not warrant the dismissal of the action under section 581, subd. 7, providing that actions may be prosecuted where appearance has been made within three years, without service of process, especially where the instrument was filed, evidence taken, and cause submitted for judgment before a motion to dismiss was made.

2. SAME—WANT OF PROSECUTION.

In an action to foreclose mortgages executed by husband and wife, the wife for herself and as executrix of her husband's estate assented to the judgment actually given. Plaintiff prosecuted the action to judgment before a motion to dismiss was made. The wife recognized the justice of plaintiff's claim and its right to a judgment. The reason of the delay in the prosecution of the action was explained. *Held*, that the court abused its discretion in dismissing the action for want of prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 140, 141.]

Department 2. Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by the Anglo-Californian Bank, Limited, against Norman W. Griswold and others. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Jesse W. Lilienthal, for appellant. Walter H. Robinson and Jordan & Brann, for respondents.

HENSHAW, J. This is an appeal from a judgment of dismissal upon the motions of William C. Spencer and Eliza S. Eldridge, under the authority of subdivision 7, § 581, of the Code of Civil Procedure, and also upon the ground that "plaintiff has abandoned the prosecution of said action and has failed to prosecute the same with due or any diligence." The action is to foreclose mortgages upon real estate executed by Norman W. Griswold and Anna E. Griswold, his wife. These mortgages were in the form of deeds absolute. The complaint was filed April 26, 1898, and summons then issued. In the moving affidavits it is alleged, upon information and belief, that the summons was not served. This is expressly denied by the affidavits filed on behalf of the plaintiff, whereby it is established that the summons was served upon the Griswolds, and that upon July 14, 1898, they executed and delivered to plaintiff the following: "To the Clerk of Said Court:

You will please take notice that we and each of us herewith enter our appearance in the above-entitled action and consent that judgment may be entered in favor of plaintiff herein as prayed for in said complaint. Dated July 14, 1898. Norman W. Griswold. Anna E. Griswold."

It is further shown by plaintiff that the Griswolds had requested the plaintiff not to proceed with the foreclosure, in the hope and expectation that the mortgaged property might increase in value so that they would be able to pay the mortgage debt from the proceeds of sales of parts of it. Thus, upon June 7, 1899, the Griswolds executed to plaintiff an authorization "to sell or convey any and all pieces of property heretofore conveyed to you by us, or either of us, to any party or parties you may decide, and at such figures or upon such terms as you may determine, crediting all proceeds from the sale of said property to our or either of our indebtedness to your bank, and we hereby ratify and confirm any sales or conveyances you may make under this authorization." So, whatever the delay in bringing plaintiff's action to a judgment, it was attributable solely to the defendants' instance and request. It was granted out of consideration for them and for what they believed to be their best interests. In June, 1899, W. C. Spencer, one of the movants herein, commenced his action against the Griswolds to foreclose his mortgage lien upon some of the property affected by plaintiff's suit. In that action this plaintiff filed its answer, setting up its mortgages. Spencer seems to have regarded the pleading of this plaintiff in his action as a cross-complaint, since he filed a reply thereto which he styled "Plaintiff's answer to defendant's cross-complaint." Negotiations followed between this plaintiff and Spencer, to the end that the mortgages should all be foreclosed in the same action. The Spencer suit remained pending from June, 1899, to August, 1905. When it came to trial, upon August 16, 1905, objection was made to the foreclosure in the Spencer suit of plaintiff's mortgages. Then immediately, upon the afternoon of that day, this plaintiff brought this cause to a hearing, introduced evidence in its support, and introduced in evidence and filed in court the appearance of the Griswolds above set forth. After taking evidence the trial judge directed that a form of minute order and decree be prepared and presented to him. Norman W. Griswold at this time was dead, and his wife was executrix of his last will and testament. Communication was had by plaintiff with Mrs. Griswold and her attorney, and her consent was obtained to be substituted as executrix in the plaintiff's action in the place of her deceased husband; it being agreed that no deficiency judgment should be taken. Appellant then prepared a form of decree and minute order in conformity with this understanding, which met the approval of Mrs. Griswold and

her attorney, and thereafter submitted these papers to the trial judge for signature. Thus plaintiff's action had been brought to trial and was ready for decision three months before the motion to dismiss was made. As to the interest of the moving parties, Spencer's claim to relief is sufficiently outlined. He became the successor to the Griswolds' title under his foreclosure proceedings. Mrs. Eliza S. Eldridge asserts she is a creditor of the estate.

Respondents' first contention in support of the dismissal which they obtained is one of strict law, based upon what they assert to have been plaintiff's failure to comply with the mandatory provisions of subdivision 7, § 581, Code Civ. Proc. An appearance in an action under the laws of this state is defined by section 1014, Code Civ. Proc.: "A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." It appears indisputably that the Griswolds gave to plaintiff a formal notice in writing addressed to the clerk of the court, not instructing the clerk to enter an appearance, but declaring that "herewith we do enter our appearance," and this appearance was coupled with the consent that judgment might be entered in favor of plaintiff as prayed for in the complaint. Here was a strict compliance with the provisions of section 1014. The defendants gave to plaintiff written notice of their appearance. The only default, then, so far as subdivision 7 of section 581 is concerned, was in the failure of plaintiff to file this appearance within three years. But in terms this subdivision does not require a filing. It declares: "But all such actions may be prosecuted if appearance has been made by the defendant or defendants within said three years, in the same manner as if summons had been issued and served." The appearance was made within three months after the commencement of the action, by the giving to plaintiff of the written notice of appearance. Neither section 1014 nor section 581 required that the appearance should be filed within three years, or within any specified time. The time limited by section 581 is for the making of an appearance, which, we repeat, is made when written notice of appearance is given to plaintiff.

Of course, jurisdiction of a defendant is not acquired until the filing of such appearance in court (*Cooper v. Gordon*, 125 Cal. 300, 57 Pac. 1006), but the principal purpose of section 1014, Code Civ. Proc., is served in that, after giving written notice of appearance to plaintiff, the defendant is entitled to notice of all subsequent steps and proceedings in the action. In *Cooper v. Gordon*, supra, it was held that a stipulation by defend-

ant consenting that plaintiff might take judgment, though not filed until long after the three years, was, when filed, an appearance and a waiver of the provisions of subdivision 7, § 581, Code Civ. Proc., and estopped the defendant from moving to dismiss under the provisions of this section. In *Roth v. Superior Court of Los Angeles County*, 147 Cal. 604, 82 Pac. 246, the parties entered into a stipulation extending the defendant's time to plead. This stipulation was not filed, and the time was further extended by verbal stipulation until more than three years after the commencement of the action. The summons was never returned, and after the expiration of the three years defendants moved to dismiss, whereupon, in answer to the motion, plaintiff filed the stipulation. This court declared the unfiled stipulation to be an appearance, saying: "The stipulation, signed as it was by petitioner's attorneys in the action, was a virtual appearance, and none the less so because it was not filed." The case at bar is much stronger. Here the stipulation had been filed, evidence taken, and the cause submitted for judgment months before the motion to dismiss was made. Even if it be conceded (though it is not decided) that subdivision 7, § 581, contemplates that such appearance shall be filed within three years, yet the failure in this instance was, as in the cases above cited, justified and excused. If, then, the trial court dismissed this action in the belief that the language of subdivision 7, § 581, made it mandatory to do so, it follows from what has been said that the court fell into error in so doing. As pointed out in *Cooper v. Gordon*, supra, even the mandatory terms of the statute would not justify a dismissal in all cases as against the protest of the defendant who desired a trial.

Even less merit attaches to the second position taken by respondent that the court was justified in dismissing the action because plaintiff had abandoned the prosecution and had failed to prosecute it with diligence. Plaintiff had prosecuted the case to judgment before the motion was made, and assent to the judgment was actually given by Mrs. Griswold for herself and as executrix of her husband's estate. The reason of the delay was fully explained, as has above been set forth, and the attitude of the Griswolds themselves, the only defendants in the action, is sufficiently evidenced by the conduct of the widow. She manifestly recognized the justice of plaintiff's claim and its right to a judgment. It was an abuse of discretion therefore for the court to have dismissed upon the ground last indicated.

For which reason the judgment of dismissal is reversed, and the cause remanded.

We concur: LORIGAN, J.; McFARLAND, J.

(153 Cal. 698)

NAPA STATE HOSPITAL v. DASSO (S. F. 4,566.)(Supreme Court of California. June 4, 1908.
Rehearing Denied July 2, 1908.)**1. INSANE PERSONS—INQUISITION—COLLATERAL ATTACK—JURISDICTION OF COURT.**

An order of commitment to the state hospital for the insane, made by the judge of the superior court, authorized to hold examinations and determine the question of insanity, and commit to the hospital persons adjudged insane, and which shows from its recitals that the court had jurisdiction of the alleged insane person, is not subject to collateral attack, the order being no more subject to collateral attack than the orders of the superior court, acting in a proceeding by virtue of special authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 35.]

2. NAMES—IDEM SONANS.

Whether one name is idem sonans with another is a question of pronunciation, not of spelling, and though a name be incorrectly written, still if when pronounced it conveys to the ear a sound practically similar to the correct name when pronounced, the rule of idem sonans obtains, and identity of person will be presumed from the similarity of sound in the pronunciation of the names.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, §§ 12–15.]

3. SAME.

Whether the name "Dasso" is idem sonans with the name "Tasso" is for the court, after hearing the pronunciation of the name "Dasso" by the witnesses, the letters "T" and "D" being considered as interchangeable, so as to apply to their use the doctrine of idem sonans.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, §§ 12–15.]

4. INSANE PERSONS—COMPENSATION FOR SUPPORT IN HOSPITALS—STATUTES—ACTIONS.

Under the insanity law (Act March 3, 1897; St. 1897, p. 311, c. 227), declaring that the treasurer of Napa State Hospital shall have legal capacity to sue on any cause of action accruing to the hospital, an action for the support of one confined in the hospital as an insane person, may be brought in the name of the hospital by its treasurer, and the action need not be brought by the trustees thereof.

5. SAME.

An action for the support of defendant, confined in the Napa State Hospital as an insane person, by virtue of an order of commitment made by the judge of the superior court, begun in 1901, while the insanity law (Act March 31, 1897; St. 1897, p. 311, c. 227), providing for the care of insane persons, etc., was in force, may be maintained notwithstanding Act March 26, 1903 (St. 1903, p. 485, c. 364), which repeals the act of 1897, and which expressly declares that any action commenced may be prosecuted to final determination, etc.

6. STATUTES—GENERAL AND SPECIAL LAWS—"CORPORATIONS"—INCORPORATION—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 1, provides that corporations must be formed under general laws, and not by special act when considered in connection with section 4, declaring that the term "corporation," as used in the article, shall include all corporations having any powers or privileges as corporations not possessed by individuals or partnerships, etc., and when considered in relation to the entire article, refers to private corporations, and has no relation to corporations like state hospitals for the insane, which are public corporations under the control of the state, and created and acting merely as state agencies for

the protection of society and the betterment of the condition of the insane.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1608–1621; vol. 8, pp. 7619–7620.]

7. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—CLASS LEGISLATION.

Act March 31, 1897 (St. 1897, p. 311, c. 227), providing for the care and custody of the insane and the commitment of insane persons to state hospitals, and declaring that the estate of an insane person shall be liable for his maintenance, etc., is not objectionable as class legislation.

Department Two. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Napa State Hospital by C. B. Sealey, treasurer thereof, against Emanuello Dasso. From an order denying a motion for a new trial after judgment for plaintiff, defendant appeals. Affirmed.

Devoto & Richardson, for appellant. John W. Stetson and Attorney General U. S. Webb, for respondent.

LORIGAN, J. This action was brought to recover a specified sum for the care, support, and maintenance of Emanuello Dasso, alleged to be confined in the Napa State Hospital as an insane person by virtue of an order of commitment, duly made and given by the superior court of the city and county of San Francisco after proceedings regularly had, and is maintained by plaintiff under the act of the Legislature known as the "Insanity Law," approved March 31, 1897, St. 1897, p. 311, c. 227. A judgment was rendered for plaintiff, and this appeal is taken by defendant from an order denying his motion for a new trial.

It is first insisted that the court erred in the admission of evidence. On the trial plaintiff offered, and the court admitted in evidence over the objection of defendant, an order of commitment, dated February 2, 1897, made by one of the judges of the superior court in and for the city and county of San Francisco, reciting that Emanuel Tasso had been personally brought before said judge for examination on a charge of insanity, and that, upon examination of the witnesses called, and after a personal examination, he was found to be insane by said judge, and by him ordered committed to the insane asylum at Napa. It is asserted that the court erred in overruling the objection of appellant that no proper foundation had been laid by respondent for the admission of the order. While it is claimed by appellant that proceedings in matters of insanity were at the date of the commitment here in question, required to be had under section 2168 of the Political Code, and by the respondent that they were to be had under section 17 of an act providing for the management of the Napa State Asylum for the Insane (St. 1875–76, p. 137, c. 135), it is not questioned by appellant but that under either provision of the law (and they are sub-

stantially the same) the judge of the superior court had power and jurisdiction to order the commitment of insane persons to the Napa Asylum. The point made is that plaintiff should have offered in evidence the affidavit charging insanity, the warrant of arrest, the record of the examination, and all the other preliminary proceedings required to be taken, and upon which the commitment was based, before the commitment itself was admissible in evidence. We do not think this point well taken. It will be observed that this attack upon the order of commitment is a collateral one, made many years subsequent to the making of the order. Under the law the judge was vested with power to make such commitments, and hence had jurisdiction of the subject-matter. The order shows that the examination, which eventuated in the commitment here in question, was had while Tasso was personally before the judge at the hearing. From the recitals it sufficiently appears, as against a collateral attack, that the court had jurisdiction of the alleged insane person; and, in the absence of any showing to the contrary, it will be presumed that the preliminary steps which the law required to be taken in order to warrant the adjudication of insanity were regularly had. It is of no moment that the proceedings here in question were before a judge of the court acting by virtue of a special power conferred, and not a proceeding in court under the general jurisdiction of such tribunal. Power having been conferred upon the judge to hold such examination and determine the question of insanity and commit to an asylum, his orders, made by virtue of such authority, and which, from the recitals upon their face and the legal implications arising therefrom, show jurisdiction, are no more subject to collateral attack than the orders of a superior court acting in a proceeding by virtue of special authority, which it must be conceded are not. *Matter of the Application of Clary*, 149 Cal. 732, 87 Pac. 580. To allow orders made by competent authority to be attacked collaterally at any time would be to defeat the object sought in conferring it, and practically to ignore it. *Van Fleet on Collateral Attack*, p. 902. The ruling of the court under the objection we are considering was therefore correct.

But it is further insisted that the order was inadmissible, because it purported to be the commitment of one Emanuel Tasso to the asylum, and there was nothing in evidence to show that Emanuel Tasso and Emanuello Dasso, the defendant and appellant, were the same person. Of course, as far as the name Emanuel or Emanuello is concerned, no point is made, as the one is the English and the other the Italian method of spelling. The stress of the objection, however, is laid on the surnames Tasso and Dasso, the claim of appellant being that each represents a separate and distinct family name, pronounced entirely different. If this is true there was no evi-

dence of it. The trial court undoubtedly considered the names Tasso and Dasso as idem sonans. Whether one name is idem sonans with another is a question of pronunciation, not of spelling. Strict accuracy in the spelling of names is not required in legal proceedings. Though a name be inaccurately written, still, if, when pronounced it conveys to the ear a sound practically similar to the correct name when pronounced, the rule of idem sonans obtains, and identity of person will be presumed from similarity of sound in the pronunciation of the names. The letter "T" is convertible with the letter "D," and is at most but a mute articulation (*Webster's Dic.*, letters T and D), and these letters have by the courts been considered as interchangeable, so as to apply to their use the doctrine of idem sonans. For example, "*Hudson*" for "*Hutson*" (*State v. Hutson*, 15 Mo. 512); "*Witt*" for "*Wid*" (*Veal v. State*, 116 Ga. 591, 42 S. E. 705). As to the use of the letters D and T in the cases cited, it was held that the only difference between them was the very slight difference in the articulation of the letters, and that idem sonans applied. It was therefore for the court to say, after hearing the pronunciation of the name "*Dasso*" by the witnesses in the case, whether, though incorrectly spelled "*Tasso*" in the order of commitment, it conveyed to the ear when pronounced practically the same sound as would be conveyed by the pronunciation of the name if correctly written "*Dasso*." It undoubtedly concluded that it did, and, under the cases cited, was warranted in doing so.

These are the only points made by the rulings of the court in the admission of evidence.

At the conclusion of respondent's case the appellant moved for a nonsuit, among other grounds insisting that the plaintiff had no legal capacity to maintain the action, and that the act of March 31, 1897, under which it was brought, was unconstitutional for various reasons. The nonsuit was denied, and it is urged here that it should have been granted. We think not. The points that are made, as to want of legal capacity in the plaintiff to maintain the action, are, first, that the action was commenced while the insanity law of March 31, 1897 (*St. 1897*, p. 311, c. 227), was in force, and under its provisions; that said act was repealed by the act of March 26, 1903 (*St. 1903*, p. 485, c. 364), creating the State Commission of Lunacy and defining its powers; that the repeal of the act of 1897, giving the right of action, operated as an extinguishment of that right, and no law thereafter existed authorizing a judgment to be rendered against defendant; secondly, that if this was not the effect of the repeal, nevertheless the action should have been brought by the trustees of Napa State Hospital, and not by the plaintiff as treasurer thereof. This second point, made by appellant, is disposed of adversely to him, in *Napa v. Yuba County*, 138 Cal. 378, 71 Pac. 450, where it is expressly held that

such a suit is properly brought by the treasurer of the hospital. As to the first point, it is equally disposed of adversely to appellant by the statute of 1903, repealing the act of 1897, because that act expressly provides that: "No action or proceeding commenced before this chapter, or any amendments thereto, takes effect, and no rights accrued are affected by its provisions. Any action or proceeding commenced * * * may be maintained and prosecuted to final determination in the manner and form in which the same was brought." As this action was commenced in 1901, and before the repeal of the act of 1897, it comes within the benefit of the reservation in the act of 1903 immediately quoted.

As to the constitutional objections raised to the act of 1897, it is claimed that this act, establishing the Napa State Hospital, was unconstitutional, as violative of section 1, article 12, of the Constitution, declaring that no corporation can be created by special act. This section reads as follows: "Corporations must be formed under general laws, and shall not be created by special act. * * *" Section 4 of this same article defines the term "corporation," as used in section 1, to be as follows: "The term 'corporation' as used in this article shall be construed to include all corporations or stock companies having any powers or privileges as corporations not possessed by individuals or partnerships. * * *" It is apparent from these sections quoted, considered by themselves, and in relation to the entire article 12 of the Constitution dealing with corporations, that the corporations thus referred to are private corporations. They have no relation to corporations, such as state hospitals for the insane, which are public corporations, under the control and government of the state, and created and acting merely as state agencies for the protection of society and the betterment and amelioration of the condition of those citizens of the state who have the misfortune to be insane. These are created to discharge a purely beneficent and governmental function, pertaining to the care and treatment of unfortunate members of the community, and exist for governmental purposes solely. They are strictly public institutions, whose maintenance is provided for by legislative appropriations on the part of the state, whose trustees or managers are appointed by the governor, and are, in fact, public officials, whose duties are fixed by express provisions of law, and whose conduct and management is under the exclusive control of the state. They are entirely distinct from either private or municipal corporations, constitute purely public corporations acting as agencies of the state for governmental purposes exclusively. They need not have been created as corporations at all, and their creation as such, and endowment with corporate powers, was in order that the duties imposed upon the official thereof

and the administration of such institutions might be discharged more conveniently and effectually. So the Napa State Asylum, being a public corporation under the act, created solely as an agency of the state for governmental purposes, the section of the Constitution relied on by appellant can have no application to its creation as a corporation. On the subject of the nature of such corporations, see *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 South. 454; *Maia's Administrator v. Dir. of Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

As to the other constitutional objection, that the act in question is, as to the right to recover from the estates of insane persons confined in the state hospital, class legislation because providing a right of action against the estates of those confined therein only, and inapplicable to estates of those not confined therein, it is effectually disposed of in *People ex rel. Moore v. King*, 127 Cal. 570, 60 Pac. 35, and in the *Estate of Yturburru*, 134 Cal. 567, 66 Pac. 729, and a reference to those cases is all that is necessary to be said on the subject. While other constitutional objections are also made, we deem them untenable.

The order appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 686

COUTS et al. v. WINSTON et al.
(L. A. 1,960.)

(Supreme Court of California. June 3, 1908.
Rehearing Denied July 2, 1908.)

1. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.

A deed absolute in form cannot be held to be a mortgage except on clear and convincing evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 108-111.]

2. APPEAL AND ERROR—QUESTIONS OF FACT—REVIEW.

Whether the evidence showing that a deed absolute in form was a mortgage was clear and convincing was for the trial court and is not reviewable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that a deed absolute in form was intended as a mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 108-111.]

4. MONEY LENT—REPAYMENT—IMPLIED PROMISE.

Where one applied to another for a loan, and the latter acceded to the request, a promise on the part of the former to repay the money advanced is implied in fact and in law.

Shaw and Henshaw, JJ., dissenting.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Susie G. Coutts and another against Carolina M. Winston and another. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Daney & Lewis and Bicknell, Gibson & Trask (Dunn & Crutcher and Edward E. Bacon, of counsel), for appellants. Stearns & Sweet, for respondents.

SLOSS, J. In 1902 the plaintiffs executed and delivered to the defendant Carolina M. Winston a deed of certain real property in San Diego county. This action was brought to have that deed declared a mortgage, and to redeem the land. The defendants answered, denying that the instrument was intended as a mortgage, and filed a cross-complaint praying judgment for possession of the premises. Upon a trial, the findings were in favor of the plaintiffs, and they had judgment granting them the right to redeem. Appeals are taken from the judgment and from an order denying the defendants' motion for a new trial.

The only contention made by appellants is that the evidence was insufficient to justify the finding of the court that the deed from plaintiffs to Carolina M. Winston was intended to be, and in fact was, a mortgage. It is no doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey the title to land in fee simple was intended to be a mortgage. "That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot thus be changed except upon clear and convincing evidence." *Woods v. Jensen*, 130 Cal. 201, 203, 62 Pac. 473. See, also, *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; *Sherman v. Sandell*, 106 Cal. 373, 39 Pac. 797; *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *Emery v. Lowe*, 140 Cal. 379, 73 Pac. 981. But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court. *Brison v. Brison*, 90 Cal. 323, 334, 27 Pac. 186; *Mahoney v. Bostwick*, supra. In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. *Sherman v. Sandell*, supra. If therefore the evidence offered by plaintiffs, taken by itself, was sufficiently "clear, satisfactory and convincing" to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect. As was said in *Wad-*

leigh v. Phelps, 149 Cal. 627, 637, 87 Pac. 93, 98, the appellate court "will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court." Reading the record in the light of these rules, we cannot say that the finding declaring the deed in question to be a mortgage was without sufficient support in the evidence.

The land in controversy is a tract of 233 acres, the greater part of which is farming land. The plaintiff John F. Coutts had resided on the property for a number of years. The defendant Carolina Winston is his sister. In 1898 John F. Coutts and his wife, the co-plaintiff, executed a mortgage of the property to the German American Savings Bank to secure a loan of \$1,500. In 1902 the bank commenced suit to foreclose its mortgage. Coutts testified that, while this suit was pending, he wrote to John B. Winston, the husband of his sister Carolina, asking him for help, and offering to secure him with a deed if he would loan the money required to pay the mortgage. Winston replied in a letter in which he said, among other things: "If you care to accept, on the proposition to deed over the property as you suggested, I can offer you \$2,000." Coutts then went to Los Angeles, the home of the Winstons, to close the matter up. He told Mr. Winston, as he testifies: "It was very nice of him to help me. If he was going to lend that money, I would deed him the property, you know, that when the time came, if he had to have his money, there would not be any trouble between us. He could have the right to sell the property and pay himself, and if I didn't have the money, and he had to have his settlement with the bank (from which he was borrowing the money), I would get out of there and give him a quitclaim deed. * * * He said he hated to go into debt, but he would do it for me." On the same day the parties met at the office of Winston's attorneys, and steps were taken for consummating the transaction. It was finally concluded in this form: The plaintiffs executed and delivered to Carolina M. Winston a grant, bargain, and sale deed purporting to convey the property subject to the lien of the mortgage of the German American Savings Bank, and of unpaid taxes. The deed recited a consideration of \$200. Mrs. Winston executed and delivered to the plaintiff Susie G. Coutts an instrument, in form a lease of the property for one year from September 19, 1902, in which Mrs. Coutts agreed to pay the sum of \$150 as rent, and was given, on condition of her paying the rent of \$150, the option of purchasing the property at any time before the 19th day of September, 1903, for \$2,150. This amount of \$2,150 was actually paid out by Mrs. Winston. She satisfied the mortgage of the German American Savings Bank, ex-

pending \$1,950 for this purpose, and paid \$200 in cash to Coutts. The \$200, as Coutts says, is an amount which he asked Winston to loan him over and above what was needed to pay the bank. It was to pay other debts owing by Coutts. The rent of \$150 fixed in the "lease" is 7 per cent of \$2,150, and this was the rate of interest paid by Mrs. Winston on the loan negotiated by her to raise this money. The plaintiffs remained in possession of the property. At the end of the year Coutts paid to the defendants \$200, and received an extension of the option for one year. In the following year, 1904, Coutts sought a further extension, and this was granted by the Winstons for a period of six months. No payment was made by the plaintiffs within the time as so extended; their efforts to make a sale of the property having been unsuccessful. In August, 1905, the plaintiffs tendered to Mrs. Winston the amount advanced by her, with interest and costs, and demanded a reconveyance. This tender and demand were refused. At the time of the execution of the deed, in September, 1902, the land in controversy was worth, with improvements, some thousands of dollars in excess of the debt to the German American Savings Bank.

Much of the foregoing statement is based on the testimony of the plaintiff John F. Coutts. In some particulars it is corroborated by other witnesses. In many important respects it is flatly contradicted by the defendants' witnesses. But, as we have said, questions of weight or preponderance of evidence are not for this court. The trial court had the right to accept Coutts' testimony as true, and evidently did so. Thus accepted, it was plainly sufficient to justify the finding that the deed in question was intended as a mortgage to secure a loan of \$2,150 made by the defendant Carolina M. Winston. It is urged that there is no direct evidence of a promise by either of the plaintiffs to repay the amount advanced, and that there can be no mortgage if there is no indebtedness. *Ahern v. McCarthy*, supra; *Henley v. Hotelling*, 41 Cal. 28. But if, as Coutts says, he applied to the defendants for a loan, and they acceded to his request, a promise on his part to repay the money advanced in consequence of these negotiations is to be implied in fact as well as in law. The circumstances of the whole case, if we accept the testimony acted on by the trial court, are entirely consistent with the view that the parties, while in fact agreeing on a loan to be secured by mortgage, were desirous, for reasons of their own, of giving the transaction a different appearance. The plaintiff John F. Coutts, being unable to pay the mortgage upon his home, which was of much greater value than the debt, applied to his sister and her husband for help. They furnished the money necessary to pay the mortgage and other pressing debts, taking a deed of the land, and giving a paper by which the plaintiff was bound to pay interest on the amount furnished, and was given the right

to get his land back within a year upon payment of the principal sum. Mrs. Winston had theretofore had unpleasant relations with a sister, from whom she had taken a mortgage which she had been compelled to foreclose. She was particularly desirous of avoiding foreclosure proceedings. Under these circumstances, it was not unreasonable for the trial court to conclude that the defendants agreed to lend Coutts the money upon the security of his land, and attempted to put the transaction in such form that no foreclosure would ever become necessary. Coutts' promise to give the Winstons a quitclaim deed if he did not have the money does not conflict with the theory of a loan secured by mortgage. It was merely an additional assurance to the defendants that they would not have to resort to a foreclosure to bar the plaintiff's title. Indeed, the fact that such deed was thought necessary tends to show that the plaintiffs understood that they were retaining an equity which would not be lost by the mere failure to pay within the time specified in the lease.

On the whole case, we are satisfied that the court was justified in making the finding assailed.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

We dissent: SHAW, J.; HENSHAW, J.

8 Cal. App. 150

GAZOS CREEK MILL & LUMBER CO. v.
COBURN et al. (S. F. 4485.)

(Supreme Court of California. June 18, 1908.)

1. QUIETING TITLE—TIMBER AND EASEMENTS—JUDGMENT TOO BROAD.

Under a contract entitling plaintiff to cut, etc., timber on defendants' lands, and, in connection therewith, to operate a wagon road over, and to maintain a sawmill on, such lands, on quieting plaintiff's title to such rights it was improper to "perpetually" estop defendants from asserting any adverse claim, though the last contract, which supplemented the first, provided that it should remain in force until all the stumps should have been cut, since plaintiff has not an indefinite time or forever in which to remove the timber, it being presumed that it was intended that plaintiff should act with reasonable diligence, and its title to the easement to build the road and to erect a sawmill should have been quieted only during the time necessary for plaintiff to remove the timber and products from the land, and the court should have fixed the time within which plaintiff would be allowed to remove the timber.

2. CONTRACTS—ENFORCEMENT.

The law will enforce a contract as made by the parties, regardless of the hardships caused thereby, if it is supported by sufficient consideration, and the parties are competent, in the absence of fraud, duress, or mistake.

3. QUIETING TITLE—WHEN SUIT MAINTAINABLE.

One having a right to cut growing timber and easements in connection therewith can quiet his title.

4. APPEAL AND ERROR—PROCEEDINGS AFTER REVERSAL—ORDER CONSTRUED.

An order of the District Court of Appeal, reversing a judgment for plaintiff and remanding the cause for further proceedings according to the opinion, does not preclude the parties from amending the pleadings as they may be advised, or from trying any issues made by the pleading as amended.

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Gazos Creek Mill & Lumber Company against L. Coburn and another. From a judgment for plaintiff and from another denying a new trial, defendants appeal. Reversed and remanded.

The following is the opinion of COOPER, P. J. (concurred in by KERRIGAN and HALL, JJ.), in the District Court of Appeal:

"The complaint alleged that plaintiff is the owner and in possession of a right of way to construct and operate a wagon road over the route described in the complaint across the lands of defendants; also, the right to maintain a sawmill upon the lands of defendants adjacent to the described right of way; also, the right to cut the growing timber situate upon the lands described in the complaint, and manufacture the same into lumber, railroad ties, posts, shingles, wood, and other things; that the defendants claim some interest or rights in or to the said right of way and the other rights claimed in the complaint, adverse to plaintiff, but that said claim of defendants is without right and wrongful. Judgment is prayed that defendants be compelled to set forth their claims, that such claims and rights may be determined, and that plaintiff's title be quieted as against defendants. The defendants in their answer deny that plaintiff is or ever was the owner or in possession of the right of way described in the complaint, of the right to erect and maintain the sawmill, or of the right to take the timber and stumpage from defendants' lands. They admit that they claim an adverse interest in said alleged easements for the wagon road and to construct a sawmill, and in the alleged rights set forth in the complaint. They aver affirmatively that defendant Coburn is the owner 'in fee absolute of the lands designated in the complaint, and the plaintiff has no easement, right, or interest therein.' The pleadings are verified. The case was tried before the court, and at the conclusion of the evidence the court found that the plaintiff is the owner and in the possession of the right of way to construct a wagon road as set forth in the complaint, and of the right to construct, maintain, and operate a sawmill upon the lands, and of the right to cut the timber and stumpage upon the said lands; that defendants claim an interest in and to the said right of way, the right to construct and maintain a sawmill, and the right to cut and manufacture the said growing timber. Judgment was accordingly entered: 'That all adverse claims of the defendants

and each of them, and all persons claiming or to claim said premises or any part thereof adversely to plaintiff's claims and rights as set forth in its complaint, through or under said defendants or either of them, are hereby adjudged and decreed invalid and groundless, and that plaintiff be, and it is hereby declared and adjudged to be, the true and lawful owner of all the property rights, privileges, and benefits set forth and claimed in its complaint in and to the land hereinafter described, and every part and parcel thereof, and that the title of plaintiff thereto be and the same is hereby adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto or to any part thereof.' Defendants made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion for a new trial.

"It is claimed by the defendants that the judgment, which declares and adjudges that the plaintiff is the owner of all the rights and privileges set forth in the complaint, the right to construct the wagon road, the right to construct and operate the sawmill, the right to cut and take off the timber from the lands described, and 'that the title of plaintiff thereto be and the same is hereby adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claim thereto or to any part thereof,' is too broad, and gives the plaintiff greater rights than are warranted by the evidence. After careful consideration, we conclude that the contention of defendants in this regard is correct and must be sustained.

"When the plaintiff sought the aid of a court of equity to prevent it from being harassed and annoyed by adverse claims to its easements and rights, it asked the court to protect and quiet its title against wrongful claims, and not against any legal rights of others. When it filed its complaint, it asked that the alleged claims of defendants be adjudicated and determined. Thus all parties were before the court with their grievances and alleged rights and wrongs. The rights of the respective parties depended upon two certain contracts in writing, which it is necessary to set forth in order to fully understand the questions involved. The first one is as follows: 'This agreement entered into this 2d day of October, in the year of our Lord one thousand nine hundred and one, in Pescadero, San Mateo county, state of California, by and between Loren Coburn and Miss Sitara S. Upton, parties of the first part, of the town of Pescadero, county of San Mateo, state of California, and D. W. Grover and C. L. Littlefield, of the city of Santa Cruz, county of Santa Cruz, state of California, parties of the second part, witnesseth: Whereby the parties of the first

part do by these presents agree to let the parties of the second part build a wagon road commencing on the Clark ranch at a point at the mouth of the Gazos Gulch at the commencement of the woods of timber land on the Clark ranch, owned by Miss S. S. Upton, thence up the gulch going to and past the Gazos mill, now standing by the Gazos creek, up said gulch, and take and haul out from land of said Loren Coburn about forty thousand split railroad ties, more or less, and sell said ties to the best advantage and highest price that said parties of the second part can get for them, and take the proceeds of said sale and pay for building said wagon road before mentioned, and after paying for said wagon road to take what moneys there may be left and repair and put the sawmill standing on land of Loren Coburn in the Gazos creek gulch, in running order, build skid roads and start the mill up and go to sawing lumber. Said money received from sale of said railroad ties being money belonging to said Loren Coburn, and being used to improve the property of said Loren Coburn, and put it on a paying basis, viz., the following agreement, to wit, witnesseth: Whereby the parties of the first part, being Loren Coburn and Miss S. S. Upton, do by these presents bargain for themselves, their heirs and assigns, to sell to the parties of the second part, they being D. W. Grover and C. L. Littlefield, themselves, their heirs and assigns, the stumpage on all the land owned by them on the Gazos creek, being about four thousand acres more or less, all the timber, oak for wood, pine for wood, that won't make lumber, tan-bark and the tan-bark wood after the bark is peeled from the trees, redwood for wood that won't make lumber; also the timber used to make split railroad ties, split pickets, split posts, split shingles and sawed shingles, lumber measure in the following way, to wit, for clear and common lumber, one dollar per thousand feet, split ties, split posts, split pickets to be measured same as lumber by the thousand feet, split shakes, 1,000 feet lumber measure making 10,000 sawed shingles. The logs are to be scaled before sawing them at the mill, and the amount of feet sawed by scale measure to be kept on a book for that purpose. And the amount of feet sawed to be given to parties of the first part each and every week. The stumpage upon redwood and upon wood being 50 cents per cord, the stumpage on tan-bark being \$2.50 per cord, the stumpage on oak wood and tan-bark oak wood being \$1 per cord. The stumpage on all above-named lumber wood, ties, posts, pickets, shakes, shingles to be paid for as fast as sold at Pigeon Point, where the lumber, posts, pickets, shakes, shingles and wood are to be for sale. It is further agreed by the parties of the first part, Loren Coburn and Miss S. S. Upton, and D. W. Grover and C. L. Littlefield, parties of the second part, that this agreement

shall be in force from and after the signing of same by all parties aforesaid for a term of two years from October 2, 1901, to October 2, 1903, with the privilege of a continuance of five years more from the expiration of the first two years. [Signed] Loren Coburn. S. S. Upton. D. W. Grover. C. L. Littlefield.'

"The second writing was made the following April, and is as follows: 'This agreement made this 25th day of April, in the year of our Lord one thousand nine hundred and two, between Loren Coburn, of the town of Pescadero, county of Santa Cruz, in the state of California, party of the first part, and D. W. Grover and C. L. Littlefield, of the city of Santa Cruz, county of Santa Cruz, in the state of California, party of the second part, witnesseth: That the said party of the first part agrees to sell unto the the said parties of the second part all the stumpage of all kinds for manufacturing purposes on his land in the county of Santa Cruz, township 7 south, range 4 west, Mount Diablo Meridian, on sections 1, 25, 26, 32, 33, 34, 35, 36, at the prices agreed upon with the said parties of the second part, in an agreement before made, the said agreement being dated the 2d day of October, in the year of our Lord one thousand nine hundred and one, and the said parties of the second part agree to buy the above said stumpage on the said land aforesaid, at the prices agreed upon on the said land above described in an agreement under date of October 2d in the year of our Lord one thousand nine hundred and one. And this agreement shall hold good until the said stumpage shall all have been cut off of the said land before described. It is mutually agreed by and between the parties hereto that all the agreements and conditions hereof shall be binding upon the heirs, executors, administrators and assigns of the respective parties to the above agreement. In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written. [Signed] Loren Coburn. D. W. Grover. C. L. Littlefield.'

"The plaintiff became the owner by purchase of the rights of Littlefield and Grover under these contracts, and no question is raised as to plaintiff being the owner of whatever rights Littlefield and Grover acquired by virtue of such contracts. The latter agreement was signed and executed by defendant Coburn alone; but, as defendants in their verified answer allege that defendant Coburn is the owner in fee of the lands described in the complaint, it probably was not necessary for defendant Upton to sign it. We must then take the two contracts together, and from them endeavor to arrive at the understanding of the parties so as to give to the plaintiff all its rights thereunder and at the same time protect the rights of defendants. As to the hardships, advantages, or disadvantages which may result to the parties by

the proper construction of the contracts, we have nothing to do. It is the policy of the law to uphold and enforce contracts as made by the parties, regardless of the hardships that may be caused thereby. In making contracts the parties deal at arms' length, and if they are competent, in the absence of fraud, duress, or mistake, they must abide by their contracts to which they have affixed their signatures if supported by sufficient consideration.

"The evident object of the defendants in making the contracts was to sell, at the prices named, the growing timber and tan-bark on the lands described in the complaint, and get the money therefor. The object of Grover and Littlefield was to secure the said growing timber and tan-bark for the purpose of manufacturing the same, and for the purpose of making a profit on it after paying the stumpage and the expenses of manufacturing it. In order to manufacture the trees into lumber, it was necessary that Grover and Littlefield should have the right to build a sawmill upon the lands. In order to get the timber, wood, and tan-bark to the saw-mill, or off the land to the market, it was necessary to have the wagon road. Defendants, in order to sell the timber and tan-bark, were willing to and did give the right of way and the right to build the sawmill, and the right of ingress and egress for the purpose of taking off the timber. The right of way was given in consideration with and for the purposes of the contracts, and for no other purpose; and so of the right to allow the sawmill to be erected and maintained. The sawmill was to be for the sawing of the timber on the tract of land described; the wagon road was to be for hauling the lumber, tan-bark and products off the land, and for purposes in connection therewith. The agreements, taken together, constituted a sale of the timber. The price was fixed. Payments were to be made as the lumber and manufactured products were sold. The first agreement provided that it should be in force for two years, with the privilege of a further continuance for five years additional. The second or supplemental agreement provided for the sale of all the stumpage, particularly described the land, and provided that the prices should be the same as in the first agreement, and contained a clause that 'this agreement shall hold good until the said stumpage shall all have been cut off said land before described.' Although no time is fixed by the latter agreement within which the timber must be cut and removed, it is not reasonable to allow the parties purchasing the timber an indefinite time or forever to remove it. It must be presumed that the parties intended to act in good faith with each other; that the purchasers of the timber would proceed to erect a sawmill, build the road, and manufacture the timber, posts, shingles, tan-bark, and other products with reasonable diligence considering all the circumstances. It must also be

presumed that it was intended that the products should be marketed with reasonable diligence, and the stumpage paid as the sales were made, or at regular reasonable intervals of time. The title to the timber, when severed from the land and manufactured, is to pass by the terms of the contract to the plaintiff; but, on the other hand, the plaintiff must give to the defendants an account of the lumber sawed each week as provided in the contracts.

"The trial court should have quieted the title of plaintiff to the easement to build a wagon road, to erect a sawmill, for and during the time necessary for plaintiff to remove the timber and products from the land, but for no longer time. It was never intended by defendants to give these easements forever, or for any other purposes than in connection with removing the timber. The court should also have quieted the title and the right of plaintiff to cut and manufacture the growing timber upon the lands, provided it kept its contract and paid for the products as sold; but it should have heard evidence, and in view of such evidence, and what is fair and right, should have fixed the time within which the plaintiff would be allowed to remove the timber. It certainly would not be right or just or equitable to allow the plaintiff to keep the timber bound up by the contracts, and thus prevent the defendants forever from selling it. In the meantime the defendants have to pay taxes on the land while the timber is continuing to grow and probably to increase in value. We are of opinion that the contracts, although inartificially drawn, are sufficiently certain to inform the court as to the intention of the parties. It is always the duty of courts to uphold and enforce contracts if it can be done under the rules as hereinbefore stated.

"The findings in some respects are not supported by the evidence. The plaintiff is not the owner of the right of way described therein except for and in connection with the objects and purposes of the contract. Nor is it the owner of the right to erect and maintain a sawmill except for the purposes of sawing the timber off the land. Nor is it the owner forever of the right to the timber growing upon said lands. It is claimed that the plaintiff has no right to maintain an action to quiet its title, for the alleged reason that under a conveyance of standing timber, to be removed, the timber in contemplation of law is to be treated as severed from the land, and therefore converted into personal property. It is not necessary to decide the question as to the status of plaintiff's title to the growing timber as to whether or not it is to be treated as personal property. While it is yet upon the land of defendants, the plaintiff has the right to have it remain there, supported and nourished by the soil, until it has reasonable time to remove it. It has the right of way for a wagon road. It has an easement for the purpose of building and maintaining its saw-

mill. It has a right to go upon and over the defendants' lands for the purpose of removing the timber, wood, and tan-bark. The defendants claim an adverse estate or interest in and to all those rights, which is an adverse estate or interest in and to real property. In *Peterson v. Gibbs*, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107, the plaintiff, as owner of the fee, was held to be entitled to maintain an action to quiet his title against the defendant, who had a right to cut and remove the timber under a contract made with plaintiff's predecessor, and to have the adverse claim of defendant defined and determined by the judgment. It was there said that under section 738, Code Civ. Proc., it was intended in such action: 'That the court shall declare and define the interest held by the defendant, so that the plaintiff may have a decree finally adjudicating the extent of his own interests in the property in controversy. The object of the action is to finally settle and determine as between the parties all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.' On the same principle, the owner of the right to cut the growing timber, and easements in connection therewith, has the right to maintain the action to quiet his title.

"The judgment and order are reversed, and the cause remanded for further proceedings in accordance with this opinion."

Craig & Craig and William Craig, for appellants. Jordan, Treat & Brann, for respondent.

PER CURIAM. The application for rehearing in this court after decision by the District Court of Appeal for the First District is denied.

One of the principal grounds of petition for rehearing is that the order remanding the action for further proceedings is not sufficiently definite. We think that under a proper construction of the order of the appellate court the parties are not precluded from amending the pleadings as they may be advised, or from trying any and all issues that may be made by the pleadings as amended.

(153 Cal. 704)

BROWN et al. v. TOWN OF SEBASTOPOL.
(S. F. 4,663, 4,758.)

(Supreme Court of California. June 6, 1908.
Rehearing Denied July 6, 1908.)

1. EXECUTORS AND ADMINISTRATORS—PROPERTY HELD IN TRUST BY DECEDENT—PRESENTATION OF CLAIM THEREFOR.

Where recovery is sought of specific real property held in trust by decedent at the time of his death, the party seeking recovery is not asking a payment of the claim from the assets, and he need not present it as a creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 780.]

2. SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY—CONTRACT AND CONSIDERATION.

A complaint to enforce specific performance of a contract to convey land, specifically alleg-

ing that specified service rendered, and a specified sum agreed to be paid for the premises, was and is a just, fair, and adequate consideration and price for the land therein described, is not obnoxious to demurrer on the ground that it fails to present facts enabling the court to say that the consideration is adequate and the contract just and reasonable.

3. SAME—CONTRACTS ENFORCEABLE—MUTUALITY.

Though part of the consideration for sale of real property to a town was in the nature of personal service, and hence not specifically enforceable, the town may enforce such contract against the other party in default, where it pleads full performance, under Civ. Code, § 3386, providing that neither party can be compelled to specifically perform unless the other party thereto has performed or is compellable to do so.

4. FRAUDS, STATUTE OF—SALE OF REAL ESTATE—PAROL CONTRACT—EFFECT OF PART PERFORMANCE.

If, under a parol contract to convey, and after part or full payment is made, possession is delivered to and taken by the purchaser, and he enters on and occupies it, it takes it out of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 295.]

5. MUNICIPAL CORPORATIONS—POWER TO PURCHASE REAL ESTATE—RIGHTS AND LIABILITIES.

A contract of a municipal corporation for the purchase of real estate, pursuant to power conferred by Deering's Gen. Laws 1906, p. 898, § 862, subd. 2, is construed by the same laws as private contracts, and the rights and obligations of the parties will be adjudged on the same principles.

6. FRAUDS, STATUTE OF—SALE OF REAL ESTATE—EFFECT OF PART PERFORMANCE—ESTOPPEL.

Notwithstanding failure to reduce to writing a contract to sell land to a town, the owner induced defendant to expend moneys, and make valuable improvements for the benefit of his remaining property, under promise to convey. He also let the town into possession, and openly disclaimed title, and caused himself to be relieved from assessment, on the ground that it was the town's property. *Held*, that parties claiming under him were estopped to hold all the benefits received while refusing performance.

7. APPEAL AND ERROR—REVIEW—ERROR FAVORABLE TO COMPLAINING PARTY.

A party in whose favor an irregular amendment of a judgment operates cannot make any complaint thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

Department 2. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Barbara E. Brown, executrix of John A. Brown, deceased, and others, against the town of Sebastopol. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

S. K. Dougherty, for appellants. L. J. Scott and T. J. Butts, for respondent.

HENSHAW, J. Plaintiff sued to quiet title (with other lands) to a triangular piece of land situate within the corporate limits of the defendant town of Sebastopol, alleging title and right of possession in her testator. Defendant pleaded by way of answer and

cross-complaint, in the cross-complaint alleging that during his lifetime John A. Brown, plaintiff's testator, entered into a contract whereby he agreed to sell and convey to the defendant town the real property in controversy, upon consideration expressed as follows: "That defendant would remove from said premises certain houses, buildings and structures then located thereon belonging to said John A. Brown, and place said houses, buildings and structures upon other lands belonging to said John A. Brown, and would lay out, make and put in condition for use a street along and across the lands of said John A. Brown * * * and would lay out, open up, make and put in condition for use Depot street in front of and adjacent to the premises hereinbefore described, and would grade and put oil on that portion of said Depot street in front of and adjacent to said premises hereinbefore described and in front of other lands and premises belonging to said John A. Brown, and that defendant would pay to said John A. Brown the sum of \$50 when the said Depot street had been oiled as hereinbefore alleged." The complaint further alleged the performance, by defendant, of all the acts to be by it done, that defendant entered into possession of the disputed land with the acquiescence of Brown, and ever since has continued in such possession, and that, upon the death of Brown, \$50 was tendered to the executrix of his will, with the request that a deed be executed in conformity with the agreement; that the tender was refused, and the right to a deed denied. It is then alleged that the services rendered, and the sum agreed to be paid for the premises, was and is a just, fair, and adequate consideration and price for the land therein described. Issue was joined upon this cross-complaint, and a trial resulted in findings and judgment for the defendant. From this judgment, and from the order of the court denying plaintiffs' motion for a new trial, plaintiffs appeal.

A demurrer to the cross-complaint was interposed, upon the ground that it failed to state sufficient facts, in this, that there was an absence of an allegation of a presentation of a claim against the estate. But it is apparent from the cross-complaint that it is an action in equity, to enforce a trust as to specific real property; that plaintiffs hold legal title to a piece of land, which legal title, in equity and good conscience, they should be compelled to convey to defendant. It is well settled that where recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate. *Byrne v. McGrath*, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127; *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; *Estate*

of Dutard, 147 Cal. 256, 81 Pac. 519. Appellants further contend that the complaint fails to present facts that will enable the court to say that the consideration is adequate, and that the contract is just and reasonable as to the plaintiffs. But the complaint specifically alleges the fairness of the contract and the adequacy of the consideration, and is not obnoxious to demurrer upon this ground. It is again urged that there is no mutuality of remedy, because the contract could not be enforced against the town. Civ. Code, § 3386. While it is true that a part of the consideration moving from the defendant was in the nature of personal service, and therefore not specifically enforceable, yet the situation here pleaded is that expressly contemplated by section 3386, where the defendant has fully performed, in which case it is well settled that the obligation, if in other respects specifically enforceable, may be enforced in specie against the party in default. It is so held in that class of cases where the consideration is, upon the one hand, purely personal and in the nature of personal services, as instanced by *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, and *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008.

The foregoing disposes of the objections urged to the sufficiency of the complaint. Coming to the evidentiary matters, urged upon the appeal from the order denying the motion for new trial, the evidence showed that John A. Brown was the owner of a tract of land within the town limits of the town of Sebastopol, and that he had subdivided this land into lots, and sold such of them as fronted upon the existing streets. He desired the town to open a new street through his lands, the value of which to him, in the enhanced prices which he could obtain for his lots, being quite apparent. He submitted to the town trustees a proposition, to the effect that if they would open, grade, and oil as a public street a certain specified piece of his land, removing, at the town's expense, the buildings upon the course of this proposed street, in a manner satisfactory to him, replacing them in such position as he might designate, and, after doing this, pay him \$50 in addition, he would deed to the town a triangular piece of land, a little over 100 feet on each side, which would remain upon the opening of this street, as a public square or plaza. He was asked to make the offer in writing, but he replied that it was unnecessary; that his word was as good as his bond. This matter of Brown's proposition was called before the board of trustees at one of its regular meetings, and put to vote, and duly accepted, though the minutes failed to contain a record of this fact. The town, however, proceeded with the work, and completed it to the satisfaction of Brown, and with Brown's permission entered into possession of the disputed triangle. It is established, moreover, that after the work was done, Brown appeared be-

fore the board of trustees as a board of equalization, objecting to the assessment to him of the triangular tract, for the reason that it was no longer his, but was the property of the town, and the assessment was canceled, and the tract never thereafter assessed. As to the value of the triangular lot, the testimony varies, in fixing it, from \$200 to \$2,000. So far as the consideration paid by the town, it is shown that the moving of the buildings cost \$170, and that \$40 was expended to purchase oil to oil the road. Besides this, there was the necessary labor in grading and oiling the road, and the value to Brown's other lands in having an open street constructed through them in the place and manner by him desired, and without expense to him. The consideration is thus shown to have been adequate. The fact that some of the moneys thus expended in constructing the road were gathered by private subscription from the citizens, and did not come directly from the town treasury, cannot matter to appellants, and does not impair, in the slightest degrees, the substantial nature of the consideration. The finding of the court that Brown entered into the agreement with the members of the board of trustees of the town of Sebastopol, instead of with the town of Sebastopol, is without significance. The members were acting for the town, and, as has been above stated, they accepted Brown's proposition in regular meeting on behalf of the town. The evidence establishes with sufficient clearness, as the court finds, that the consideration for the contract was as above set forth, and that by the town it had been fully performed.

The informality and irregularity in allowing this contract, dealing with the transfer of lands, so to rest in parol is, of course, apparent. But, as laid down by Mr. Washburn (3 Washburn on Real Property, 215): "If under a parol contract to convey, and after part or full payment of the purchase money is made, the possession of the estate is delivered to and taken by the purchaser, and he enters upon and occupies the estate, it takes it out of the statute of frauds." See, also, *Weber v. Marshall*, 19 Cal. 447; *Moulton v. Harris*, 94 Cal. 421, 29 Pac. 706; *Calanchini v. Branstetter*, 84 Cal. 253, 24 Pac. 149. The town of Sebastopol is incorporated under the general laws of the state of California. *Deering's Gen. Laws Cal.* 1906, p. 635, c. 7, Act 2348: By section 862, subd. 2, thereof power is conferred upon the corporation "to purchase real estate." It is well settled that the contracts of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on Estoppel, § 1128: "But it is a well-settled principle, applicable

alike to the states and the United States, that whenever a government descends from the plains of sovereignty, and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court, the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons." See, also, *Sacramento Co. v. S. P. Co.*, 127 Cal. 222, 59 Pac. 568, 825; *Contra Costa Co. v. Breed*, 139 Cal. 432, 73 Pac. 189. We have here presented the case where, notwithstanding the irregularity and informality in the failure to reduce the contract to writing, the owner of the legal title induced defendant to expend moneys, and make valuable improvements for the benefit of his remaining property, under promise to convey a specific piece of land. Defendant was, by the owner of the legal title, let into possession of this land, and the owner of the legal title made open disclaimer of his title before the trustees of defendant, and caused himself to be relieved from the assessment, upon the ground that it was defendant's property. Plaintiffs here seek to hold all the benefits, while refusing performance on their part. They are estopped from so doing, under fundamental and well-settled principles. *Des Moines & Ft. Dodge R. R. Co. v. Lynd*, 94 Iowa, 368, 62 N. W. 806; *Lane v. Pacific, etc., Co.*, 8 Idaho, 230, 67 Pac. 656; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Blood v. Serena L. & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; 1 *Abbott's Municipal Corporations*, § 259; *City of Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7.

The court by its original judgment decreed that the "plaintiffs take nothing by their action." It appears that this was an inadvertence, since, to certain of the lands described in the complaint, no claim was made by the town. The court then amended this judgment by decreeing to plaintiffs, as against defendant, all the lands in the complaint described, excepting such lands as were described in defendant's cross-complaint. An appeal from the judgment was pending at the time this order was made. However irregular it may be said to have been, since it was manifestly in the interest of plaintiffs, and to correct a clear oversight, plaintiffs were not injured in any way, and should not be heard to complain.

This disposes of all the questions which we deem necessary for a consideration, and for the reasons above given the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 715

In re BULL'S ESTATE. (S. F. 4,981.)
(Supreme Court of California. June 9, 1908.)

1. STATUTES—CONSTRUCTION.

The numbering of sections in statutes is a purely artificial and unessential arrangement, resorted to for convenience only, and does not prevent the construction of the act as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 282-288.]

2. TAXATION—INHERITANCE TAX—CONSTRUCTION OF STATUTE.

Act March 20, 1905 (St. 1905, p. 342, c. 314) § 2, provides for an inheritance tax on estates not exceeding \$25,000. Section 3 provides that "the foregoing rates in section 2 are for convenience termed the 'primary rates.' When the market value of such property or interest exceeds \$25,000, the rates of tax upon such excess shall be as follows: (1) Upon all in excess of \$25,000 and up to \$50,000, one and one-half times the primary rates." *Held*, that section 2 does not relate exclusively to estates not exceeding \$25,000, but that the primary rates therein provided for are to be computed in all cases.

3. SAME—EXEMPTION LAWS—TAXING LAWS—CONSTRUCTION.

A taxing law is to be construed strictly, and this rule extends to exemptions, as well as impositions.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Alpheus Bull, deceased. From a decree requiring payment of an inheritance tax, the widow and sole legatee appeals. *Affirmed*.

Platt & Bayne, for appellant. Hartley F. Peart, for respondent.

BEATTY, C. J. This is an appeal by the widow and sole legatee from an order or decree of the superior court, requiring her to pay an inheritance tax of \$2,062.07 on the net value of her deceased husband's estate, amounting to \$121,483.05. The following table shows how the probate judge computed the amount of the tax:

	Exemption.	Taxable Inheritance.	Rate.	Tax.
First \$25,000.....	\$10,000	\$15,000 00	1 %	\$ 150 00
\$25,000 to \$50,000....		25,000 00	1½%	375 00
\$50,000 to \$100,000....		50,000 00	2 %	1,000 00
Excess over \$100,000		21,483 05	2½%	537 07
				\$2,062 07

The only item in this estimate excepted to is the first: One per cent. of the \$15,000 remaining after deducting from the first \$25,000 the widow's exemption of \$10,000. The objection to this item, amounting to \$150, is based upon appellant's construction of sections 2 and 3 of the act of March 20, 1905 (St. 1905, pp. 342, 343, c. 314), by which the inheritance tax was imposed. It is contended that section 2 relates exclusively to estates not exceeding \$25,000 in value, and makes a wholly independent provision for estimating the amount of the tax on such estates, while section 3 deals exclusively with estates exceeding \$25,000 in value (the case here),

and by its terms imposes a tax only upon the excess over that sum. It is true that by section 3, read by itself, and very literally, no tax is imposed, except upon the excess over \$25,000 of estates having a value exceeding that sum, but that section is not to be read by itself. The numbering of sections in statutes is a purely artificial and unessential arrangement, resorted to for purposes of convenience only, and can never be allowed to hinder a correct construction of the entire act. Section 2 of this act does, in terms and in fact, relate exclusively to estates not exceeding \$25,000 in value. It imposes a tax upon the unexempt portion of that sum, of from 1 to 5 per cent. according to the degree of relationship of the heir or devisee or legatee to the decedent. Section 3 imposes a tax according to a sliding scale on the excess over \$25,000 in the case of all estates exceeding that valuation, but it does not, as counsel contend, omit or exempt the first \$25,000, for by its first clause it imports the provisions of section 2. It reads: "Sec. 3. *The foregoing rates in section two are for convenience termed the primary rates.* When the market value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows: (1) Upon all in excess of \$25,000 and up to \$50,000, one and one-half times the primary rates. (2) Upon all in excess of \$50,000 and up to \$100,000, two times the primary rates. (3) Upon all in excess of \$100,000 and up to \$500,000, two and one-half times the primary rates. (4) Upon all in excess of \$500,000 three times the primary rates." The clause in italics connects the two sections, and gives to section 3 its proper construction. It shows that the intention of the Legislature was that the "primary rates" were to be computed in all cases. The rule of strict construction is invoked by appellant; the rule, that is to say, that a statute will not be held to have imposed a tax unless it is clear and explicit. It is no doubt true that a taxing law is to be construed strictly, but the rule extends to exemptions, as well as impositions, and the construction contended for by appellant would yield this absurd result: A widow succeeding to an estate of \$25,000 would pay a tax of \$150; A widow succeeding to an estate of \$25,001 would pay a tax of 1½ cents. A stranger in blood to the decedent, taking by devise or bequest an estate of \$25,000, would pay a tax of \$1,225, but if the estate was worth a dollar over \$25,000 he would pay only 7½ cents. We think a strict construction should be indulged against a rule of exemption so unequal and unjust as this would be.

The order and decree of the superior court is affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

153 Cal. 711

MCGINNIS v. MAYOR, ETC., OF CITY OF SAN JOSE. (S. F. 4503.)

(Supreme Court of California. June 8, 1908.)

1. MANDAMUS—GRANT OF MUNICIPAL FRANCHISE—CONTROL OF DISCRETION.

Act March 22, 1905 (St. 1905, p. 777, c. 578), providing as to the sale of street railroad and other franchises in counties and municipalities, that when application is filed with the governing or legislative body, it shall, in its discretion, advertise the fact, together with a statement that it is proposed to grant the same, etc., vests such body with sole power to determine, in its discretion, whether or not a franchise shall be granted at all, and its discretion is not to be controlled by mandamus requiring advertisement of a pending application in the manner provided thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 134.]

2. SAME.

Discretionary power to refuse to take any step toward granting a franchise sought continues until official action, notwithstanding any existing intention on the part of the legislative body or its members as to how they will ultimately vote, and as long as such discretionary power exists, it cannot be controlled by compelling action looking to the granting of such franchise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 134.]

3. SAME—SCOPE OF REMEDY.

The act which will be compelled by mandamus must be one to which the complaining party is entitled at the institution of his proceeding, and it is the refusal or neglect to perform an act which is enjoined as a present duty that serves as its foundation, and a writ cannot be issued which will be effectual only in the event that the inferior tribunal or board shall subsequently determine a matter then pending before it, in a certain way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 37.]

In Bank. Mandamus by J. S. McGinnis against the mayor and common council of the city of San Jose. Alternative writ discharged, and proceeding dismissed.

Partridge & Jacobs, Charles S. Wheeler (J. F. Bowle, of counsel), and S. F. Lieb, amici curiæ, for petitioner. F. B. Brown, J. E. Richards, Cobb & Rea (J. C. Campbell, Wm. B. Bosley, and S. F. Lieb, of counsel), Harry L. Titus, and Morrison, Cope & Brobeck, amici curiæ, for respondents.

ANGELLOTTI, J. Application for writ of mandamus, prayed to be directed against the mayor and common council of the city of San Jose, a municipal corporation. Plaintiff, a resident, citizen, and taxpayer of the city of San Jose, seeks by this proceeding to obtain a writ of mandate, requiring the defendants to advertise a pending application for a franchise for certain street railroads in said city, in the manner provided by an act of the Legislature of the state of California, entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," approved March

22, 1905. St. 1905, p. 777, c. 578. An alternative writ was issued upon the filing of the petition. The matter has now been submitted for decision upon a demurrer to the petition.

The questions upon which a decision is desired by counsel are: First, whether the act in question is applicable to the city of San Jose; and, second, whether such act is void under certain provisions of our state Constitution. While we fully recognize the importance of these questions, we are met at the outset by an objection to their consideration in this proceeding, which appears to us to be unanswerable. If we assume that the act in question is in all respects valid, and, further, that it constitutes the law applicable in the matter of granting street railroad franchises in the city of San Jose, we are satisfied that plaintiff would nevertheless not be entitled to the relief sought herein, or any other relief within our power to give upon this application. If this be true, the questions above stated are practically relegated, so far as this proceeding is concerned, to the category of moot or abstract questions, the determination of which in petitioner's favor could not affect the result. Under such circumstances we do not feel that this court would be warranted in entering upon their consideration.

It is alleged in the petition that on or about November 21, 1903, the San Jose & Santa Clara Railroad Company, a corporation, filed with the clerk of defendants, and presented to defendants, its petition for the franchise; "that the said mayor and common council propose and intend to grant the said franchise as petitioned for"; that they "have threatened and do now threaten to grant" the same, "without advertising in any manner in any newspaper * * * the fact of said application, and without so advertising any statement that they propose to grant the same, and without so advertising that bids will be received for such franchise, and that it will be awarded to the highest bidder"; that each and every one of them propose and intend to vote for the granting, and they will grant the franchise petitioned for without requiring any payment therefor into the city treasury, and without any sale of such franchise; that no competition for the purchase of the franchise will be permitted, and the city will thereby be deprived of a large sum of money, and the burden of the taxpayer will be greatly increased; that petitioner himself desires to bid for such franchise, and if competitive bidding is not had, will be deprived of opportunity so to do; that on December 4, 1905, petitioner demanded of the mayor and common council that they advertise for sale the said franchise, and give an opportunity to petitioner and all others to bid therefor; that notwithstanding said demand, the mayor and common council refuse to so advertise. The act of March 22, 1905, provides that

every franchise or privilege to do certain things, including the construction or operation of street or interurban railroads upon any public street or highway, "shall be granted upon the conditions in this act provided, and not otherwise." It then specifies the procedure and conditions. When an application for a franchise is filed with the governing or legislative body of the county or municipality, "thereupon said governing body shall, in its discretion, advertise the fact of said application, together with the statement that it is proposed to grant the same," in one or more newspapers of the county or municipality for a certain designated period. This advertisement must contain a statement of the character of the franchise proposed to be granted, the proposed term, if it be a street railroad, the proposed route, that the franchise will be awarded to the highest bidder, who must, during its life, pay to the county or municipality a certain portion of its gross annual receipts, and that sealed bids will be received up to a certain hour and day named therein. It then provides for the manner of said bids, the consideration thereof, the right of any person, at the time of opening of the bids, to bid a sum not less than 10 per cent. above the highest sealed bid, the sale by the governing body to the highest bidder, the execution of a bond by the successful bidder, the granting of the franchise by ordinance, and the commencement of work thereunder within a specified time.

It is very clear that this act invests the governing or other legislative body of the county, city and county, city or town, with the sole power to determine, in the exercise of its discretion, whether or not the franchise or privilege petitioned for shall be granted at all, and the only purpose of the act in this regard is to prevent the granting thereof in any other manner than that prescribed. The presentation of an application to such legislative body does not compel it to proceed to grant the franchise, or to take a single step in the direction of granting it. The Legislature has been careful to expressly provide that such body, upon the filing of the application, shall "in its discretion advertise," etc. This, of course, does not mean that the body may, in granting such a franchise, in its discretion dispense with advertising, but it does undoubtedly mean that it may, in its discretion, refrain from taking any step toward granting a franchise for the thing asked. In other words, the question whether any such franchise shall be given to any one is, notwithstanding the presentation of the application, solely with such legislative body, to be determined by it in its discretion. It is elementary that mandamus will not lie to control the discretion confided by law to an inferior tribunal or board, and no

one could contend, with any show of reason, that the legislative body of the city of San Jose could be compelled by mandamus to perform any of the acts essential, under the act, to the granting of the franchise, merely because an application for such franchise had been presented to it. This, we take it, is recognized by learned counsel for petitioner, and accounts for the presence in the petition of the allegations as to the intention of the mayor and members of the common council. But, however material these allegations might be in an application for a writ of prohibition to restrain action by the legislative body in violation of the provisions of the act, which, of course, would not lie, the functions of the body in such a matter not being in any degree judicial (see *Camron v. Kenfield*, 57 Cal. 550; *Farmers, etc., v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210, 5 Pac. 83), or in a proceeding to enjoin any such action, they do not affect the matter before us. The discretionary power to refuse to take any step toward granting the franchise sought continues to the very moment of official action by the legislative body, notwithstanding any existing intention on its part, or on the part of any of the members of the body, as to how they will ultimately vote thereon; and, as long as that discretionary power exists, we cannot control it by compelling action looking to the granting of such franchise. Such clearly would be the effect of granting the writ sought by petitioner herein.

We do not understand that a writ of mandate can be issued which shall be effectual only in the event that the inferior tribunal or board shall subsequently determine a matter then pending before it in a certain way. The act which will be compelled by mandamus must be one to the performance of which the complaining party is entitled at the institution of his proceeding. It is the refusal or neglect to perform an act which is enjoined by the law as a present duty that serves as the very foundation for the proceeding.

The point we have discussed is raised by the demurrer, and was expressly made by counsel on the oral argument. As we think that it effectually disposes of the proceeding, it will be unnecessary to consider any of the other propositions which have been elaborately and ably argued by learned counsel. If Act March 22, 1905, is a valid act, applicable to the city of San Jose, and a franchise for a street railroad is granted in violation of its terms, doubtless an adequate remedy can be found in a proper proceeding.

The alternative writ of mandate heretofore issued is discharged, and the proceeding is dismissed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(153 Cal. 725)

KULLMAN, SALZ & CO. v. SUGAR APPARATUS MFG. CO. (S. F. 4,351.)(Supreme Court of California. June 10, 1908.
Rehearing Denied July 9, 1908.)**1. SALES—IMPLIED WARRANTIES.**

Mere use of a trade-name in describing a machine in a contract of sale thereof will not carry with it implied warranties.

2. EVIDENCE—WRITTEN CONTRACTS—PAROL REPRESENTATIONS AND WARRANTIES.

Oral representations or warranties and implied warranties and all oral negotiations are merged in the complete written contract, and the parties must be bound by its terms.

3. SALES—IMPLIED WARRANTY—ARTICLE MADE FOR PARTICULAR PURPOSE.

An agreement to sell a machine for a certain price, installments to be paid on acceptance of the proposition and shipment of the machine, with an option of returning it within a certain time in lieu of the last payment, and giving no claim on the part paid, is a lease for experimental purposes with the privilege of completing the purchase, and not a sale within Civ. Code, § 1770, providing that one who manufactures an article under an order for a particular purpose warrants it reasonably fit therefor.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 6291-6306; vol. 8, p. 7793.]

4. SAME—MERCHANDISE INACCESSIBLE TO EXAMINATION.

Civ. Code, § 1771, providing that one who sells or agrees to sell merchandise inaccessible to the buyer's examination thereby warrants it sound and merchantable, does not apply to a lease of a machine to see whether it will do certain work, with a privilege of purchase on specified terms.

5. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting evidence to vary express terms of a contract of sale will not necessitate reversal of a judgment rescinding the contract, where the complaint sufficiently and explicitly charged a breach of warranty shown by competent evidence, and the court explicitly found in accordance therewith.

6. SALES—RESCISSION OF CONTRACT—BUYER'S DELAY.

Where a buyer was diligently endeavoring to bring a machine up to the standard of efficiency warranted, the time consumed in doing so, approximating 90 days from a certain date within which privilege was given of returning it, regardless of a breach and without claim to installments paid, did not lay the buyer open to the charge of unreasonable delay in offering to rescind the contract for a breach of warranty and to restore the machine.

7. APPEAL AND ERROR—REVIEW—FINDINGS AND EVIDENCE.

In reviewing findings of the trial court, the weight of the evidence will not be considered.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. Hebbard, Judge.

Action by Kullman, Salz & Co., against the Sugar Apparatus Manufacturing Company, a corporation. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Gray & Leet, for appellant. M. B. Kellogg and A. E. Shaw, for respondent.

HENSHAW, J. Plaintiff sued to rescind a contract for the purchase of a "Lillie triple-

effect evaporator," and for the recovery of such part of the purchase price as it had paid, for the failure of the machine to meet the requirements of a warranty expressed in the written contract between the parties. Judgment was given for plaintiff, and from the judgment and order denying its motion for a new trial defendant appeals.

Plaintiff is a California corporation engaged in the business of tanning hides. Defendant is a corporation engaged in the manufacture of machinery in the state of Pennsylvania. As a branch of its business, it manufactures evaporating apparatuses and machines, one of which is, by its trade-name, designated a "Lillie triple-effect evaporator."

In plaintiff's process of tanning, the hides are successively dipped in tannic solutions of constantly increasing strength. These solutions are obtained by running water over the tanbark and leaching the tannin therefrom. The first and weakest solution to which the hides were subjected was one of 18 or 20 degrees barkometer, and the solutions were gradually increased in strength to 45 or 50 degrees barkometer. When there was a failure of the water to extract as high as 18 or 20 per cent. from the tanbark, the result was a solution unsuitable for tanning uses, and thus a waste product. Plaintiff conceived the idea that it might be able to employ an evaporating and condensing apparatus whereby the percentage of tannin in these low solutions could be so increased as to make them available for use. Plaintiff then came into communication with Mr. Lillie, president of the defendant company, who inspected the tannin solutions, and thought, and so stated, that the apparatus manufactured by his company would do the desired work. Plaintiff desired defendant to lend it one of its machines for experimental purposes, not only to see whether the machine would perform the desired work, but as well to learn whether its use would be consistent with the method of tanning employed by the company. Mr. Lillie declined to lend the machine, for the very obvious reason that, if not purchased, it would be returned without compensation, as a second-hand outfit. The conversations and negotiations between the parties resulted in the following agreement, which is pleaded in the complaint, and became, without doubt or dispute, the original contract between the parties: "Gentlemen: I beg hereby to affirm the proffer made by me verbally to Mr. Kullman this morning, which was: To sell to you the Lillie triple-effect evaporator with condenser (jet not surface) vacuum pump and engine referred to in our letter to you of the 13th inst. for the sum of four thousand and four hundred (\$4,400.00) f. o. b. Philadelphia, payable as follows, viz., \$750.00 on acceptance of this proposition, \$750.00 on shipment of the plant, and \$2,900.00 ninety days after arrival of said shipment in San Francisco, you however to have the option of returning the

apparatus (i. e., triple-effect, condenser, engine and vacuum pump, with all fittings and connections furnished therewith by us) at the end of the said ninety (90) days after the arrival of shipment in San Francisco in lieu of making the said payment of \$2,900.00. Shipment of same to be by rail to the Sugar Apparatus Manufacturing Company, Philadelphia, Pa., freight prepaid by you. It is to be understood that the return of the apparatus by you will give you no claim upon any part of the \$1,500.00 paid to us on account of it, and also that the apparatus is to be shipped, if returned to us, properly packed, and in as good condition as is consistent with thirty days use of it with average care. This triple-effect is shown on the accompanying blue print 167A and will be delivered to you as shown on that print, with the addition of an engine for driving and circulating pumps and a vacuum pump and jet condenser in the place of the condenser shown on the print. With the usual supply of water to the condenser to maintain vacuum of 26 inches in the third effect, you will be able to evaporate three hundred (300) gallons of water per hour from your tannin solutions if the triple-effect is operated according to the written instructions which will be given to you in detail."

Some delay followed in shipping the machine and in placing it in plaintiff's tannery. When so placed, it worked unsatisfactorily. An expert of defendant came to the Coast, labored upon the machine, and finally reported it as being in a satisfactory condition and doing the work; whereupon, and because of the delay and the past unsatisfactory performance of the machine, a written modification of the original contract was entered into between the parties, as follows: "It is agreed between Kullman, Salz & Co., and the Sugar Apparatus Manufacturing Company that this agreement is to substitute one dated June 20, 1900, regarding price, although all other conditions referring to the efficiency of apparatus, etc., are still to remain in force as per original contract. It is hereby agreed that in consideration of one thousand dollars (\$1,000) paid by Kullman, Salz & Co., to the Sugar Apparatus Manufacturing Company, the receipt of which is hereby acknowledged, that the final and full payment on the triple-effect machine referred to in the original contract is to be \$2,000, which when paid at the expiration of ninety days from this date, is to be payment in full for apparatus complete, including freight and all incidental expenses."

From this date plaintiff continued to operate the machine until, just before the limitation of the 90 days, which the parties seemed to agree was to run from June 14, 1901 (the date of the modification of the original agreement), plaintiff gave notice of rescission. Thereafter plaintiff commenced this action for rescission and the recovery of the portion of the purchase price which it had paid. De-

fendant answered, joining issue upon these matters, and by counterclaim sought a recovery of the unpaid portion of the purchase price. The allegations of the complaint as to the breach of contract are as follows: "That the said apparatus mentioned in said written contract was warranted to be able to evaporate 300 gallons of water per hour, as specified therein, but that the apparatus delivered to said plaintiff under said contract was not able under the conditions specified, all of which were observed fully by plaintiff, to evaporate 300 gallons of water under the conditions as specified in said contract, but failed very largely to accomplish the work required thereof. That plaintiff believed the representations of said defendant and entered into said contract solely by reason of said representations and the said warranty therein contained, and said plaintiff was unable to ascertain the truth or falsity of said representations before entering into said contract. * * * That thereafter, and within due time, the said plaintiff notified said defendant that said apparatus and machine was not satisfactory, in that the same did not evaporate 300 gallons per hour, as warranted, and in fact fell very far short of said capacity, and that in other particulars said apparatus and machine did not fulfill the requirements specified in said contract, and said plaintiff offered to return said apparatus to said defendant upon receiving a satisfactory machine or the amount theretofore paid by said plaintiff on account of the purchase price of said apparatus."

The principal contention between the parties upon this appeal turns upon the interpretation of the contract and the scope to be given to its terms. By appellant it is contended that the contract is clear, plain, and unambiguous; that the only warranty of defendant was that of the ability of the apparatus to evaporate 300 gallons an hour under the conditions specified in the warranty, namely, if the apparatus "is operated according to the written instructions which will be given to you in detail"; that the only phrase in the contract, as to the interpretation of which, by any possibility, evidence should have been received, was the phrase "Lillie triple-effect evaporator"; and that when it is made to appear, as it does appear without question, that a Lillie triple-effect evaporator was in fact delivered to plaintiff, the need even of taking evidence upon this point was at an end.

By respondent it is contended: That they have pleaded that plaintiff entered into the contract solely by reason of the "representations and the said warranty" contained in the written contract. That it was thus proper for plaintiff to show that the "Lillie triple-effect evaporator" was the trade-name of a machine, which machine was held out to purchasers, under the defendant's book or catalogue, as possessing certain specified valuable

properties and characteristics, as that it could be operated by exhaust steam without pressure, that it was automatic in operation, and that it would not entrain, and therefore it was not necessary to use oil to prevent entrainment. That each of these representations were implied warranties running concurrently with the expressed warranty of capacity, and that plaintiff was therefore entitled to show a breach of any or all of them, even though they were not pleaded as warranties, but were pleaded merely as representations. Upon all of these matters the court adopted the contention of plaintiff and admitted evidence. It went even further than this, permitting plaintiff's manager to testify, as one of the representations made before the contract was entered into, that Mr. Lillie, after inspecting the plant and tannin solutions, told him "that he had an apparatus which would do that work and do it satisfactorily." The trial court in receiving this evidence did so under a sound declaration of the principles of law governing a written contract, namely, that parol evidence may not be received to add to, detract from, or vary the terms of a written instrument, and that only when an ambiguity exists may parol evidence be employed to enable the court to arrive at what was the actual meaning expressed in the contract, and that to this end, and for this limited purpose, testimony of surrounding circumstances may be given. But, while thus enunciating the true principle of law, it opened the door to the introduction of any and all kinds of evidence, notwithstanding the writing between the parties, in the further declaration: "I think I had better hear this whole story, with all its possibilities and probabilities." Following its ruling admitting all of this evidence, the trial court further embodied its conclusions upon the effect of this evidence in findings such as this: "That at the time of entering into the original contract, the defendant, by its officers and agents, represented to said plaintiff that a Lillie evaporator was possessed of certain characteristics which made it a specially valuable machine, among others, to wit: That said style of evaporator could be operated with exhaust steam, that there was and would be practically no entrainment from such a machine, that it was automatic in operation, and that it did not require the use of oil to prevent entrainment. * * * That the said apparatus furnished by defendant did not possess the qualities and characteristics as represented by said defendant at the time of entering into the agreement, in that the said apparatus was not automatic in operation; nor could said apparatus be operated with exhaust steam, and said apparatus in operation entrained very heavily, and further required the use of an immense quantity of oil to partially control said entrainment, and said apparatus at no time evaporated 300 gallons of water per hour, but failed very

largely to accomplish the work required thereof, and plaintiff in operating said machine fully observed and conformed to the conditions specified in said contract of June 20, 1900."

By its rulings and by these findings it is apparent that the court adopted the theory of the plaintiff, namely, that the representations made by defendant "at the time of the entering into the original contract" constituted warranties upon which plaintiff was entitled to rely. In recognition of the indisputable rule that where the oral negotiations of the parties have ended in a complete written contract, that contract is conclusively presumed to express the full meaning of the parties and may not be modified by any antecedent representations whatsoever, plaintiff has these rulings and findings rest for support, not as did the trial court, upon the representations made "at the time of entering into the original contract," but, as has been above stated, upon what it contends to have been the warranties implied by the use in the written contract of the trade name "Lillie triple-effect evaporator." And, in the same connection, plaintiff also calls to its aid the implied warranties declared in sections 1767, 1769, 1770, and 1771 of the Civil Code. Upon the first proposition, that the mere use of a trade-name will carry with it, under the circumstances here indicated, the warranties contended for, we are referred to no authority, and the rule is quite the contrary. Under certain circumstances, the seller of personal property does, with his sale, extend the warranties of the sections of the Civil Code above referred to, and which in this connection will hereafter be considered; but the general principle of law, well settled, is that where a complete written contract is made, oral representations or warranties, and implied warranties, and all oral negotiations are merged in the written contract, and by its terms the parties must be bound. Civ. Code, § 1625; *Mechem on Sales*, 1254; 30 *Am. & Eng. Ency. of Law*, 135; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625; *First Nat. Bank v. Hughes* (Cal.) 46 Pac. 272; *Farkas v. Monk*, 119 Ga. 515, 46 S. E. 670; *McCormick Harvester Machine Co. v. Yoeman*, 26 Ind. App. 415, 59 N. E. 1069; *Millett v. Marston*, 62 Me. 477; *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711; *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Conant v. Nat. State Bank of Terra Haute*, 121 Ind. 323, 22 N. E. 250; *Union Selling Co. v. Jones*, 128 Fed. 672, 63 C. C. A. 224; *Seitz v. Brewers Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

But if, for the purpose of explaining the phrase "Lillie triple-effect evaporator," resort may be had to the circumstances surrounding the making of the contract, still less tenable does respondent's position become. Those circumstances disclose, in accordance with the testimony of the plain-

tiff's manager, that: "We (plaintiff) wanted an opportunity of demonstrating whether it would be advisable or consistent with our processes to use a concentrator of any character or of any type, and I asked him (Mr. Lillie) whether he would send me one of his apparatuses on trial." Plaintiff desired to experiment, not alone to learn whether the machine was suitable, but whether, if suitable, it was desirable or advantageous to employ it in their manufacturing process. They desired to experiment. Ninety days was considered long enough for the experiment. It was reasonable that they should pay in case they decided not to accept the machine, since upon its return it would be second-hand and of less value. Defendant agreed to furnish plaintiff with a designated type of machine of its own manufacture, precisely as, in the Seitz Case above cited, the refrigerating company agreed in writing to supply Seitz with a machine of its own manufacture designated as "No. 2 size refrigerating machine." The very fact that plaintiff was allowed the 90 days time for experiment negatives the idea that defendant was warranting, or was called upon to warrant, or was expected to warrant, the machine in any other than the one particular—that it would concentrate the tannin solutions by evaporating therefrom 300 gallons per hour. It is not until near the expiration of the 90 days that plaintiff makes complaint of the unsatisfactory working of the machine, and then only of its inability because of its small size, to evaporate the 300 gallons per hour. Mention in one of the letters of plaintiff is made of the fact that the machine requires an excessive amount of oil to prevent entrainment, though this statement is coupled with the further one that "on this score we are not disposed to raise serious objection." Moreover, it is shown that, at and previous to the time when plaintiff finally declared to defendant the unsuitableness of the machine, it was desiring to purchase a larger machine of the same Lillie type with the capacity of evaporating a thousand gallons per hour. So that, as well from the surrounding circumstances as from the letter of the law applied to this contract, it is clear that no warranty was extended by defendant other than that expressed as to the condensing capacity of the plant.

Nor can we perceive that respondent's position is bettered by the invocation of the sections of the Civil Code which are called to its aid. Section 1767 is to the effect merely that one who sells personal property, knowing that the buyer relies upon his advice or judgment warrants to the buyer that the seller does not know of the existence of any fact concerning the thing sold which would to his knowledge destroy the buyer's inducement to buy. No pleading and no evidence touches this section of the Code. Section 1769 is to the effect that the seller of an article of his own manufacture warrants

it free from any latent defects not disclosed to the buyer. Nothing in the pleadings or proof touches this section. Section 1770 is to the effect that one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose. The pleadings are silent as to this, but moreover, this was not such a sale as is contemplated by section 1770, but was a lease of the apparatus for experimental purposes, with an option to return at the expiration of 90 days under any circumstances, and with the privilege of completing the purchase upon designated terms if, after experiment, plaintiff should be satisfied to retain it. And that the machine in question was reasonably fit for the purpose is shown from the evidence of plaintiff itself, where it insisted upon its right to continue the use of the machine until another was installed. Section 1771 is to the effect that one who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants it sound and merchantable, a provision which, by no possibility, can be held applicable in the case at bar.

It follows from the foregoing that the court erred in admitting the evidence referred to, and still further erred by permitting the evidence so introduced to vary the express terms of a complete and unambiguous written contract. But while this was error, it was not such error, under the facts here presented, as to necessitate a reversal of the judgment and a new trial, for the complaint sufficiently and explicitly charged on a breach of warranty, and the court explicitly found in accordance with the allegation of the complaint. True, the evidence is conflicting; that on behalf of appellant establishing that the machine successfully evaporated in excess of 300 gallons an hour in the tests made by its agent before the supplemental contract of June 14, 1901, was entered into, and that again in 1902, while the machine was still being used in plaintiff's business. It was once more tested by the agent of defendant and shown to fulfill the requirements of the warranty. But, upon the other hand, the evidence on behalf of plaintiff, which the court adopts in its finding, was that, while strictly conforming to the directions given by defendant for the use of the machine, it was incapable of doing the work warranted. This finding, then, of a breach of warranty, is sufficient to sustain the judgment if plaintiff's offer of rescission was timely made. Upon this latter matter it is to be borne in mind that plaintiff's right of rescission was entirely independent of its contractual right to return the machine. The latter it could do within the stipulated time, regardless of any breach of warranty and without assigning any reason whatsoever for such return, paying merely for the use of the machine as contemplated by the contract. But the offer to rescind, which existed en-

tirely independent of this right to return, could be founded only upon a substantial breach of the contract, which the court found to exist, and upon a timely offer to restore. It may not be said, under all the evidence in the case, that the offer of plaintiff in this regard was not timely. Plaintiff's testimony shows that it was diligently endeavoring to bring the machine up to the standard of efficiency warranted, and the time which it consumed in this, though approximating 90 days from June 14th, does not lay it open to the charge of an unreasonable delay. True, much argument is advanced by appellant upon the conflicting evidence in the case, to the general effect that plaintiff was not sincere either in its offer to rescind or in its mode of rescission, but that it was endeavoring merely to obtain a larger type of defendant's machine at an unconscionable advantage. But this, after all, is but an argument addressed to the weight of the evidence, which, in view of the adverse finding of the court, may not here be considered.

For the foregoing reasons, the order and judgment appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

8 Cal. App. 200

BARRY v. BEAMER et al. (Civ. 460.)

(Court of Appeal, Third District, California. April 25, 1908. Rehearing Denied by Supreme Court June 24, 1908.)

1. TRIAL—FINDINGS—PROBATIVE FACTS.

While it is improper and unnecessary for the court to find probative facts without evidence to sustain the findings, such error is immaterial where the court's finding of the ultimate fact is sufficiently supported by the evidence.

2. SPECIFIC PERFORMANCE—CONTRACT TO WILL—EVIDENCE.

In a suit for specific performance of a contract by testator to will all his property absolutely to complainant, evidence held to warrant a finding that such contract was in fact made, that complainant performed her part thereof, and that testator violated the same by making the will conveying the property to trustees for complainant's support for life, with remainder to testator's nieces.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 393.]

3. SAME—CONTRACT TO WILL.

Where a contract by which testator agreed to will complainant all his property in consideration of her services was definitely and fully established, and it did not appear that the legal or equitable rights of any innocent third person would be affected, complainant, having performed her part of the contract, was entitled to specific performance thereof.

4. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—FINDINGS OF TRIAL COURT.

The appellate court, in reviewing an appeal in a suit for specific performance of a contract, would not be warranted in declaring that the contract was not definite, certain, and just as found by the trial court, unless the record evidence required such a decision as a matter of law.

5. SAME—CONFLICTING EVIDENCE.

To the extent that the determination of a trial court rests on mere preponderance of evidence, or on the consideration of conflicting or contradictory evidence, the findings are not open to review on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Lucy A. Barry against R. H. Beamer and another, as trustees under the will of George J. Garey, deceased, and others. Judgment for plaintiff, and, from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Clark & Anderson, for appellants. N. J. Barry, for respondent.

HART, J. The object of this action is to secure the specific enforcement of an alleged oral agreement entered into by and between George J. Garey, in his lifetime, and the plaintiff, by which, it is claimed the first named agreed to will all his property to the plaintiff herein. The court gave plaintiff judgment. Thereafter a motion for a new trial was made and the same denied by the court. From the order denying said motion this appeal is taken.

The complaint alleges: That the plaintiff and George J. Garey were brother and sister; that in the month of October, 1900, the plaintiff, who was then about 73 years of age, was, and had been for some years, a resident of Marysville, and at that time owned a small farm near that city, making her own living from the products of said farm; that she was living alone, and, at the time we are speaking of, she was visited by her brother, George J. Garey, who was a bachelor, aged about 63 years, residing at Ash Valley, in Lassen county, where he was engaged in the business of raising cattle, and where he owned considerable property, both real and personal; that Garey was then in ill health and declared to the plaintiff that "he was living in a very rough and comfortable manner" in Lassen county, and he "was dependent entirely upon hired help for assistance in his said business of farming and raising cattle, and was dependent upon such persons as he could hire to keep house for him and to give him the comforts of life, and was, a great portion of the time, compelled to live among men without such comforts as may be acquired through the assistance and society of women, and was compelled to do his own cooking, washing, and mending, and general housekeeping; that he was growing old and had not a great while to live, and he greatly desired in his declining years to have some one of his own blood near him to give to his old age the comforts of a home, to care for him in his sickness, to do his general housekeeping, to see to the cooking of his food, his washing and mending, and particularly to give to him that love

and affection due from a sister to a brother"; that at the time mentioned said Garey agreed with the plaintiff that, if she would lease her property near Marysville until such time as the same could be sold, and in the meantime go with him to his home in Ash Valley, there to remain with him as long as he or she lived, and would take charge and care of the general housekeeping duties for him, and look after and minister to his wants and necessities in sickness, and would allow him to take the money derived from the leasing and sale of her said property, to be used by him in his said business, that he would support and care for her as long as he or she lived without any expense to her, and that he would make a will and thereby give, devise, and bequeath to her absolutely for herself all of the property of every kind or nature which he might own at the time of his death; that plaintiff agreed to this proposition, leased her said property, and went to the home of Garey, remaining there and acting as his general housekeeper and otherwise taking care of him until the time of his death, on the 30th day of October, 1905; that plaintiff, in accordance with said agreement, gave and turned over to said Garey all moneys she received under the lease and also the money realized from the sale of her property, of which she subsequently disposed by a sale; and that Garey used the same in his business. It further appears from the complaint that, upon the death of Garey, a last will and testament executed by him in Yolo county on the 4th day of February, 1904, was found and presented to the probate court for probate, and that by the terms of said will all his property was devised and bequeathed to the trustees, herein named as defendants, to be held by them "for the abundant support and maintenance of my sister," the plaintiff herein, with the remainder, if anything remained, of the estate after her death, to his "two nieces, Katie Garey and Lulu Garey, daughters of my deceased brother, M. J. Garey."

The answer denies all of the allegations of the complaint, and alleges that Garey had supported and maintained plaintiff for many years prior to the time that she went to his home; that plaintiff did not at any time derive sufficient means from the products of her farm near Marysville from which she could support herself; that said farm was of little value, was subject to overflow, was strongly impregnated with alkali, and was, consequently, very unproductive; and that it frequently happened that such crops as she planted did not grow or mature. It is further alleged that in consequence of the poverty of plaintiff and her inability to properly support herself, Garey had advanced to and loaned her money, and that, finally, on account of her extreme old age and growing helplessness, and out of compassion for her, and believing that he could the better care for her, and render to her the succor

necessary in her helpless condition, he invited her to come to his home in Lassen county to live with him; that she went to his home under the circumstances thus indicated; and that Garey "continued to care for her as he had in the past, looking out for her wants and comforts." The answer also alleges that, at the time of the death of Garey, the plaintiff was and "is now indebted to his estate in an amount in excess of any claim made by the said Lucy A. Barry in said complaint."

The contention of the appellants is that the evidence is insufficient to sustain the essential and important findings of the court. The complaint urged by appellants that, among its findings, the court found certain probative facts to be true without evidence to justify such findings, appears to be well founded; but we think that, notwithstanding that fact, the court's findings of the ultimate fact derive sufficient support from the evidence. It is manifestly unnecessary to make findings of the probative facts, or, in other words, of the evidence introduced for the purpose of proving the ultimate fact or the fact in dispute; but such findings will not vitiate the findings of the ultimate fact, if the evidence is of sufficient strength to support them. And it may be stated that the rule is that, even where probative facts only are found, yet if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient. *Emmal v. Webb*, 36 Cal. 197; *Biddell v. Brizzolara*, 56 Cal. 381; *Packard v. Johnson*, 57 Cal. 183; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576. Therefore it follows that, if the evidence as shown by the record justifies the findings that the agreement as pleaded, and for the enforcement of which this suit was instituted, was made and entered into by and between the deceased and the plaintiff, and that the latter performed her part thereof, then the ultimate fact is established by the findings, upon which, under the law, the judgment rests in perfect security, assuming the contract as proved is one enforceable in equity, although some of the probative facts found by the court may not be warranted by the proofs.

The court, as we have seen, found that said agreement was made by the deceased and plaintiff; that the plaintiff carried out and performed her part thereof; that the deceased violated the terms of the agreement by failing to devise, by his last will and testament, all the property of which he died seised absolutely to the plaintiff; that, on the contrary, he gave, by will, all his property, except a life estate therein granted to plaintiff, to two nieces; and, as a conclusion of law, found that the plaintiff was entitled to a specific performance of said agreement. The only questions in the case, then, are: (1) Does the evidence support the findings? (2) Is the agreement as pleaded and as found by the court to have been made one which a

court of equity may and ought to enforce? These questions may be answered by an examination of the evidence as presented and the equitable principles which recognize contracts of the nature of the one here alleged, resting, as this does, entirely in parol, and which sustain the enforcement of the terms thereof.

The evidence addressed to the merits of the controversy and received by the court on behalf of the plaintiff is undisputed, so far as any attempt to impeach or contradict it by the defendants appears from the record, except such effort as was made to do so by the cross-examination of plaintiff's witnesses. The testimony of the plaintiff shows that the transaction involving the making of the agreement occurred under the circumstances, substantially, as alleged in the complaint; that the deceased, who had for many years been living the life of a bachelor on his Lassen county ranch, having and enjoying none of the ordinary comforts of a home, had visited the plaintiff at her residence near Marysville in October, 1900, and then and there importuned her to dispose of her possessions, turn over the money realized therefrom to him, to be used in his business, and to go to his home, live with and take care of him, and to exercise a general supervisory control over his household affairs; that he promised her that, if she would do as he thus requested and desired, he would give to her, by will, all the property of which he was the owner at the time of his death, if she outlived him, provided, further, that in the event that she should die first, then whatever property she might have she would give to him; that she accepted the proposition thus made by her brother, first leased her farm, consisting of 160 acres, and turned over to him the money received as the rent therefor, and thereafter sold said farm, and, after paying off some debts, gave to Garey the balance; that she went to Garey's Lassen county farm, and there remained, from the year 1900 until his death in the month of October, 1905; that during all that time she managed and superintended his home affairs, by cooking, washing, mending his clothes, and generally doing all the service ordinarily incident to the duties of a housewife; and that she took care of Garey when he was ill, at all times treated him tenderly and affectionately, and gave him home comforts to which he had previously been unaccustomed on said farm. The plaintiff testified that she had always made a comfortable livelihood on her own farm by raising grain, vegetables, chickens, and turkeys; that she often employed two or three men to assist her in sowing and gathering her crops and vegetables and in disposing of the products of her farm; that she was always surrounded by circumstances of comfort, and was comfortably situated at the time her brother made the agreement which is the subject of this action by which she was induced

to leave and finally dispose of her own home and go to his and there permanently reside. She further testified that she took with her to her brother's home all her furniture and bed and bedding; that she took, among other things, some feather beds, a luxury theretofore unknown to what some of the witnesses characterized as Garey's "buckaroo" camp, referring to the Lassen county home of the deceased. The witness Ellery, who was once the foreman on the plaintiff's farm near Marysville, corroborated the plaintiff with regard to the character of said farm and its capabilities as a producer and the ability of plaintiff to thereby make a comfortable living. George Templeton also testified that he was acquainted with the farm of Mrs. Barry near Marysville, that he was there in 1900, and that the farm consisted of "good land," and the plaintiff then had "plenty of stock, horses, turkeys, and chickens and grain, and that she was then making a comfortable living," etc. J. G. Conklin testified to conversations had with the deceased after the plaintiff came to his ranch; that deceased had told him that the plaintiff "had put her money in with his, and he was going to live like a white man, and if he died first it would all be hers, and if she died first it would be his." He further said that Mrs. Barry had attended to all the housekeeping for Garey after her arrival at his farm; that Garey "drank a great deal of liquor and was in poor health." Mrs. Alice Dibble stated that she knew Garey for many years prior to his death, and also knew the plaintiff; that she visited Garey's house many times before plaintiff went there; that Garey "did not live very nice. He did his own cooking, and he didn't wash at all, I think. He had no women there to do anything, and they got along the best they could by 'batching.' Sometimes they had good food, and sometimes they didn't, and sometimes the men would cook, and sometimes Mr. Garey would cook. After Mrs. Barry came up she kept his bed clean and his dishes clean, did the cooking, and got on pretty well. She was a pretty good cook. I was there in August, the year he died. She took care of him. She treated him kindly. She kept things clean and was good to him. She was patient with him. She gave him his medicine if any one gave it to him. * * * She did lots of things, everything she could do. She made his bed, ironed, bathed his feet and person, combed his hair, gave him a glass of milk if he wanted it, and did anything she could for a dying man. He was dying at that time. I know she did his washing and mending. I had a conversation with George Garey regarding his business, in August last year. He told me he had Aunt Lucy well provided for. He said he had willed her everything." Mrs. Lou Templeton corroborated Mrs. Dibble relative to the conditions existing on Garey's farm before the arrival there of plaintiff, and also as to the comforts by which

deceased was surrounded through the ministrations of plaintiff after she took charge of the domestic affairs of the deceased. She also testified that Garey was very "cross" and hard to please, that he slept in a sort of "dog's nest" before Mrs. Barry went to his ranch, and that after plaintiff took control of his home affairs he was given a comfortable home and was well taken care of. This witness also testified that she knew that plaintiff on one occasion gave Garey \$500 and on another the sum of \$1,017.60. On one occasion the deceased said to her after plaintiff went to his farm that "he was living like a white man, that Mrs. Barry was taking care of him, that it was lots different than it used to be, that he was pleased with her, that she was doing all she could, and that he was happy now." This witness further testified: "I remember Mrs. Barry signing a note with George Garey to the bank of Alturas, and that he called Aunt Lucy in and told her to put her name down. He remarked: 'That makes the estate pay it.' That was all I heard about the note." The witness George Templeton, to some of whose testimony we have before referred, stated that plaintiff had general supervision of the housework during all the years she lived with Garey, that for five years prior to his death Garey "complained all the time," and that for three of said five years "he was very bad," referring to his physical condition. "He had," continued this witness, "pains in his back, and we had to rub him with pain balm. His habits with reference to sobriety were not very good. He was always cross when he was on one of his drunks. He was hard to get along with. Mrs. Barry always took care of him. * * * He told me Mrs. Barry gave him \$500, that he got \$1,000 of Mrs. Barry at one time, and at another time he said he got \$500. I remember one time that George gave a note to the bank of Alturas. I signed it, and Mrs. Barry also signed it with George. At that time he said to Lucy: 'I guess you'd better sign this too, and in case anything should happen to me the estate would have to pay it.'"

The foregoing embraces, we think, a fair synopsis of all the testimony brought out through the examination in chief of all the witnesses whose evidence has any bearing on the merits of the case. As we have declared, no effort was made to contradict the facts elicited from plaintiff's witnesses, except through the cross-examination of said witnesses. We think the evidence presented by the record before us is undoubtedly sufficient to establish the making of the agreement as pleaded. There are, it is quite true, what appear to be some inconsistencies and contradictions disclosed by cross-examination in the testimony of the plaintiff's witnesses. There seems to be much force in the criticism by counsel of the testimony of the plaintiff herself, where she declares that, at the time she borrowed

something over \$1,800 and executed a mortgage on her farm to secure the payment of the same, she then had in her possession the sum of \$900 in coin which she had accumulated and saved from the earnings of her farm. And counsel call attention to discrepancies in the testimony of other witnesses for the plaintiff. Many of these, from the bare record, might appear to be sufficient to discredit the entire testimony of such witnesses. Yet, since the trial judge, in whose presence these witnesses testified, and who had the opportunity, not given to reviewing courts, of seeing and hearing the witnesses, of judging of their intelligence, of observing any physical or mental infirmities with which they might then have been afflicted, of viewing the circumstances under which, by cross-examination, the seeming inconsistencies were made to appear, and, in short, of applying all the tests by which the credibility of witnesses and the weight of their testimony may, at least to moral accuracy, be determined, has seen fit to accept the declarations of the witnesses directed to the proof of the making of the pleaded agreement, we do not see how a reviewing court would be justified in saying that such testimony should be entirely disregarded. The plaintiff positively testified that she had as much as \$900 when she borrowed the amount, to secure which she gave a mortgage on her farm. She could not tell whether the \$900 was in gold or in silver, but declared repeatedly that she in fact had that sum then. It would seem to be almost incredible that one having in her possession such a large sum of money could not tell whether it was in gold or silver; but the trial judge for some reason seems not to have regarded the declaration as particularly significant. The plaintiff testified that at the time of the trial, May, 1906, she was 79 years of age, and it is probably true that the trial judge, in his analysis of her cross-examination, considered this fact in determining the credit and weight to which, under the circumstances, her testimony was entitled; but, as we have said, this court is not required to weigh the testimony or reconcile discrepancies therein. If the evidence as disclosed by the record is such that it cannot be said, as a question of law, to be insufficient to support the findings, then we are powerless to interfere with said findings. That the agreement is one which, having been proved, should be enforced, there can be no doubt, it seems to us.

The evidence shows that the nearest relation by consanguinity to the deceased was the plaintiff. He had for many years lived in a state of celibacy on a cattle ranch situated in an isolated section of the mountainous regions of the state—a life unaccompanied by the tender attentions which constitute home comforts in their fullest sense. His sole companions were "buckaroos" (vaqueros), or men presumably without culture or refinement, engaged in the business of herd-

ing and "rodeoing" cattle. As he grew older, naturally life to him under such circumstances became irksome and wearisome, and with his advancing years he, naturally, the more and more yearned for the companionship and the tender care of the one who, of all living persons, could the more completely and satisfactorily fill the long-existent hiatus in an unhappy and then rapidly waning life. He earnestly and, it may be, pleadingly, besought his only sister to dispose of her own home—a home where she had spent many of the years of her life in comfortable circumstances, and valued by her not more perhaps because of its intrinsic worth than because to her it was hallowed by pleasant memories and fond associations—and come to him, situated as he was, that he might be given the care and attention which he could under the circumstances only derive through the love and affection of a sister. She not alone complied with his request to live with and take care of him, but turned over to him all her means to be used in his business. The evidence shows that, while he was a man of ample means, he nevertheless practically lived, prior to the arrival of his sister at his home, in squalor and misery. His habits for sobriety were not good, according to the testimony. He slept, as one of the witnesses declared, in a "dog's nest," by which it is to be understood that the bed upon which he slept was no better, for comfort and cleanliness, than that ordinarily occupied by that animal. She changed all this. She rescued him from a life of uncleanness and misery and gave him comforts to which he had been unused, and when his last illness attacked him, she tenderly and affectionately cared for him, and thus minimized the sufferings of the last, expiring hours of his life. For five years, he declared, and well could he do so, "he had lived like a white man." Is there any possible money compensation equal to the service thus rendered and the sacrifices thus made by this sister? Could the plaintiff, under the circumstances disclosed by the record, be placed in statu quo by any known legal remedy? Why should not equity enforce such a contract as is shown here? The evidence shows an adequate consideration; that the contract is just and reasonable as to the parties against whom it is sought to be enforced; that there is no showing, nor an attempt at showing, that the plaintiff practiced fraud or undue influence in securing the contract; that it is certain and definite, not within the statute of frauds, and its enforcement will not involve the invasion of the legal or equitable rights of an innocent third party. Section 3391, Civ. Code; Stewart v. Smith (Cal. App.) 91 Pac. 667, and cases therein cited. Professor Pomeroy, in his work on Specific Performance (page 268) states the principle upon which such agreements as the one here are enforced, in the following language: "Courts of equity will, under special

circumstances, enforce a contract to make a will, or to make a certain testamentary disposition, and this may be done, even when the agreement was parol, *where in reliance upon the contract the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud upon him.* (Italics ours.) The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement."

The principle thus stated has been applied in many cases in California and other jurisdictions. One of the leading California cases upon the subject is McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008, Healy, who was for many years engaged in the stock-raising business on an extensive scale in one of our northern counties, after acquiring considerable wealth, visited his native country, Ireland. There he met McCabe, then a boy of 14 years of age, to whom he became attached. He importuned the boy's mother, who was his sister, to allow the boy to return with him to this country, agreeing to educate the lad, train him in the business in which he was engaged, and if, upon learning the business, the boy would properly look after the same, he (Healy) would, upon his death, leave him all his property. The "plaintiff, his mother, and his guardian accepted this proposition made by Healy, and upon the strength of these promises plaintiff was given into the possession of Healy, brought by him from Ireland to Lassen county, Cal., and for 17 years these two people lived together, keeping faith to the full letter and spirit of the aforesaid understanding." Healy died intestate, and McCabe brought suit to enforce the agreement made by Healy. Sustaining the decree of the trial court enforcing the performance of the terms of said agreement, the Supreme Court, among other things, says: "The facts of this case, when tested by the law as the court finds it, demand the relief given by the chancellor's decree. * * * Appellants, in their brief, have cited no case where relief has been denied upon facts in any substantial degree similar to those here presented, and it is doubtful if there is such a case to be found in the law books. It is not plain to the understanding what additional element in the nature of further covenants between Healy, upon the one part, and the boy, his guardian, and his mother, upon the other part, could have been inserted into this contract which would have given it greater legal strength." A significant distinction between that case and the one at bar, and favorable to the latter, is to be observed in the fact that in the former there

must have been, under the terms of the agreement and in the very nature of the situation, a considerable period during which the promisee could perform no actual service, while in this case the plaintiff immediately proceeded to render the service she agreed to perform and to carry out other covenants of the agreement which she promised to execute. "It is the settled doctrine of this court," says Chief Justice Beatty, in *Bell v. Wyan*, 147 Cal. 515, 82 Pac. 41, "that a man may bind himself by a contract, written or oral, to make a particular disposition of his property by will, and that such contract may be specifically enforced in favor of the promisee." In the late case of *Stewart v. Smith*, supra, this court, in an opinion by Mr. Justice Burnett, elaborately discusses this principle. In that opinion will be found, in addition to an interesting discussion of the proposition, a long line of authorities cited, in which the principle is exhaustively considered. But there is no need of pursuing the subject, for it is a firmly settled proposition, so elementary that it requires no discussion, that a man may dispose of his own property at his pleasure and in any manner which may best suit his own judgment, and, as is said in the leading case of *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 776: "No good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose as well by will as by a conveyance to be made at some specific future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." There is not to be found in this case the element present in the case of *Owen v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, which furnished the very strongest reason for denying the specific performance of an agreement similar in terms to the one here. The rights of innocent third parties have not intervened here to justify the refusal by a court of equity, upon that ground, to award the relief asked for. After *McNally* had made the agreement with the plaintiff, he married, and the court, in an opinion by Mr. Justice Henshaw, says that a contract such as this, if so construed as to be in restraint of marriage, would be void, and that therefore "the only permissible conclusion is that the parties contracted in contemplation of that event. Upon its happening, the rights of innocent third parties intervened and a decree of specific performance could not be awarded," citing *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332.

Counsel for appellants have cited many

authorities which they claim sustain their several contentions, but we think an examination of them will show, upon the facts, a marked distinction between them and the case here. It is earnestly and correctly argued that a contract such as this, whose existence and terms must depend for their establishment upon the uncertainty of the memory of witnesses, should be, when sought to be enforced by a court of equity, "scrutinized with particular care," and that "only upon a satisfactory showing that it is definite and certain and just will it be enforced." *Owens v. McNally*, supra. That a court of equity should thus be particular and cautious in the enforcement of such agreements is a proposition which cannot be gainsaid, and we assume, as we are bound to do, that the court to which the evidence was addressed, and which must determine the question of the truth or falsity of all the testimony and settle and reconcile to its own satisfaction any discrepancies in such testimony, if any appear, or whether the memory of any particular witness or that of all of them may or may not be depended upon, has exercised the particular care required in such cases, and has concluded that a satisfactory showing was made that the agreement here is definite and certain and just. To us, as a reviewing court, the agreement, from the evidence presented, appears to be so, and, as we have endeavored to make clear in another part of this opinion, we would not be warranted in declaring that it is not definite and certain and just, unless the record evidence is such as to support us in so declaring as a question of law. This, we say, we are not justified in doing in this case. It is hardly necessary to refer to authorities upon this point. They are numerous in this as well as in every other state in the Union; but the language used by our Supreme Court in discussing this question in *Brisson v. Brisson*, 90 Cal. 324, 27 Pac. 189, is so pertinent to the case at bar that we quote: "It may be conceded, as is claimed by the appellant, that the evidence of a verbal agreement between husband and wife that will create a constructive trust should be clear, satisfactory, and conclusive; but it must also be conceded that whether the evidence in any case is of this character must be determined by the trial court, and this court must accept the determination of the trial court thereon as conclusive." And, again, in *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93, it is said: " * * * This question of fact, like all other questions of fact, is one for the trial court. All questions as to preponderance and conflict of evidence are for the trial court. To the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the findings of the trial court are not open to review in this court." See, also, *Shults v. Shults*, 159 Ill. 654, 43

N. E. 800, 50 Am. St. Rep. 188; Steinmeyer v. Seibert, 190 Pa. 471, 42 Atl. 880, 70 Am. St. Rep. 641; Elliot v. Whitmore, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700; Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

There is, as before observed, no contradictory evidence in the case at bar upon the vital points involved. The discrepancies or, rather, apparent inconsistencies, shown by the cross-examination of plaintiff and of some of her witnesses, constitute alone the foundation for the claim that the evidence is contradictory, and that the pleaded agreement was not proved.

We can see no reason for disturbing the findings, and thus the decree of the court below, and discover no prejudicial errors in the court's rulings.

The order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 167

LOWE v. YOLO COUNTY CONSOL. WATER CO. (Civ. 452.)

(Court of Appeal, Third District, California. April 23, 1908. Rehearing Denied by Supreme Court June 22, 1908.)

1. PLEADING—DEMURRER—COMPLAINT.

A demurrer to a complaint is addressed to the case as presented.

2. WATERS AND WATER COURSES — WATER COMPANIES—IRRIGATION — FAILURE TO FURNISH WATER—ACTIONS—COMPLAINT.

A complaint, in an action against a water company for failure to deliver water for irrigation, which does not show that Civ. Code, § 552, relating to the duties of a corporation organized to furnish water for irrigation to persons entitled to the use of the water, has any application, is not bad for failing to allege that the company has sufficient water to supply plaintiff, after other consumers entitled to preference have been supplied, as provided by said section.

3. SAME.

A complaint, in an action against a water company for failure to deliver water for irrigation, which shows that the company is the owner of water rights, that at the time of the demand therefor alleged, and subsequent thereto, it had sufficient water to irrigate the lands referred to, including the land of plaintiff, and that, notwithstanding the payment and tender alleged, it refused to comply with the demand to the extent of its reasonable ability, states a cause of action within St. 1885, p. 95, c. 115, providing that every company appropriating water for sale, on demand and tender of the established water rates, shall sell water at the established rates, to the extent of the actual supply, etc.

4. SAME—NEED OF IRRIGATION.

A complaint, in an action against a water company for failure to deliver water for irrigation, which alleges that, by reason of the refusal of the company to furnish plaintiff with water, a crop growing on his land described was destroyed, sufficiently shows that plaintiff's land needed irrigation.

5. TENDER—PLEADING.

Under Code Civ. Proc. § 2076, providing that the person to whom a tender is made must at the time specify any objection, or he will be deemed to have waived it, etc., a complaint,

in an action against a water company for failure to furnish water for irrigation, which alleges that plaintiff tendered defendant in cash a specified sum for the payment of such water as might be furnished at the rates established, sufficiently alleges a tender, as against a general demurrer, for, in the absence of any objection, proof of the tender as alleged would be sufficient.

6. WATERS AND WATER COURSES—WATER COMPANIES — IRRIGATION — FAILURE TO SUPPLY WATER — ACTIONS — DEMAND AND TENDER EXCUSED.

A complaint, in an action against a water company for failure to deliver water for irrigation, which alleges that, prior to the demand for water, the company refused to furnish plaintiff with water for irrigation purposes, or at all, shows the absence of any necessity for any specific demand for water and tender therefor at the rates established; the allegation of refusal implying a request to furnish plaintiff with water, and its refusal excusing any more specific demand or any tender.

7. APPEAL AND ERROR — REVIEW — HARMLESS ERROR — ERRONEOUS RULINGS ON DEMURRERS.

Where the omissions in a complaint defectively alleging facts necessary to a cause of action were supplied by the answer, and all the material issues were clearly presented by the pleadings, the overruling of a demurrer to the complaint on the ground of such defects was not reversible error.

8. WATERS AND WATER COURSES — WATER COMPANIES — IRRIGATION — OBLIGATION TO FURNISH WATER.

The obligation of a corporation organized to sell and distribute water to furnish water is created by Const. art. 14, § 1, declaring that the use of water appropriated for sale or distribution shall be a public use and subject to regulation in the manner prescribed by law, and does not arise under St. 1885, p. 95, c. 115, requiring a corporation appropriating water for sale or distribution to furnish water to the extent of the actual supply, and providing that any corporation neglecting so to do shall be liable in damages to the extent of the actual injury sustained; and a water company guilty of fraud, oppression, or malice in failing to furnish water is liable to exemplary damages within Civ. Code, § 3294, providing that in an action for the breach of an obligation not arising from contract exemplary damages may be recovered, where defendant has been guilty of oppression, fraud, or malice.

9. STATUTES — CONSTRUCTION — OVERTURNING PRINCIPLES OF LAW.

It will not be presumed that the Legislature in the enactment of a statute intended to overturn established principles of law, unless such intention is made to clearly appear either by express declaration or by necessary implication.

Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by O. A. Lowe against the Yolo County Consolidated Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. A. Hawkins, for appellant. A. C. Huston, for respondent.

BURNETT, J. This is an appeal on the judgment roll alone from a judgment rendered upon the verdict of a jury awarding plaintiff \$599, actual damages, and \$500, exemplary damages, for failure to deliver water to the plaintiff for the irrigation of certain

lands consisting of 42 acres in Yolo county.

Appellant declares that "the sufficiency of the complaint and the right of plaintiff to recover exemplary damages are the only questions involved on the appeal."

1. The first point urged against the complaint is based upon the principle that prior users have a preferred claim to the waters supplied by a corporation organized for the sale and distribution of water, and therefore it is contended plaintiff must allege that the defendant has sufficient water to supply plaintiff's wants "after all other consumers theretofore applying as well as theretofore supplied, or who had contracts with the defendant for the supplying of water had been fully supplied." The claim is made by virtue of section 552 of the Civil Code, which provides that: "Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continual use of said water, upon the same terms as those who have purchased their land of the corporation." But, as pointed out by respondent, there is nothing in the complaint to show that said section 552 has any application, and the demurrer, of course, is addressed to the case as presented, and we cannot assume that there are others entitled to preference. If so, it is the proper procedure to disclose it by the answer, as it is matter of defense. *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 Pac. 137. As said in *Crow v. San Joaquin Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058: "Under the provisions of section 1 of article 14 of the Constitution, and of the act of March 12, 1885, to enforce the same, the sale, rental, or distribution of water is declared to be a 'public use,' and it is made the duty of a water company supplying water for distribution to furnish water upon tender of the established rates, and no other duty than such tender can be lawfully prescribed or imposed by such company as a condition for supplying water as required by law."

We think that plaintiff shows clearly by his complaint that he is entitled to the water which he claims. It appears that appellant is the owner of large and valuable water rights; that through its various ditches it was diverting the waters of Cache creek and supplying the same to the farming neighborhoods mentioned; that at all the times herein mentioned the said defendant had sufficient water to supply the demands of the stockholders and also to furnish the plaintiff herein with the water necessary to irrigate the lands hereinbefore referred to at the time

of the service of the demand as alleged and subsequent thereto, "and, furthermore, that at the time of said demand and subsequent thereto, the said defendant had an ample supply of appropriated waters as aforesaid for the purpose of furnishing the said plaintiff with water for the irrigation of said lands; that notwithstanding the said payment and tender the said defendant refused to comply with said demand to the extent of its reasonable ability so to do, and said defendant further refused to and has not complied with said demand at all." By these and subsequent allegations the plaintiff brought himself within the terms of section 10 of the "act to regulate and control the sale, rental and distribution of appropriated water in this state," etc., approved March 12, 1885 (St. 1885, p. 98, c. 115), which provides that: "Every person, company, association and corporation having in any county in the state * * * appropriated waters for sale, rental or distribution to the inhabitants of such county, upon demand therefor and tender in money of such established water rates, shall be obliged to sell, rent or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association or corporation for such purposes. If any person, company, association or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect for the period of five days after such demand to comply therewith to the extent of his or its reasonable ability so to do shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand or tender, to be recovered, with costs." The complaint before us alleges all the facts contemplated by said section as precedent to and the basis for the liability of the corporation, and we can see no warrant for holding that the court erred in overruling the demurrer.

2. The suggestion that "there is no averment that plaintiff's land required or needed irrigation, or that irrigation would be of any benefit," does not appeal to us as possessing substantial merit. The following allegation is sufficient to cover the point: "That by reason of the refusal of said defendant to furnish plaintiff with water as aforesaid, the said crop of alfalfa growing on said tract of land has become lost and destroyed."

3. Objection is made to the sufficiency of the tender. Conceding that the allegation is not as full and explicit as it should be, it is not open to attack by general demurrer. It is averred that the plaintiff tendered defendant in cash the sum of \$100 in advance for the payment of such waters as might be furnished by defendant at the rates established by the board of supervisors. This should be deemed sufficient in the absence of any ob-

jection to the form of the tender or the amount offered. In considering the complaint we cannot presume that any such objection was made. Section 2076 of the Code of Civil Procedure provides that: "The person to whom a tender is made, must at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards." In the absence of any such objection, proof of the tender as alleged would be sufficient, and hence the allegation, without any indication of such objection, should be held to meet the requirement of good pleading. In *Mullally v. Townsend*, 119 Cal. 51, 50 Pac. 1066, it is said that "Any language intended to constitute a demand, and which plainly informs the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient. A demand, however, like all allegations of fact, should be pleaded with directness and certainty. But whether any given essential allegation should be held sufficient on appeal often depends upon the manner in which it is attacked. Objections which go to the sufficiency of the statement of facts and not to the facts themselves, must be by special demurrer pointing out the particular defects complained of."

But again, the complaint alleges "that prior to the demand the said defendant refused to furnish the said plaintiff with water for irrigation purposes or at all." Under such circumstances, it is difficult to see the necessity for any specific demand or tender. In *Remy v. Olds*, 88 Cal. 542, 26 Pac. 355, it is said: "The only other point which we propose to notice, that the suit cannot be maintained because there is no allegation of demand for a deed, is equally untenable. Such demand was unnecessary. Why should the plaintiff be required to do that which the defendants have expressly notified him in writing that they would not do? The law does not require the performance of a useless act, and when it is made to appear by the defendant's own act that the demand would have been refused, they cannot be heard to object that no demand was made." *Koyer v. Willmon*, 150 Cal. 785, 90 Pac. 135. Appellant contends that this rule is not applicable here for the reason that "the demand creates the cause of action, and no right exists until the demand has been made." Ordinarily this would be true in the case of a party seeking water for irrigation from a public service corporation, but here the appellant placed itself in default by its refusal on any terms to furnish any water whatever to respondent. The allegation of refusal implies, of course, that some sort of request or demand was made upon appel-

lant to furnish plaintiff with water, but its treatment of the latter excused any more specific demand or any tender.

But, again, if some of the facts necessary to a cause of action were somewhat defectively alleged, it resulted in no prejudice to appellant, as the omission was supplied by the allegations of the answer, and thereby all the material issues were clearly presented by the pleadings. In *Alexander v. Central Lumber, etc., Co.*, 104 Cal. 536, 38 Pac. 410, 411, it is said: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of the judgment based upon the trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error in order to avail appellant, for otherwise he has no cause of complaint." See, also, *Dennis v. Crocker-Huffman L. & W. Co.* (Cal. App.) 91 Pac. 425. The rule does not apply, manifestly, where there is an entire failure to state a cause of action, but that is not the case here. At most there is some uncertainty and want of accuracy in certain allegations, but, assuming that the demurrer upon the ground that the complaint "is uncertain and ambiguous and unintelligible" challenges consideration of the alleged defects, we would not be justified in reversing the ruling of the trial court.

4. The complaint alleges as the basis for exemplary damages: "That the said defendant refused to comply with said demand and refused to supply the plaintiff with water unless the said plaintiff would repay to the said defendant the amount paid by said defendant to plaintiff for the right of way across his lands for the said ditch or canal; that the said refusal of the said defendant was wanton, willful, malicious, and without any right whatever, and was made for the purpose of extorting from this plaintiff the amount of money paid by said defendant to said plaintiff for said right of way * * * and for the purpose of damaging, injuring, and destroying the crop growing on said lands and for the purpose of vexing, harassing, and annoying this plaintiff herein." This would seem to be sufficient to bring the case within section 3294 of the Civil Code, which provides that: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." The action is for the breach of an obligation arising from the Constitution and statutes, and not from contract, and there is no doubt the allega-

tions of the complaint disclose oppression and malice; but it is urged by appellant that the statute of 1885, *supra*, section 10, provides the penalty, viz., "damages to the extent of the actual injury sustained," and that "where an obligation is created by statute and the same statute prescribes a penalty for a breach of the obligation no other or additional penalty can be allowed." But we do not understand that the obligation to furnish the water arises from the statute, but it is created rather by the Constitution, which declares that the use of all water appropriated for sale, rental, or distribution shall be a public use and subject to the regulation and control of the state, in the manner to be prescribed by law. Article 14, § 1. In *Price v. Riverside Land I. Co.*, 56 Cal. 433, it is said: "Every corporation deriving its being from the act above cited has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. * * * The duty exists without any express statutory words imposing it wherever the public use appears." It is true the Constitution did not provide for the control and regulation of the use of the water outside of cities and towns, and the omission was supplied by the said act of 1885; but this latter is not the source of the obligation, but provides the conditions under which the obligation shall be discharged. The said act prescribes the general rule for damages for failure to discharge the duty to furnish water, but there is nothing in the statute to indicate the purpose of the Legislature to relieve the corporation from the operation of the special provision of the Code as to those exceptional cases where the delinquent is guilty of fraud, oppression or malice.

It is not to be presumed that the Legislature in the enactment of statutes intends to overturn long-established principles of law, unless such intention is made to clearly appear either by express declaration or by necessary implication. In *re Garcelon's Estate*, 104 Cal. 584, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. In the case of *Lyles v. Perrin*, 119 Cal. 264, 51 Pac. 332, the right to recover punitive damages in this class of cases seems to be recognized. It is there said: "Instruction 15, asked by the defendant, by which the court was requested to instruct the jury substantially that there was no evidence in the case which would warrant any punitive damage, was properly refused." In *Sutherland on Damages*, p. 1093, the rule is announced as follows: "If a wrong is done willfully—that is, if a tort is committed deliberately, recklessly, or by willful negligence, with a present consciousness of invading another's right, or of exposing him to injury—an undoubted case is presented for exemplary damages." In *Greenberg v. Western Turf Ass'n*, 140 Cal. 358, 73 Pac. 1050, it is held, as stated in the syllabus, that: "The pro-

vision of the statute for a penalty of \$100 in addition to the actual damages is not exclusive of punitive damages in a case justifying punitive damages; and it was proper to instruct the jury, in accordance with section 2292 of the Civil Code, that if they found the defendant had been guilty of oppression, fraud, or malice, actual or presumed, they might, in addition to actual damages, give damages, for the sake of example and by way of punishing the defendant." The reasoning in that case is pertinent here. We can see no good reason for holding that appellant is an exception to the rule which imposes an additional penalty for fraud, oppression, or malice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 160

GREEN v. THORNTON. (Civ. 412.)

(Court of Appeal, First District, California.
April 22, 1908.)

1. MORTGAGES—ACTIONS BETWEEN MORTGAGOR AND MORTGAGEE—EJECTMENT—CONDITION PRECEDENT.

Ejectment will not lie by mortgagor against mortgagee, unless the mortgage has been paid.

2. SAME.

In ejectment by mortgagor against mortgagee, rents and profits collected by mortgagee cannot be applied by mortgagor to the payment of the mortgage, since such receipts are in the nature of an equitable set-off to the amount due, and must be settled on an accounting in equity.

3. SAME—ACTIONS TO REDEEM—RIGHT TO DISREGARD FINDINGS OF JURY.

A complaint, in one count, alleged that plaintiff's intestate executed to defendant a conveyance of the land in controversy, which, though in form a deed absolute, was in reality a mortgage, and that thereafter defendant, claiming to be the owner by virtue of the deed, entered into possession, and refused to surrender the same on demand, or render an account of rents and profits. In a second count the complaint alleged that plaintiff, in his representative capacity, was the owner of the land, and that defendant was in possession, and claimed title thereto adversely to plaintiff, founding his title on a conveyance by intestate; that the conveyance was intended as a mortgage, and that the indebtedness had been paid, but that defendant nevertheless held possession and refused to surrender the same. The prayer of the complaint was for a decree quieting title, for an accounting, and that plaintiff be permitted to pay any balance due, or should a balance be found in plaintiff's favor, that plaintiff have judgment therefor, and for possession of the land and for other relief. *Held*, that the complaint was to redeem from the mortgage, and not in ejectment, which theory was strengthened by the prayer, and hence the court was entitled to disregard the findings of the jury and substitute findings of its own.

4. EQUITY—PRAYER—CONSULTATION TO DETERMINE RELIEF INTENDED.

The prayer of a complaint may be consulted with a view to ascertain the kind of relief intended, where the complaint states two causes of action.

5. MORTGAGES—ACTIONS TO REDEEM—TIME TO SUE.

The right to redeem from a deed, absolute on its face, but intended as a mortgage, execut-

ed subsequent to Supreme Court decisions that, where the right to foreclose a mortgage is barred by the statute of limitations, the right to redeem is also barred, and, prior to the enactment of Code Civ. Proc. § 346, providing that an action to redeem may be brought within five years, is barred where the right to foreclose is barred by the statute of limitations, for the parties are deemed to have contracted in view of the rule declared by the Supreme Court decisions, and section 346, having been enacted after the deed was executed, is inapplicable.

Appeal from Superior Court, San Mateo County; A. L. Rhodes, Judge.

Action by George W. Green, administrator of the estate of Benjamin S. Green, deceased, against R. S. Thornton. Judgment for defendant, and from it and an order denying a new trial, plaintiff appeals. Affirmed.

Drown, Leicester & Drown (D. M. Delmas, of counsel), for appellant. E. F. Fitzpatrick and A. E. Shaw, for respondent.

KERRIGAN, J. The complaint is in two counts, the first of which avers that on August 17, 1872, plaintiff's intestate, Benjamin S. Green, was and had been in the actual and exclusive possession of the lands in controversy for many years; that on that day he was indebted to the defendant and, for the purpose of securing the payment of present and future debts, he executed to defendant a conveyance which, though in form a deed absolute, was in reality a mortgage. It further alleges that on January 30, 1895, defendant, claiming to be the owner of said lands by virtue of said deed, entered into and has ever since retained possession thereof; that although demand therefor has been made, defendant refuses to surrender possession of the premises, or to render an account of the rents and profits thereof. In the second count the plaintiff, who is the administrator of the estate of Green, avers, after formal allegations, that he is, in his representative capacity, the owner of said property; that "defendant is now in possession of said premises, and claims title thereto adversely to plaintiff," founding his title upon the alleged conveyance to him by decedent; but that said conveyance was intended as a mortgage to secure present and future debts; that (as plaintiff is informed and believes) "said indebtedness has been fully paid"—"nevertheless the defendant still holds possession"—"and refuses to surrender possession." The prayer of the complaint is for: "A decree of this court quieting his title to said land," "that an accounting be taken" concerning said indebtedness and rents. "That in case the balance be found in defendant's favor, plaintiff be permitted to pay the same to defendant in satisfaction thereof." "That in case the balance be found in plaintiff's favor, plaintiff have judgment therefor against defendant, and judgment for possession of said lands." For other just and equitable relief. Defendant in his answer admits that he en-

tered into possession of the lands, and still holds under the conveyance from Green, denies that the conveyance was a mortgage, and pleads the five-year statute of limitations founded upon adverse possession. The case was submitted to a jury upon special issues. The jury answered the questions submitted to them in favor of the plaintiff. Among other matters they found that the conveyance from Green was a mortgage, and that defendant had not had five years' adverse possession. After the coming in of the verdict defendant filed an amendment to his answer, in which he pleaded that the action had not been commenced within four years after the cause of action had accrued. The court then substituted findings of its own for the verdict of the jury. In these it found, as had the jury, that the conveyance from Green was a mortgage, but that the action was barred, not having been commenced within four years after the cause of action had accrued. It also found that, at the time of the making of the deed, Green was not the owner of the property, but was merely in possession of it, and by his deed conveyed such possession to defendant; that from the date of the conveyance to the time of his death in 1882, Green occupied the property as a tenant at will of Thornton; also that defendant was rightfully in possession of the property, and had been in such possession for more than four years before the commencement of the action.

Before taking up a discussion of the case, it may be well to state that the litigation involving the lands in controversy had been before the Supreme Court so often that, on the occasion of its last appearance there, November 10, 1900, in the case of *Green v. Thornton*, 130 Cal. 482, 62 Pac. 750, the court made the following comment and enumeration of the cases wherein adjudications had been had: "The contest, in relation to the premises in question, in its various forms, has been in this court on several different occasions. In fact it has become a sort of *Jarndyce v. Jarndyce*"—citing the various cases involving this land: *Hyde v. Thornton*, 83 Cal. 83, 23 Pac. 126; *Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059; *Hyde v. Boyle*, 89 Cal. 590, 26 Pac. 1092; *Hyde v. Boyle*, 93 Cal. 1, 29 Pac. 247; *Hyde v. Boyle*, 105 Cal. 102, 38 Pac. 643; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Robinson v. Thornton*, 114 Cal. 275, 46 Pac. 79; *Robinson v. Thornton*, 129 Cal. 12, 61 Pac. 946. The case of *Green v. Thornton*, 130 Cal. 482, 62 Pac. 750, and the present one are quite similar. That was an action to quiet title. There Hannah Green the widow of Benjamin S. Green, was the plaintiff, claiming to be the owner of the property, while in this case the plaintiff is the administrator of the estate of Benjamin S. Green, claiming that the deed from Green to Thornton was a mere mortgage. The only material difference in the

facts of the two cases is that here evidence was introduced to show that the deed was intended as a mortgage. In that case defendant prevailed.

Appellant (plaintiff) contends that this is an action in ejectment, and hence that the court had no right to disregard the finding of the jury, and to substitute therefor findings of its own. Respondent, on the other hand, insists that the complaint was a bill to redeem; and if he is right, the findings of the jury were merely advisory. If it be conceded that the second count of the complaint embodies an action in ejectment, yet, unless there was proof that the mortgage was paid, ejectment could not be maintained. "Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable—whether it be to cancel the mortgage and close up his title, or to enjoin a sale under power given him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles it is a settled rule that the mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." *Spect v. Spect*, 88 Cal. 442, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, and cases cited. See, also, *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157. There was a finding by the jury, which was adopted by the court, that a certain amount in rents had been collected by respondent from the tenants of the property, but in ejectment rents and profits cannot be applied to the payment of the mortgage. Such receipts are in the nature of an equitable set-off to the amount due upon the mortgage debt, and must be settled upon an accounting in equity. *Spect v. Spect*, supra; *Jones on Mortgages*, § 716.

The first count is an action to redeem. At first blush the second count appears to be an action to redeem only, but upon reflection it seems to embrace also an action in ejectment. Aside, however, from the averment in the second count of payment of the mortgage, and the omission of the respondent to deny this averment by direct and positive statement, the complaint is devoid of anything that even suggests ejectment. The case was tried by the appellant upon the theory that, if there was any payment of the mortgage it was by application of the rents and profits, and not otherwise, which application, as just seen, cannot be made in ejectment. Furthermore the case was submitted to the jury, without objection, upon special issues. Indeed, to refer again to the complaint, and taking it as a whole, it is clear that redemption, and not ejectment, is the relief to which appellant deemed himself entitled, and this theory is strengthened when the prayer of the complaint is considered. To be sure, a prayer

cannot aid a defective pleading, still, in a case where, as here, there are two causes of action, it may be consulted with a view to ascertaining the kind of relief which was intended (*Nevada Co., etc., Canal Co. v. Kidd*, 37 Cal. 282); and when that is done in this case, it is obvious that the appellant sought relief in equity only. If he had any other thought, he obscured it in his complaint, and abandoned it at the trial. In fine, the case was tried and submitted, in all respects, exclusively as an action to redeem. We are convinced that it should be so regarded. This brings us to the only other point in the case.

Since the adoption of the Code in 1873 (*Code Civ. Proc.* § 2), the period of limitation for the commencement of an action to redeem from a mortgage on real property is five years. Prior to that time, and at the date the deed in question was given, it was four years (section 19 of "An act defining time for commencing civil actions," approved April 22, 1850; *Comp. Laws* 1850-53, p. 819, c. 148). This section was identical with the present section 343 of the Code of Civil Procedure, which provides that an action for relief, not otherwise provided for, must be commenced within four years after the cause of action shall have accrued. Appellant claims the benefit of the five-year provision, while respondent insists that the other should prevail; it being the one in existence at the date of the deed. *Cunningham v. Hawkins*, 24 Cal. 410, 85 Am. Dec. 73. However that may be, this case is governed by the rule laid down in *Hughes v. Davis*, 40 Cal. 117, and in *Espinosa v. Gregory*, 40 Cal. 58, cited by respondent, which settled the rule for the interpretation of instruments like the one here, and the parties are deemed to have contracted in view of that rule. According to those cases, at the time of the execution of this deed, although in equity a mortgage, it conveyed the legal title, and left to the grantor a mere equity of redemption, and when the debt secured by the deed became barred by the statute of limitations, the right to redeem was also barred. From the record it is clear that when the present action was commenced, the statute of limitations had run against the debt to secure which the deed was made. Section 346, *Code Civ. Proc.*, providing that an action to redeem may be brought within five years, having been enacted after the conveyance was executed, is inapplicable. The law, as declared in the two cases just noticed, defined the legal obligations of the parties to the transaction, and entered into and became a part of their contract, and therefore, when the right to foreclose the mortgage expired, the mortgagor or his successors at the same time lost the right to redeem, and respondent's title was freed from appellant's equities, and became full and complete.

In *Allen v. Allen*, 95 Cal. 197, 30 Pac. 213,

In re SCOTT. (Civ. 463.)

(Court of Appeal, Third District, California.
March 27, 1908.)

1. DEPOSITIONS—ATTENDANCE OF WITNESSES—
SUBPENA—ISSUANCE—STATUTORY PROVI-
SIONS—JUDGE OR "OTHER OFFICER."

Code Civ. Proc. § 1936, subd. 3, as amended by St. 1907, p. 730, c. 391, § 1, provides that a subpoena to require attendance out of court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws, is to be issued by the judge, justice, or other officer before whom attendance is required, and if the subpoena is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required, upon the order of such court or a judge thereof. *Held*, that the term "other officer" means any one authorized to administer oaths or take testimony, etc., and includes a notary public, in view of Pol. Code, § 794, providing that it is the duty of notaries public to take depositions and affidavits and administer oaths in all matters to be used before any court, etc., and it was proper for a judge of the superior court of S. county to order the clerk to issue a subpoena requiring a witness residing therein to attend before a notary in the county to give his deposition, and for the clerk to issue such subpoena.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5088, 5089.]

2. STATUTES — CONSTRUCTION — STATUTORY
RULE—CONFLICTING PROVISIONS.

Even if the latter provision of subdivision 3 conflicts with the preceding clause as to the method of issuing a subpoena, the latter provision would prevail, in view of Pol. Code, § 4484, providing that if conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless inconsistent with the meaning of such chapter or article.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 284.]

3. WITNESSES — ATTENDANCE — VALIDITY OF
SUBPENA—WAIVER OF DEFECT OR IRREGU-
LARITY.

Where a subpoena regular on its face is issued out of a court of general jurisdiction, and it procures the attendance of the witness at the time and place appointed, and he is sworn and submits to a partial examination without objection, he waives any defect or irregularity in the issuance of the subpoena, and he cannot sustain the action of a judge of the superior court in refusing to direct him to complete the deposition by raising the question of the sufficiency of the subpoena for the first time in an original proceeding in the appellate court for a writ of mandate to compel the judge to require the witness to complete the deposition.

4. DEPOSITIONS—EXAMINATION OF WITNESSES
—REQUIRING ANSWER—PROCEDURE—STATU-
TORY PROVISIONS.

Code Civ. Proc. § 1991, as amended by St. 1907, p. 731, c. 391, § 2, provides that any judge, justice, or other officer authorized to take depositions, etc., may report any disobedience or refusal to answer questions to the superior court of the county in which such attendance was required, and such court thereupon has power, upon notice, to order the witness to perform the omitted act, etc. *Held*, that the judge of a superior court has no discretion to refuse to exercise the powers, so far as necessary to secure the petitioner the right which the law confers to take the deposition of a witness; and

16 L. R. A. 646, a deed made in 1869, intended as security, was passed upon. The court says: "At the time the conveyance was made by John H. Allen to the respondents, a deed, absolute in form, but intended as a mortgage, in this state transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt, to secure which the deed was made, became barred by the statute of limitations, the right to redeem was barred. *Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58. The right to redeem and the right of the creditor to sue on a contract were reciprocal. *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Arrington v. Liscom*, 34 Cal. 366, 94 Am. Dec. 722; *Grattan v. Wiggins*, 23 Cal. 16. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. *Bronson v. Kinzie*, 1 How. (U. S.) 316, 11 L. Ed. 143; *Walker v. Whitehead*, 16 Wall. (U. S.) 318, 21 L. Ed. 357; *Heyward v. Judd*, 4 Minn. 483 (Gil. 375); *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405, 4 L. R. A. 348, 10 Am. St. Rep. 266. Under the decisions just cited, section 346 of the Code of Civil Procedure is inapplicable, because it would effect a material change in the rights and obligations of the parties. *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405, 4 L. R. A. 348, 10 Am. St. Rep. 266; *Heyward v. Judd*, 4 Minn. 483 (Gil. 375). And for the same reason *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866, and other and later cases declaring the rule stated in that section, are not in point. They are based upon that section of the Code, and it was passed posterior to the time the parties entered into the contract."

The case of *Allen v. Allen*, supra, came up before the Supreme Court again, and it is reported in 106 Cal. 137, 39 Pac. 436. There the court says: "By that decision [referring to the former decision between the same parties] it was held that under the transfer and conveyances of plaintiff herein, they acquired the legal title to the property, leaving in defendants a mere equity of redemption; that the parties are deemed to have contracted in view of the rule of interpretation of such instruments expressed in *Hughes v. Davis*, 40 Cal. 117, and *Espinosa v. Gregory*, 40 Cal. 58, and that the debt, to secure which the deed was made, being barred, the right to redeem was also barred. * * * Wherever the right to possession of the land may have been before the time for redemption had expired, upon the failure of the defendants to redeem within the statutory period, the right vested absolutely in plaintiffs, and their title, freed from defendants' equities, became full and complete."

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

it is his duty to consider the report by a notary to the court of the refusal of a witness to complete a deposition, and determine whether the questions were proper, and if so, to direct the witness to answer, and in case of refusal to employ the punitive power of the court to compel obedience.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Depositions, § 141.]

5. MANDAMUS—SUBJECT OF RELIEF—PROCEEDINGS OF JUDGES—SPECIFIC ACTS OF JUDGE—REQUIRING WITNESS TO ANSWER QUESTIONS.

A writ of mandate will lie in the appellate court, to compel the judge of a superior court to require a witness, before the notary taking depositions in the county, to answer questions, and complete his deposition sought to be taken in an action in another county, for it is the duty of the judge to so act, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, and Code Civ. Proc. § 1085, authorizes the issuance of a writ of mandate by any court, except a justice's or police court, to any inferior tribunal to compel the performance of an act which the law specially enjoins as a duty, and section 1086 requires that the writ be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law.

6. SAME—PENDENCY OF CONTEMPT PROCEEDINGS IN OTHER COURT.

The fact that contempt proceedings were pending in the superior court of the county in which the deposition was to be used is immaterial with respect to proceedings to require the witness to complete his deposition.

7. SAME—ISSUES—QUESTIONS NOT RAISED IN ORIGINAL PROCEEDING—RESIDENCE OF WITNESS.

Whether the witness' residence was in the county where the deposition was to be used cannot be considered in the first instance in the appellate court, in proceedings for a writ of mandate to compel a judge of the superior court of another county to require the witness to answer questions before a notary taking his deposition.

8. JUDGES—DUTIES—EFFECT OF DISMISSAL OF PROCEEDING.

When under the law it is clearly the duty of a court to proceed to the consideration of a motion upon its merits, it cannot relieve itself of that duty, nor divest itself of jurisdiction by an arbitrary dismissal of the proceeding.

9. MANDAMUS—SUBJECTS OF RELIEF—ACTS OF JUDGES—NATURE OF DISPOSITION OF PROCEEDINGS BY RESPONDENT.

An order of a judge of the superior court recited that the motion of plaintiff for an order directing a witness to answer the questions propounded on the taking of his deposition before a notary public, and to adjudge him guilty of contempt and punish him according to law if he refused to answer the questions having been heretofore argued by counsel, submitted to, and by the court taken under advisement, now on this — day in open court appeared the respective counsel, and the court renders its decision as follows: It is ordered that said proceeding be and the same is hereby dismissed. There was no conflicting evidence, and no issue of fact was presented to the court. A petition for a writ of mandate to compel the judge to require the witness to complete his deposition alleged that the proceeding was dismissed solely on the ground that the facts disclosed by the application showed that the court had no jurisdiction, and that allegation was not denied by the answer. *Held*, that the dismissal was not on the merits, and the determination was not final, but the effect was the same as a refusal of the court to hear and determine the application, and would not preclude compelling the

judge by mandamus to require the witness to answer the questions and complete the deposition.

10. JUDGMENT—ESSENTIALS—"ORDER"—"JUDGMENT"—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1003, defining an "order" as every direction of a court or judge made or entered in writing and not included in a judgment, the determination by the judge of the superior court was contained in an order virtually denying the motion, and it was not a "judgment," within the meaning of section 577, defining a judgment as a final determination of the rights of the parties in the action or proceeding.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 6, pp. 5020-5023; vol. 8, pp. 7695, 7696, 7739.]

11. APPEAL AND ERROR—DECISIONS REVIEWABLE—STATUTORY PROVISIONS.

The order was not appealable, in view of Code Civ. Proc. § 963, providing that an appeal may be taken from certain orders, not including a dismissal for want of jurisdiction.

Application by Mrs. W. P. Scott for a writ of mandate against Hon. Peter J. Shields, judge of the superior court of Sacramento county. Issue of peremptory writ ordered.

James Meridith and J. B. Landis, for petitioner. L. L. Chamberlan and Fred Tuttle, for respondent.

BURNETT, J. This is an original proceeding for a writ of mandate to compel the respondent to require a certain witness, one George E. Lamphrey, to answer questions and complete his deposition, sought to be taken in an action pending in the superior court of Placer county, wherein petitioner is plaintiff and Fred S. Stevens, as executor of the estate of Adolph J. Weber, deceased, is defendant. By the petition it appears that the proper affidavit was filed, and notice given that the deposition would be taken before H. B. Bradford, a notary public of Sacramento. Upon application of petitioner respondent made an order directing the county clerk of the county of Sacramento to issue a subpoena, directed to and commanding the said witness to appear and testify at the time and place mentioned in the said notice. The subpoena was issued and served, and the witness appeared. He was sworn and answered certain questions, and then he refused to answer any further, upon the ground that his residence in the future would be in Placer county, and that he would be ready and willing to testify as a witness at the trial. The facts were reported by the notary to respondent, who, upon the hearing of the same, dismissed the proceedings and report, and refused to direct the said witness to answer said proposed questions, on the sole ground that he, as judge of the superior court of Sacramento county, had no jurisdiction to make an order requiring the said witness to complete his deposition. Upon application of petitioner an alternative writ was issued out of this court, and in response to the order to show cause a demurrer and an answer were filed. The demurrer is a general one, and the answer

denies, upon information and belief, only one allegation of the petition, which refers to the residence of the witness, averring that for more than three weeks last past he has been and is now a resident of the county of Placer. There is also the additional allegation that similar proceedings have been taken before the superior court of said Placer county, and that the report of said notary has been set for hearing there, with a view of having that court compel the witness to answer questions, or be punished for contempt in case of his refusal to do so. Besides, an amendment to the answer sets out the order of the court dismissing the proceedings.

By the averments of an affidavit the case was brought within the provision of subdivision 2 of section 2021 of the Code of Civil Procedure. The witness also admitted that, at the time his deposition was being taken, he was a resident of Sacramento city. The regularity of the proceedings, indeed, is not questioned, except that it is claimed the subpoena requiring the attendance of the witness should have been issued by the notary before whom the witness was to appear, rather than by the clerk of the superior court under the direction of the judge thereof. The contention involves the construction of the following portion of section 1986 of the Code of Civil Procedure, as amended by the Statutes of 1907, p. 730, c. 391, § 1: "A subpoena is issued as follows: (3) To require attendance out of court, in cases not provided for in subdivision 1, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of the state, it is issued by the judge, justice or other officer before whom the attendance is required. If the subpoena is issued to require the attendance before a court or at the trial of an issue therein, it is issued by the clerk, as of course, upon the application of the party desiring it. If it issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon the order of such court or of a judge thereof, which order may be made *ex parte*." This "other officer" clearly means any one "authorized to administer oaths or take testimony in any matter under the laws of this state." A notary public is such an officer. Pol. Code, § 794. In the case at bar, therefore, since the subpoena required the attendance of a witness residing in Sacramento before a notary public of Sacramento county at his office in Sacramento city, under the aforesaid provision of the statute it was proper for the judge of the superior court of Sacramento county to make the order for the issuance of said subpoena, and for the clerk of said court to issue it. But it is said that the provision is in conflict with the preceding clause of said subdivision 3, which exacts of the notary the duty of issuing the subpoena. Even so, the latter provision would prevail

over the former under the well-settled rule of construction embodied in section 4484 of the Political Code, as follows: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." *Hall v. Kerrigan*, 135 Cal. 7, 66 Pac. 868; 26 Am. & Eng. Ency. of Law, pp. 619, 734. Another answer to the contention of respondent obviously is that the witness recognized the validity of the subpoena, attended at the time and place appointed, was sworn, and submitted himself to examination as a witness without objection, and he thereby waived any defect or irregularity in the issuance of said subpoena. A subpoena "is the process by which the attendance of a witness is required. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness." Code Civ. Proc. § 1985. The subpoena in the present instance was regular on its face, was issued out of a court of general jurisdiction, and it accomplished its purpose in producing the attendance of the witness; and, conceding that the witness could have refused to be sworn or answer questions, on the ground that he was present without authority of law, it should not require citation of authorities to maintain the position that he cannot now, for the first time, make the said objection to justify the action of respondent in declining to direct him to complete his deposition.

That brings us to a consideration of the question, what procedure is to be taken to compel the witness to answer. Section 1991 of the Code of Civil Procedure, as amended in 1907 (St. 1907, p. 731, c. 397, § 2), provides for the course to be pursued as follows: "Any judge, justice, or other officer mentioned in subdivision three of section nineteen hundred and eighty-six, may report any such disobedience or refusal [to answer questions] to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court." It was proper, therefore, for the notary to report to the superior court of Sacramento county, and as no question is presented as to the regularity of the proceedings before said court, it was clearly the duty of respondent to consider the said report and determine whether the questions were proper, and, if so, to direct the witness to answer, and, in case of his refusal, to employ the punitive power of the court to compel obedience. The judge of the court had no discretion to refuse to exercise the powers with which the law invested him so far as necessary to secure the petitioner the right which the law confers upon her to take the deposition of the witness. *Crocker v. Courey*, 140

Cal. 218, 73 Pac. 1006. See, also, *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597. But the judge of the court, according to the allegations of the petition, did refuse to exercise his powers to compel the witness to testify, and the question arises whether petitioner has sought the proper remedy to secure the right to which she is clearly entitled. Section 1085 of the Code of Civil Procedure provides that the writ of mandate "may be issued by any court except a justice's or police court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station," and section 1086 expresses the legislative command that the "writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." We have already seen that it was the duty, resulting from his office, of respondent to compel the performance of the act, and it is apparent that there is no other plain, speedy, and adequate remedy in the ordinary course of law. It is said in *Crocker v. Conrey*, supra: "Mandamus is the proper remedy. There is no other adequate remedy, and where he has no discretion to refuse to act, a judicial officer is as much subject to the mandate of a higher court as any other officer."

We pass now from this somewhat general consideration to the specific objections to the issuance of the writ, suggested by respondent and based upon the allegations of the answer. If we are right in holding that it was the duty of respondent to require the witness to answer, then it is obvious that the averment as to the pendency of the proceeding for contempt before the superior court of Placer county must be disregarded, as involving a matter not within the jurisdiction of said court. It is equally clear that the question of the residence of the witness cannot be considered in the first instance by this court. If the issue had been presented to respondent and adjudicated adversely to petitioner's contention, this might be urged as a reason why the writ should not be made peremptory, although as to that we express no opinion, as it is not necessary to this decision. But it is plain that only those facts must be regarded here that existed at the time of the application to respondent which were presented to him. A fact existing then, and not put in issue and not tried, cannot be urged afterwards as a justification for the court's refusal to perform a plain duty, as it appears from the record that was presented at the time the motion was made.

The only other question worthy of serious attention involves the determination of the nature and effect of the order or judgment set out in the amended answer as follows: "The motion of plaintiff in the above-entitled action or proceeding for an order of this court directing and commanding the witness George E. Lamphrey to answer the questions

propounded to him upon the taking of his deposition before H. B. Bradford, a notary public in and for the county of Sacramento, state of California, and that if said witness refuses to answer the questions that he may be adjudged guilty of contempt and punished according to law, having been heretofore argued by counsel for the respective parties, submitted to and by the court taken under advisement, now on this ——— day, in open court appeared the respective counsel, and the court renders its decision as follows: It is ordered that said proceeding be and the same is hereby dismissed." It is claimed that the dismissal of the proceedings divested the court of jurisdiction, and therefore the writ of mandate is not appropriate, since it presupposes not only the duty but necessarily the legal power to require the witness to answer the questions. But this is a mistaken view of the situation. The effect of the order dismissing the proceeding is the same as the refusal of the court to hear and determine the application. When under the law it is clearly the duty of the court to proceed to the consideration of a motion upon its merits, it cannot relieve itself of this duty, nor divest itself of jurisdiction by an arbitrary dismissal of the proceedings. Such an easy and convenient method of rendering ineffective the statute providing for the issuance of the writ of mandate is not to be countenanced.

In *Heinlen v. Cross*, 63 Cal. 44, the proceeding was dismissed on the ground that the process of contempt was a proceeding in the action, and that by the appeal from the judgment in said action all proceedings under said judgment had been stayed. The Supreme Court said: "Had the action of the court below been in the exercise of a judicial discretion, of course mandamus would not lie to compel the court to proceed in the matter. But it is perfectly manifest that the action of the court in dismissing the proceeding was based on a supposed want of power, occasioned by the appeal and the incidental stay of proceedings wrought by the execution of the undertaking on appeal. If the injunction was not suspended by virtue of the appeal, it was the duty of the court to have inquired into the facts, and to have brought its judgment to bear upon them. *Merced Mining Company v. Fremont*, 7 Cal. 130." It was held that the appeal did not suspend the injunction, and the peremptory writ of mandate was issued.

In *Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699, it is said: "This is an application for a writ of mandate, to compel the superior court of Los Angeles county, Judge W. A. Cheney presiding, to hear a charge of contempt of court, made against one B. Newman, which that court refused to hear, and has dismissed on the ground of want of jurisdiction. We have examined the record and are of opinion that the matter is within the jurisdiction of the court. The facts stated

bring the case clearly within section 1210 of the Code of Civil Procedure, and under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it."

But it is contended that the court acted upon and determined the matter submitted to it, and however erroneous its determination, it is not subject to review in this proceeding. In support of this position *People v. Weston*, 28 Cal. 640, and *Francisco v. M. I. Co.*, 36 Cal. 286, are cited. In the former case the county court had dismissed an appeal from the justice court, and an application was made to the Supreme Court for a writ of mandate requiring the county judge to proceed and try the cause. It is said: "But the court had jurisdiction to inquire and determine whether the appeal had been properly taken and was then pending in that court or not, and in determining that question acted judicially. The court did not refuse to act, but acted, and judicially determined that the appeal had not been properly taken, and upon this ground dismissed it. Where the act to be done is judicial in its character, the writ will not direct in what manner the inferior court shall act, but only direct it to act." In the *Francisco Case* it is said: "In the case now presented the district court has acted upon the petition of defendant for removal of the cause. The matter was properly before the court upon the petition and evidence in support thereof, and, being satisfied therefrom of the existence of the requisite facts entitling defendant to the order prayed for, the same was granted by the court, and a removal of the cause ordered; and this court by mandamus cannot, directly or indirectly, compel a rescission or disregard of this order."

It may be conceded that those cases were properly decided upon the record as presented to the Supreme Court, but there is some language used in the opinions, somewhat inaccurate, as pointed out in *Wood v. Strother*, 76 Cal. 548, 18 Pac. 766, 9 Am. St. Rep. 249, wherein it is declared: "It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and by reasoning from them, as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases." After reviewing numerous authorities the court proceeds: "In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to

control judicial action or to compel a tribunal to act in a certain way. * * * In every case the tribunal that is to act must determine, in the first instance, whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final; and if not, whether there is any other plain, speedy, and adequate remedy. * * * But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue." The determination in the case at bar is contained in an order (Code Civ. Proc. § 1003) virtually denying the motion; it is not a judgment (Code Civ. Proc. § 577); and there is no appeal (Code Civ. Proc. § 963). Hence it must be clear that it was not intended to be final, and there is no other remedy at all. That the court did not proceed to determine the vital consideration whether the questions propounded to the witness should be answered is manifest. There was no conflicting evidence, no issue of fact was presented to the court, and the proceeding was dismissed solely upon the ground that the facts disclosed by the application showed that the court had no jurisdiction. Such is the allegation of the petition here. It is not denied by the answer, and there is nothing in the order to indicate the contrary.

It is claimed that said order shows that the application was considered and determined, but the language of the order leaves no doubt that the thing considered was "the motion of plaintiff" and the argument of counsel. Such consideration cannot be effective to prevent the issuance of the writ of mandate if the court to which application is made is of the opinion that the duty of the lower court to grant the motion is clear, and that there is no other adequate remedy. The contention of respondent's counsel, if carried to its logical conclusion, would lead to the denial of any application for the writ where the action of an inferior court is involved. It was the plain duty of respondent upon the facts presented, not only to consider the motion and argument, but to grant said motion and compel the witness to complete the deposition.

For the foregoing reasons, it is ordered that the peremptory writ issue.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 80

In re LAMPHREY. (Civ. 464.)

(Court of Appeal, Third District, California.
April 10, 1908.)

Application by George E. Lamphrey for a writ of prohibition against the superior court of the county of Sacramento and Hon. Peter J. Shields, judge of said court, to prohibit action on an application to require the petitioner to complete depositions before a notary. On demurrer to the petition. Demurrer sustained, and order to show cause discharged.

H. C. Ross, for petitioner. J. D. Meredith, for respondent.

BURNETT, J. This proceeding grew out of an effort to take the deposition of the said George E. Lamphrey, in a cause pending in the superior court of Placer county, wherein Mrs. W. P. Scott is plaintiff and Fred S. Stevens, as executor of the estate of Adolph J. Weber, deceased, is defendant.

For a statement of the facts in relation to said deposition, we refer to the matter of the application of the said Mrs. W. P. Scott for a writ of mandate, directed to Hon. Peter J. Shields, as judge of the superior court of Sacramento county, reported in 96 Pac. 385, decided by this court March 24, 1908.

After making the order, which is set out in the opinion on said application for a writ of mandate, respondent, concluding, no doubt, upon reflection, that he should have directed the witness to complete his deposition, made the following order: "Good cause appearing therefor, it is ordered that the order dismissing the proceeding in the above-entitled action or proceeding heretofore made herein on the 6th day of March, 1908, be and the same is hereby vacated and set aside. It is further ordered that the motion of plaintiff in the above-entitled action or proceeding for an order of this court directing and commanding the witness George E. Lamphrey to answer the questions propounded to him upon the taking of his deposition before H. B. Bradford, a notary public in and for the county of Sacramento, be and the same is hereby set for hearing for Thursday, March 19, 1908, at 10 o'clock a. m. It is further ordered that counsel for the plaintiff give notice to the witness George E. Lamphrey of the making of said orders."

The prayer is for a writ to prohibit the said court and the judge thereof from acting or proceeding in the matter of said application for the purpose of requiring petitioner to answer before said notary public, and from taking any action or proceeding adjudging or decreeing petitioner guilty of a contempt of court for failing or refusing to answer before said notary. It could be easily demonstrated that the writ should not issue for several reasons, but in the said application for the writ of mandate we held that it was the duty of respondent to do what is in this application sought to be prevented. The alternative writ in this proceeding was issued before any conclusion was reached as to the peremptory writ of mandate, but the reason for issuing the latter is sufficient ground for denying the petition herein.

The demurrer to the petition is sustained, and the order to show cause is discharged.

We concur: **CHIPMAN, P. J.; HART, J.**

8 Cal. App. 221

HENTIG v. JOHNSON et al. (Civ. 475.)

(Court of Appeal, Second District, California.
April 28, 1908.)

1. APPEAL AND ERROR—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—ERROR AFFECTING CO-PARTY.

Plaintiff owned a one-half interest in land title to which stood in the name of W., and a mortgage thereon was foreclosed, and the surplus proceeds paid to W. in conformity with the decree. Plaintiff sued W. for one-half the surplus proceeds, and made the mortgagee and others parties defendant. A joint demurrer to the petition was overruled. Judgment was against W. alone. *Held*, that any error as to the other defendants in overruling the demurrer was immaterial and could not be reviewed on W.'s appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3584-3590.]

2. MORTGAGES—FORECLOSURE—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—RIGHT TO SURPLUS PROCEEDS.

Though plaintiff owning a one-half interest in land title to which stood in the name of W., which was subject to a mortgage, was a party defendant in a suit to foreclose the mortgage, in the absence of a showing to the contrary, it would be assumed that the issues as to him were based on the usual allegation that he claimed some interest in the premises subordinate to the mortgage, and, as no conflicting rights between plaintiff and W. would be injected into the foreclosure suit by such issue, the foreclosure decree would not be *res judicata* as to plaintiff's right to a share of the surplus proceeds.

3. ACTIONS—MISJOINDER OF CAUSES—ONLY ONE CAUSE SUFFICIENTLY STATED.

Where plaintiff alleged his one-half interest in land title to which stood in the name of W., and W.'s refusal to pay over one-half the surplus proceeds received by him on foreclosure of a mortgage on the land, and also attempted to set up a conspiracy between W. and other defendants to defraud plaintiff, but the allegations as to conspiracy did not state a cause of action, there was no misjoinder of causes of action.

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 475, providing that no judgment shall be reversed or affected because of any error, ruling, etc., unless it appears from the record that it was prejudicial, and the appealing party thereby suffered substantial injury, where a complaint stated a cause of action against appellant, and attempted, but failed, to state another cause against appellant and other defendants, overruling a demurrer to the complaint for misjoinder of parties would not warrant a reversal, where the judgment was against appellant alone.

5. "JUDGMENT"—FORM—SUFFICIENCY.

Where a court ordered, adjudged, and decreed that defendant within 10 days pay plaintiff a certain sum, instead of adopting the expression "that plaintiff do have and recover," etc., the determination was a judgment within the meaning of Code Civ. Proc. § 577, defining a "judgment" as a final determination of the rights of the parties in an action, and it was not merely an interlocutory order, for, no particular form being prescribed by the Code, the test of the sufficiency of a judgment must be the substance, rather than its form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 395-411.]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695-7696.]

6. SAME—SURPLUSAGE—EFFECT.

Even though the requirement for payment within 10 days was unwarranted, it was without force and should be treated as surplusage, and would not require modification of the judgment on an appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 395-411.]

Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by F. G. Hentig against Frances E. Johnson, Mary Williams, and another for one-half the surplus proceeds received by defendant Williams from foreclosure of a mortgage on certain property. From a judgment for plaintiff against defendant Williams, she appeals. *Affirmed*.

E. C. Bower, for appellant. F. G. Hentig and Percy B. Lloyd, for respondent.

SHAW, J. Plaintiff was the owner of an undivided one-half of a certain lot, the legal title to which stood in the name of Mary Williams, subject to a mortgage held by Frances E. Johnson. Williams refused to transfer to plaintiff his interest in said lot, whereupon he brought suit to compel conveyance thereof. Judgment was rendered in his favor, from which Williams appealed. Pending this appeal, Johnson brought suit to foreclose her mortgage, making plaintiff a party defendant therein. She obtained a decree of foreclosure, under which the lot was, on August 2, 1904, sold for a sum in excess of that required to satisfy her judgment, and which surplus was, in accordance with the decree, paid to Williams, the record owner of said lot. Later, the judgment in favor of plaintiff requiring Williams to convey to him an undivided one-half interest in the lot, and from which she had appealed, was affirmed. Upon her refusal to pay to him any part of the surplus proceeds of the sale of said lot, he brought this action against her, making Johnson and others party defendants therein. All of the defendants joined in a demurrer, which was overruled, and thereupon they filed separate answers. Judgment went in favor of all the defendants, except Mary Williams, against whom judgment was rendered in favor of plaintiff for one-half of said surplus money received by her under said decree of foreclosure, together with interest thereon from the date of its receipt. Her appeal is from this judgment.

1. In considering the demurrer interposed it is unnecessary to discuss the objections therein urged to the sufficiency of the complaint, save and except in so far as it forms a basis for recovery against appellant. If the ruling be correct as to her, the fact that it was erroneous as to the other defendants not complaining is immaterial as to appellant. The complaint contains a mass of surplusage intermingled with a statement of facts, from which it appears that plaintiff was the owner of an undivided one-half of said lot subject to said mortgage; that the title thereto stood of record in the name of said Williams, who wrongfully refused to convey the same to him; that, while thus holding the title, a suit foreclosing the Johnson mortgage was instituted, and the property sold under the decree rendered therein, and the surplus arising from such sale, consisting of \$759.95, was, on August 2, 1904, in accordance with the directions in said decree, paid to her; that she refused to pay any part thereof to plaintiff; and that she still retains the same. The prayer of the complaint is for general relief. By his complaint, in addition to the above facts, plaintiff undertakes to set up a conspiracy between appellant and her codefendants, whereby they sought to defraud plaintiff in depriving him of the title to said lot, and upon which he prays that Johnson and Williams be required to convey to him one-

half of said lot. The allegations, however, fall far short of constituting a cause of action under which such relief could be granted, and as inserted in the complaint constitute mere surplusage. The complaint shows that Hentig was made a party defendant in the foreclosure suit, by reason of which fact appellant contends that respondent was estopped from asserting claim to any part of the surplus proceeds derived from sale under the decree of foreclosure. As the record discloses nothing to the contrary, we must assume that as to Hentig the issues involved were based upon the usual allegations contained in complaints for foreclosure of mortgages to the effect that he as defendant other than the mortgagor claimed some interest in the mortgaged premises, which claim, however, was subordinate to the lien of the mortgage. No conflicting rights between Hentig and Williams as to the ownership of the property were injected into the action by such issue, and there is nothing in the record showing the issue involved in this suit to have been involved or tried in the action instituted by Johnson to foreclose her mortgage. Hence the judgment of foreclosure was not *res adjudicata* as to Hentig's right to recover from appellant that portion of the surplus proceeds of the sale which she wrongfully withheld from him. *Beronio v. Ventura Lumber Co.*, 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; *Murray v. Etchepare*, 129 Cal. 318, 61 Pac. 930. There was no misjoinder of causes of action, for the reason that only one cause of action was stated, namely, that to recover one-half of the surplus money received by appellant from the sale. The attempt to state another was wholly futile. Conceding the ruling upon the demurrer for misjoinder of party defendants to have been erroneous, it was nevertheless an error which could not prejudice the rights of appellant. Section 475, Code Civ. Proc.; *Reynolds v. Lincoln*, 71 Cal. 184, 9 Pac. 176, 12 Pac. 449; *Hayne on New Trial and Appeal*, § 286. We therefore conclude there was no prejudicial error in the ruling of the court upon the demurrer.

2. It is urged that the judgment is not justified by the findings, and this for the reason that, instead of adopting the expression "that plaintiff do have and recover," etc., the court "ordered, adjudged, and decreed that the defendant Mary Williams, within 10 days from this date, pay to the plaintiff F. G. Hentig the sum of," etc. Appellant contends that this is not a judgment, but merely an interlocutory order. We cannot agree with this contention. While it is irregular in form, it nevertheless, in substance, conforms to the definition of a "judgment" as contained in section 577, Code of Civil Procedure. It is a "final determination of the rights of the parties in the action." No good reason exists for departure from established and well-recognized forms; but, in the absence

of any particular form being prescribed by the Code, the test of the sufficiency of a judgment must be the substance, rather than its form. With reference to the form of judgments, Mr. Black, in his work on the subject (section 115), states the rule as follows: "It may therefore be stated as the modern rule that the form of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated." In discussing the same subject, another law writer says: "That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it show: (1) The relief granted, and (2) that the grant was made by the court in whose records the entry is written." Freeman on Judgments, § 50. Measured by the above rules, the document in question constitutes a final judgment for money to be enforced by the issuance of a writ of execution against the property of defendant, as provided by section 684, Code Civ. Proc. As thus interpreted, it follows that the words "within 10 days from this date," as here used, perform no office whatever. While their use is unwarranted, they are nevertheless, in our opinion, on the face of the judgment, of no force or effect. If this be true, the use of the words cannot prejudice the substantial rights of appellant, and it is therefore unnecessary to order a modification of the judgment by striking therefrom words which are mere surplusage. The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 1

KLOKKE v. RAPHAEL. (Civ. 469.)

(Court of Appeal, Second District, California. March 27, 1908. On Rehearing, April 25, 1908. Rehearing Denied by Supreme Court May 25, 1908.)

1. PLEADING—AMENDMENTS—DISCRETION OF COURT.

Under Code Civ. Proc. § 473, permitting the court, in furtherance of justice, to allow a party to amend any pleading, etc., and enlarge the time for answer, demurrer, etc., a wide discretion is vested in courts of original jurisdiction, and where the exercise of such discretion is to afford litigants a trial upon the merits, the abuse thereof must clearly and conclusively appear to justify interference on appeal; and hence, though no copy of an amended complaint was served upon defendant until the expiration of the time for filing, the action of the trial court in permitting it to be served thereafter, but before the filing of defendant's motion to strike the amended complaint, was not an abuse of its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 601.]

2. MECHANICS' LIENS—INDEMNITY AGAINST LIENS—ACTIONS ON BONDS—COMPLAINT.

In an action on a bond, signed by defendant as surety, to secure the performance of a building contract, and to indemnify against liens

by reason thereof, the complaint alleged that suit was instituted to foreclose liens on plaintiff's building, and the contractors, though made parties thereto, neglected to defend, and by reason of their failure to release the building from the liens as they had contracted to do, and in order to protect his interests in the suit to foreclose the liens, plaintiff was obliged to and did employ an attorney to represent him therein, and was compelled to pay him a large sum for services rendered in the suit, and that by reason of the contractors' failure to comply with the conditions of their contract, for the performance of which the bond was given, plaintiff was damaged in the sum paid his attorney, etc. Held, that the complaint stated a cause of action, on general demurrer, and the allegation of payment to his attorney, while ambiguous and uncertain, was sufficient to justify the admission of evidence of the amount actually paid; there being no demurrer to the complaint upon that specific ground.

3. SAME—DAMAGES—ATTORNEY'S FEES IN DEFENDING LIENS.

Where contractors defaulted in their covenant to release a building from all claims against it, and liens were filed thereon, and suits instituted to foreclose them, which the contractors neglected to defend, as required by Code Civ. Proc. § 1193, providing that contractors shall defend such suits at their own expense, and the owner of the building was ready, on the release of his property from the liens, to pay the parties entitled thereto the balance remaining in his hands due the contractors, he was entitled to have the rights of the lienors established by decree of court, and in an action on the contractors' bond could recover a reasonable amount paid for attorney's fees in defending the actions; such fees being the proximate and direct result of the breach of contractors' covenant to discharge the claims.

On Petition for Rehearing.

4. SAME — TRIAL — VERDICT — RESPONSIVENESS TO ISSUES—EXCEEDING CLAIM.

In an action by the owner of a building on the building contractors' bond to indemnify against liens, in which he sought recovery for attorney's fees paid in defending claims against the building, which the contractors failed to discharge or defend, the complaint not having made claim for money expended as costs in such suit, but only for attorney's fees, the amount of such costs was improperly included in the verdict.

5. APPEAL AND ERROR — DISPOSITION OF CAUSE—MODIFICATION—REDUCING AMOUNT OF RECOVERY.

Where an item was improperly included in a verdict for plaintiff, he being otherwise entitled to recover, the judgment will not be reversed, and a new trial ordered, but will be affirmed as modified, after eliminating the item improperly included.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4498-4505.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Ernst F. C. Klokke against Isadore Raphael. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

H. S. G. McCartney and E. C. Bower, for appellant. Walter G. Van Pelt, for respondent.

SHAW, J. This is an action to recover upon a bond, signed by appellant as one of the sureties, and given to secure the performance of a builder's contract, which, among other provisions, contained the following: "The

contractor shall, on or before thirty-five days after the acceptance of the building, cancel and release the said building and premises from all claims that may have accrued against the said building by reason of the aforesaid erection." The condition of the bond was that if the contractor should strictly keep and perform all the covenants of the contract by him to be kept and performed, and should, on or before 35 days after completion of the building, discharge and satisfy all claims or liens that might have accrued against the same in and by reason of the performance of said contract, and should save the owner free and harmless from all damages therefrom, as in said contract provided, the bond should be void. It was provided in the contract that the cost of the building should be paid in installments, of which the sum of \$558.75 was payable on completion, and \$1,117.50 payable 36 days thereafter. The building was completed according to the contract, and plaintiff, on June 20, 1903, duly accepted the same. Prior to said acceptance, and before the expiration of 30 days thereafter, a number of mechanics and laborers, who had been employed in the construction of the building by the contractors, and certain others who had, upon the order of said contractors, furnished material for said building, served notice that they had not been paid for said labor and material, and demanded that plaintiff withhold payment of the balance in his hands due said contractors under the terms of said contract. Whereupon plaintiff retained in his hands said installment of \$558.75, which became due to said contractors upon the completion of the building, and also withheld payment of the last installment of \$1,117.50, and made demand upon said contractors that they cancel the demands of said laborers and materialmen, and release the building from the lien thereof. The contractors neglected and failed so to do, and left the state. Within 30 days after completion of the building, notice of 11 liens, claimed on account of labor performed and material furnished, were filed against the building and premises. The complaint alleges that thereafter suit was instituted to foreclose said liens, and, said contractors, though made parties to said suits, neglecting upon demand to do anything in the premises, plaintiff, by reason of the failure of the contractors to release said building from said liens as covenanted in said contract, and in order to protect his interest in the suits to foreclose said liens against his building, was obliged to and did employ an attorney to represent him therein, and was compelled to pay said attorney a large sum of money for services rendered in said suits; that by reason of said contractors' failure to comply with the terms and conditions of their contract, for the performance of which said bond was given, plaintiff was damaged in the sum of money which he had paid, and for which he had become indebted to his attorney, which dam-

age, it is alleged, amounts to \$500. The court found all the issues in favor of plaintiff, and further found the amount actually paid by plaintiff to be \$388.90, for which sum it gave him judgment, and from which defendant appeals.

1. Appellant moved the court to strike from the files plaintiff's second amended complaint, upon the ground that, although it had been filed within the time granted by the court for filing the same, no copy thereof had been served upon appellant or his attorneys until the expiration of such time. The amended complaint was duly filed within the time granted, and a copy thereof served upon appellant before the filing of his motion. There was no abuse of discretion in the denial of the motion upon the showing made by plaintiff's affidavit. Under section 473 of the Code of Civil Procedure a wide latitude of discretion is vested in courts of original jurisdiction, in relieving parties from default in the performance of acts where such default tends to obstruct a hearing of pending actions. Where the exercise of such discretion is to accord litigants a trial upon the merits, the abuse thereof must clearly and conclusively appear in order to justify interference by this court.

2. Defendant interposed a general demurrer, which was overruled, and this ruling is assigned as error. It is insisted that attorney's fees paid by plaintiff are not recoverable on the bond, because such damage is remote; that if they are recoverable, the complaint fails to allege payment thereof by plaintiff; that it does not appear from the complaint that the amount of money, payment of which was withheld from the contractors, was inadequate to pay the amount of all the liens, and the complaint contains no allegation showing the amount of the liens. There is no merit in these and other grounds urged against the ruling of the court on the demurrer. However inartificially drawn the complaint may be, the objections thereto are not subjects of a general demurrer. It sufficiently states a cause of action. The allegation of payment, while ambiguous and uncertain, is nevertheless sufficient (there being no demurrer interposed to the complaint upon such ground) to justify the admission of evidence of the amount actually paid by plaintiff to his attorney for services rendered in the proceedings to foreclose said liens. While it is not alleged that the amount withheld was inadequate to pay all liens and claims, it does appear that plaintiff was, by said notices of claims served upon him, required to withhold the balance due the contractors, and that this entire balance was required, by decree of court rendered in the actions to foreclose said liens, to be paid and distributed to said lienors, and that the whole amount was exhausted. *Burnett et al. v. Glas et al.*,¹ cited by appellant, furnishes

¹ Rehearing granted by Supreme Court.

no support for his contention on this point, for the reason that the facts of that case differ widely from the case at bar. No valid contract was involved therein, and the owner held in his hands nearly \$1,000 due to the contractor, over and in excess of all claims and liens against his property, which he wrongfully refused to pay over.

3. Appellant's chief contention is that plaintiff is not entitled to recover attorney's fees paid, for the reason that the damage resulting from such payment is too remote and consequential. The contractors defaulted in their covenant to cancel and release the building from all claims which accrued against it. Liens were filed upon the premises, and suits instituted to foreclose the same. The contractors failed and neglected to defend these suits, as they were required to do under the provisions of section 1193 of the Code of Civil Procedure. Plaintiff was ready, upon the release of his property from the liens thereon, to pay the parties entitled thereto the balance remaining in his hands due the contractors. He had no means of ascertaining whether the claims were just or unjust. He could not, except at his peril, voluntarily pay them. Therefore, in the absence of any action on the part of the contractors, he was entitled to have the rights of the lienors established by decree of court. The contractors failing to perform their covenant, plaintiff's only course of safety was to secure a release of his property by proceedings in court. To accomplish this result it was necessary to employ an attorney to represent him in such actions as were brought to enforce the liens. As a result of these suits and the action taken by plaintiff, the amount of the liens was ascertained, and the balance in his hands due the contractors ordered distributed pro rata to the parties entitled thereto, through the payment of which plaintiff secured a release of his property from said claims. The reasonable amount paid his attorney for services rendered in said actions was the direct and proximate damage resulting to plaintiff by reason of the breach of the covenant of the contractors to cancel and release the said building and premises from all claims, a covenant for the performance of which the bond was given as security. In the case of *Hickman v. Craig*, 6 Mo. App. 583, it was held that, "where one agreed to deliver a house free of liens, the measure of damages, where there had been a breach of the covenant against liens, is the amount plaintiff was compelled to pay on account of liens, including costs and attorney's fees in defending the lien suits." In *Tally v. Ganahl* (Cal.) 90 Pac. 1049, the court, in discussing the right to recover attorney's fees upon a

bond containing a similar condition, and where claims of lien had been filed against the premises, and suits instituted thereon, says: "As a result of the suits and of her [plaintiff's] employment of the attorney, the amount of the liens was ascertained, she paid the amount into court, and secured a discharge of the several liens. The amount paid to the attorney in these suits was claimed in the complaint as special damages, and was allowed by the court, after due proof of the facts. We perceive no error in this. It was damages proximately caused by the breach of the agreement to deliver the building free from liens, a covenant for which the bond was security. The liens in question were fairly within the terms of that agreement, the owner was acting in good faith, and the fee was found to be reasonable."

4. There is nothing in the point suggested that the findings are not supported by the evidence. The employment of an attorney, the necessity for such employment, the actual payment by plaintiff of the sum found due, and for which judgment was rendered, the reasonableness of the amount so paid, together with the fact that the services were performed, and the expenditures made in good faith, are all conclusively shown by the evidence.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

On Rehearing.

In the petition for a rehearing filed herein our attention is directed to a fact overlooked in the opinion. The judgment rendered includes the amount of \$28.90, which sum, as shown by the evidence, was paid by plaintiff to his attorney as costs, and not for legal services rendered. No claim is made for money expended as costs; therefore, under the pleadings, plaintiff's right to recovery is measured by the sum actually expended by him for attorney's fees only. This sum, as appears by the evidence, was \$360. It follows that the inclusion of the \$28.90 by plaintiff paid out as costs was unwarranted. It is not necessary, however, to reverse the judgment or order a new trial, as the error may be corrected by a modification of the judgment. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

It is therefore ordered that the judgment be modified by deducting therefrom, as of the date of its rendition, the sum of \$28.90, and as thus modified it is affirmed.

The petition for rehearing is denied.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 232

GOODMAN v. SUPERIOR COURT OF CALIFORNIA IN SANTA CLARA COUNTY et al. (Civ. 525.)(Court of Appeal, First District, California.
April 29, 1908.)**1. CERTIORARI—WRIT OF REVIEW—SCOPE.**

A writ of review may not be used to correct errors, but only issues where the court has acted without or in excess of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 1.]

2. JURY—RIGHT TO JURY TRIAL—DENIAL.

The denial of a jury trial, in a case where a jury may be waived, is error only, and not action in excess of jurisdiction.

3. SAME—WAIVER OF JURY.

Under Const. art. 1, § 7, the right of trial by jury may be waived in civil actions and in criminal cases not amounting to a felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 176-203.]

4. CERTIORARI—RIGHT TO WRIT OF REVIEW—DENIAL OF JURY.

A writ of review should not be granted to review an order denying petitioner's right to a jury, in a case where a jury trial might be waived, because petitioner had not demanded a jury within the time required by the rules of court.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Petition for writ of review by P. G. Goodman against the superior court of California in Santa Clara county and another. Petition denied.

William A. Bowden, for petitioner.

HALL, J. This is an original application for a writ of review, the purpose of which is to have it determined that the superior court exceeded its jurisdiction in refusing petitioner's request for a jury trial, in a cause appealed to said court from a justice's court, and in trying said cause without a jury, and in entering judgment against petitioner upon said trial notwithstanding his demand for a jury trial.

The petition shows that the superior court refused to allow petitioner a jury because of failure to comply with the rules of the court concerning the time within which the demand for a jury must be made. The writ of review may not be used to correct errors, but can only be issued where the court, to which it may be directed, has acted without or in excess of its jurisdiction. The basis of petitioner's contention in this case is that the court acted in excess of its jurisdiction in trying the case without a jury notwithstanding petitioner's demand for a jury. It is sometimes a nice question as to whether a particular action of the court is mere error, or is in excess of jurisdiction; but in this state it has been decided that the denial of a jury trial in a case where a jury might be waived is error only, and not action in excess of jurisdiction. *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113; *Powelson v. Lockwood*, 82 Cal.

613, 23 Pac. 143. Both in criminal cases not amounting to felony, and in civil actions, the right of trial by jury may be waived (Const. art. 1, § 7). In *Ex parte Miller*, supra, in denying a writ of habeas corpus, the court said: "If a jury trial was denied, it was a mere error which could not be reached by habeas corpus." And in *Powelson v. Lockwood*, supra, it was held that in refusing a jury to defendant charged with misdemeanor a justice court did not exceed its jurisdiction, but at most only committed error, for which reason the justice court could not be prohibited from proceeding to try the action. In *Witman v. Police Court*, etc., 145 Cal. 474, 78 Pac. 1052, it was said: "This court has held in two well-considered cases that the denial of a jury altogether in a misdemeanor case was but an error of law, and that the justice's court did not in such denial exceed its jurisdiction"—and cited the two cases above referred to in support thereof. So, also, in *Ex parte Fife*, 110 Cal. 8, 42 Pac. 299, the court said: "A jury may be waived in any civil case, and it is not contended by any one that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than error, and, as a jury may, under the Constitution, be waived 'in all criminal cases not amounting to felony,' a jury is not a necessary constituent part of a court for the trial of a misdemeanor, and the refusal of the court to allow a jury on such a trial is mere error." In this case the court held that the court clearly erred in refusing the jury, but determined that it was error only, and did not go to the jurisdiction of the court to try the case without a jury. So in the case at bar the court had jurisdiction of the parties and of the subject-matter of the action, and its refusal of petitioner's demand for a jury was at most mere error which did not go to its jurisdiction.

The petition is denied.

We concur: **COOPER, P. J.; KERRIGAN, J.**

8 Cal. App. 226

LARSEN v. LEONARDT. (Civ. 442.)(Court of Appeal, Second District, California.
April 28, 1908. Rehearing Denied
June 27, 1908.)**1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

An employé assumes the risk of a danger of which he knew, or which was so obvious that he must have known it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600, 610-624.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

An employé, who fails to use ordinary care for his own protection, is guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 674.]

3. TRIAL — VERDICT — SPECIAL FINDINGS — FINDINGS INCONSISTENT WITH GENERAL VERDICT.

In an action for injuries while working on a scaffold in defendant's employment, the court submitted to the jury the special question whether the unsecured condition of the plank from which plaintiff fell was open to his observation, and whether he could have found out its unsecured condition by looking at it, and instructed the jury that an employé assumed the risk of dangers of which he knew, or which were so obvious that he should have known, and, if plaintiff did not use ordinary care for his own protection, he could not recover. The jury answered that "under the evidence they were unable to determine" the special question, and returned a general verdict for plaintiff. *Held*, that if the jury were unable to determine this special question as to whether the defect was open to plaintiff's observation, which was a fact upon which his right of recovery depended, plaintiff was not entitled to a general verdict, and the judgment will be reversed.

4. SAME — GENERAL VERDICT — SPECIAL VERDICT — PURPOSE.

A general verdict for plaintiff implies a finding in favor of plaintiff of every fact essential to support his cause of action, and the purpose of requiring answers to special questions is that defendant might determine whether the jury would be able to find in favor of plaintiff upon the separate elements of his cause, as well as to find generally for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 809-812.]

5. SAME—SPECIAL FINDING—QUESTION SUBMITTED—PROPRIETY.

Code Civ. Proc. § 625, provides that, upon request of any party, the court must direct the jury to find a special verdict upon any or all issues, and, if they render a general verdict, to return a written finding upon particular questions of fact. In an action for injuries by falling from a scaffold while in defendant's employment, the court submitted a special question as to whether the unsecured condition of the plank from which plaintiff fell was open to his observation and its unsecured condition could have been found out by looking at it, and at the same time instructed the jury that an employé assumed the risks of obvious dangers and must use ordinary care for his own protection, and, if plaintiff did not do so, could not recover. *Held*, that the question was authorized by the statute, and defendant was entitled to have them answered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

6. SAME—FAILURE TO MAKE SPECIAL FINDING.

Code Civ. Proc. § 625, provides that, upon request of any party, the court must direct the jury to find a special verdict upon any or all issues, and, if they render a general verdict, to return a written finding upon particular questions of fact. In an action for injuries by falling from a scaffold while in defendant's employment, a special question was submitted to the jury as to whether plaintiff could have observed the unsecured condition of the plank, to which the jury answered that they could not determine the question from the evidence, and to several other special questions submitted, answered, in effect, that they "did not know," or were "unable to determine" them. *Held*, that the answers did not meet the requirements of the statute, and the failure to find was fatal to the verdict.

7. APPEAL AND ERROR — DISPOSITION OF CAUSE—ON REMAND—PROCEEDINGS ON RETRIAL—LAW OF THE CASE—DECISION BY DIVIDED COURT.

Upon reversal of a judgment for plaintiff, if the appellate judges do not agree upon questions of law, their decision on such questions

would not become the law of the case upon a retrial.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Henry Larsen against Carl Leonhardt. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed and remanded for new trial.

Hunsaker & Britt, for appellant. Edwin A. Meserve (Paul H. McPherrin, of counsel), for respondent.

TAGGART, J. Action for damages for personal injuries. Defendant appeals from judgment for plaintiff and from an order denying his motion for a new trial.

Plaintiff was a hodcarrier, or brickmason's helper, in the employ of defendant, who was a contractor engaged in the erection of a large building in the city of Los Angeles. Plaintiff fell from a scaffold because of stepping upon a loose plank which was insecurely laid on the cross-beams, or putlogs, which supported the floor of the main or permanent scaffold, extending clear across the building, used by the bricklayers and their helpers in laying up the brick in the walls of the building. When the work on the main scaffold reached a stage called "scaffold high," temporary scaffolding, consisting of four ten-inch planks fourteen feet long, was laid upon trusses which were set upon the main scaffold, and were used by the bricklayers to stand upon while laying up the arches to the windows. This temporary scaffolding was moved from arch to arch by the bricklayers and their helpers, and the loose plank which caused plaintiff to fall was moved along with the temporary scaffolding and thrown down alongside of the floor of the main scaffold. While the masons were on the temporary scaffold, the bricklayers' helpers continued to stand upon the main scaffold and to pass up brick and mortar to the brickmasons on the temporary scaffold. Plaintiff had been handing up brick at the end of the temporary scaffold and was called to supply brick to the mason who was working near the center of the arch, and in attempting to pass around the end of one of the trusses, standing upon the main scaffold, so as to be able to hand up the brick from a point near the center of the temporary scaffold, stepped upon the insecure plank, which laid about a foot from the floor of the main scaffold, and was thrown to the ground and injured. It is for damages for this injury that this action was brought.

Quite a number of questions are presented upon this appeal, and as to the determination of some of them the members of this court are not all able to concur. There is one reason, however, which all agree requires that the judgment be reversed and the cause remanded for a new trial, and that is the failure of the jury to find upon certain of the special questions which were submitted to

them, with the general form of verdict. Of the twelve questions propounded, but four were answered directly. The rest were answered evasively, or, in effect, by "we do not know," or "are unable to determine."

The sixth special question was answered: "Under the evidence submitted, we are unable to determine." The question being: "Was the unsecured condition of the plank from which the plaintiff fell open to the view and observation of the plaintiff, and could the plaintiff have found out the unsecured condition of said plank by looking at it?" The court instructed the jury that an employé assumed the risks of a danger which he knew, or which was so obvious that he must have known, and that, if the plaintiff "failed to use ordinary care for his own protection—did not look out properly for himself"—that he was guilty of contributory negligence. This is the law. *Kenna v. Central Pac. R. R. Co.*, 101 Cal. 26, 35 Pac. 332; *Brett v. Frank & Co. (Cal.)* 94 Pac. 1051.

If the jury were "unable to determine" from the evidence whether or not the condition of the plank was open to the view of plaintiff, we are at a loss to know how they could render a general verdict in his favor under the instructions of the court. If the jury were unable to find positively that a fact material to the general verdict had not been proven, the plaintiff was not entitled to the verdict, since his case lacked this essential element. The general verdict implied a finding in favor of plaintiff of every fact essential to the support of his cause of action, and the purpose of requiring answers to these special questions was that defendant might determine whether or not the jury would be able to find in favor of plaintiff upon the separate elements of the case when so presented, as well as to render a "lump" verdict in his favor which might conceal some mental reservations. *Plyler v. Pacific Portland Cement Co. (Cal.)* 92 Pac. 56.

The questions were such as were authorized by section 625 of the Code of Civil Procedure, and defendant was entitled to have them answered. To permit them to be evaded was to deprive the defendant of a statutory right. Such answers as were given to questions 1, 2, 5, 6, 7, 10, 11, and 12 did not meet the requirements of section 625, and, if allowed, would operate to fritter away and destroy the intention of the Legislature in amending the section.

Any expression of the views of the respective members of the court upon the questions of law as to which all do not agree would be useless, since such opinions would not become the law of the case and could not serve as a rule or guide upon a retrial of the cause.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 774

DE WITT v. FLORISTON PULP & PAPER CO. (Civ. 409.)

(Court of Appeal, First District, California.
March 26, 1908. Rehearing Denied
May 25, 1908.)

1. MASTER AND SERVANT—DEATH OF SERVANT—EVIDENCE.

In an action for death of a servant by the bursting of a defective elbow negligently fitted on a steam pipe, evidence held to sustain a verdict against the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

2. TRIAL—INSTRUCTIONS—FORM AND REQUISITES.

Instructions must be read as a whole, and when so read, if not contradictory, and if supplemented by each other, they fairly state the law. An objection that one or more of the instructions do not state all the rule applicable to the evidence with its modifications is unsustainable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

3. MASTER AND SERVANT—DEATH OF SERVANT—DEFECTIVE APPLIANCES.

While it is the duty of a master to furnish its employées with safe and suitable appliances, such duty is performed when it exercises reasonable and ordinary care in the selection of appliances for the uses for which they are intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

4. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions that it was defendant's duty to furnish plaintiff's decedent with safe and suitable appliances was not objectionable for failure to charge that such duty was performed by the exercise of reasonable care, where the court in other instructions in various connections charged that defendant's duty was performed when it exercised reasonable and ordinary care in the selection of the appliance which exploded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

5. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Where intestate was killed by the explosion of an elbow on a steam pipe, but there was no evidence that he knew of any defect in the elbow, he did not assume the risk of danger therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

6. DEATH—EVIDENCE—HEALTH OF PLAINTIFF.

In an action by intestate's mother as his administratrix for his wrongful death while in defendant's employ, evidence that her health was good, and that she had not been sick since she was nine years old, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 91.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—DEATH—EVIDENCE.

In an action for death of a servant by the bursting of an elbow on a steam pipe in the engine room of defendant's mill, the court did not err in admitting a declaration by decedent five minutes before the explosion that he was going down to the engine room to look after the engine; there being no contention that decedent was in a place where he should not have been when he was injured.

8. WITNESSES—KNOWLEDGE—EVIDENCE.

In an action for death of a servant by the explosion of a steam pipe elbow, which had been obtained from a scrap pile and placed on the pipe, where a witness had testified on cross-ex-

amination that there were many such elbows in use, and that an old elbow which had stood the test was better than a new one, and as to matters in connection with getting elbows from the scrap pile, it was not an abuse of discretion to permit the witness on redirect examination to answer a question as to whether he had ever known of an instance in his experience as a steam fitter where an elbow had been taken from a scrap pile where it had been lying for a year and been put on a steam pipe of the kind in question, to obtain a fuller explanation of the witness' knowledge as to the use of such elbows.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Melinda A. De Witt, as administratrix of the estate of Boone W. De Witt, deceased, against the Floriston Pulp & Paper Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Snook & Church, for appellant. H. B. M. Miller, for respondent.

COOPER, P. J. This action was brought by the plaintiff as administratrix of the estate of her deceased son, Boone W. De Witt, to recover damages for his death while in the employ of the defendant, such damages alleged to have been caused by its negligence. The case was tried before the court with a jury, and a verdict was rendered in favor of the plaintiff, upon which judgment was duly entered. Defendant made a motion for a new trial, which was denied. This appeal is from the judgment and the order denying the defendant's said motion.

It is claimed that the evidence is insufficient to support the verdict, and that the evidence does not show that the defendant was guilty of such negligence as will entitle the plaintiff to recover. This is the first and most important point in the case. It appears without conflict that at the time of the injury the defendant, a corporation, was engaged in the manufacture of pulp and paper in its pulp and paper mills at Floriston, in Nevada county, Cal., and that the deceased was, and for some weeks prior thereto had been, in its employ as a millwright. While so employed in the engine room of the defendant about his usual business doing the work required of him, and with no suggestion of negligence on his part, an iron elbow, forming part of a steam pipe through which steam was conveyed from defendant's boiler at its mill to an engine in said engine room, burst, and by the explosion blew out a partition between the said engine and said elbow, and by the escape of the steam so badly scalded and burned the deceased that he died of his injuries on the following day. It is alleged that the injuries to deceased "were caused by and through the carelessness and negligence of the said defendant in this: That said elbow which exploded as hereinbefore stated was by the said defendant attached to the said steam pipe of which it formed a part on the 26th day of December, 1903, and at the

time of and immediately prior to its being so attached it was old, rusty, decayed, defective, unsafe, and unfit for the purposes for which it was intended to be and was used by defendant; that of these facts the said defendant had full notice and knowledge." After a careful examination of the evidence we are of the opinion that it sustains the verdict.

John H. Brightwell, a steam fitter by trade, was working for said defendant in such capacity at the time deceased was injured. He testified in part as follows: "The elbow which exploded was put in by me between the 25th and 28th days of December under the instructions of Mr. Woodford, the master mechanic, who had charge at the mill of putting in these elbows. There was no material about the shop to select from, and I got the elbow from the junk pile at the back of the shop. I told Woodford that I found the elbow out in the junk pile, and said to him that he should put off the matter of putting in this elbow and get some new fittings, and that possibly he could get it from Reno; that the elbow was not safe to put in, and he said, 'Put it in,' he would take the chances of its blowing up, or something to that effect; and that they figured on starting it up on the 28th of December. This conversation occurred in the pipe shop on the 25th of December. On Woodford's instructions I put the elbow on the pipe that was connected with the separator. It was a 6-inch pipe to convey steam from the boiler house to the engine. It was something over 200 feet from the boiler house to the engine room. Steam was first passed through the pipe after the elbow was put on about 7 o'clock in the morning, possibly earlier; had been passing through up to the time of the explosion, which occurred about 4 o'clock in the afternoon. I got that elbow in the junk pile between the machine room and the pipe room. I saw Woodford after I found it, after 12 o'clock Christmas day, and said: 'Frank, I have been looking all over the place for an elbow, and have found only one. I got it out here on the junk pile. I don't think it is safe to put it on the steam line.' I told him it had been lying out there and might be cracked from cold weather. I hadn't seen any indications of it being cracked, but there was sulphite on it, and the threads were bad at one end."

Woodford, the defendant's head machinist, testified in substance as follows: "I had a talk with Brightwell in relation to putting in the separator. The first I remember of saying anything to Mr. Brightwell in regard to that was that Mr. Shepard wanted to get it in its place. Brightwell said they were short of elbows. This was in the pipe shop. He told me he didn't want to put anything on that had been used around the sulphite. I said I guessed we could find some elbows. I found one flange elbow in the warehouse and one screw elbow in the machine shop which looked like a new one. I called Mr. Brightwell's attention to the two elbows, and the

same day or the next day I met him between the machine shop and the machine room, and showed him lying along the passageway a screw elbow with a short piece of pipe screwed in each end."

The witness Allen testified that he was present, and heard a conversation between Woodford and Brightwell, which he narrated as follows: "Mr. Woodford walked around and examined the elbow. He said: 'This elbow is all right. Put it in, and I will go out in the machine room and get another.'"

The witness Campbell testified that he heard a conversation between Brightwell and Woodford, and that, as he remembered the conversation, it was as follows: "Brightwell spoke to Woodford and told him that he was not able to find elbows that were safe to put on that steam line, and he also spoke about an elbow found on the scrap pile, and I think he showed this elbow to Woodford, and Woodford told him it was all right, to put it in. Brightwell spoke about putting it off for a day and seeing if they could get an elbow from Reno. Woodford said he didn't think they could get them there."

The witness McKay gives his version of the same or a similar conversation as follows: "Woodford came in, and Brightwell told him that he had hunted all over the place, and he could not find fittings that were good to put on this new work of piping up to the engine—the steam pipe between the engine and boiler. Woodford asked if he had any fittings at all, and he said 'Yes,' that he had one that he found on the scrap pile, and that he didn't like to put it on on that account, that he would rather send to Reno and get one. Woodford walked around and looked at it while it was lying on the bench, and said: 'Jack, that is all right. Go ahead and put it in. That engine must be started up Monday morning.'"

In cross-examination Woodford was questioned as to these conversations and answered as follows: "Q. Mr. Brightwell and three or four witnesses all testified that that elbow which is there on the table, plaintiff's Exhibit A in the case, was shown to you at the mill of the defendant at Floriston a little after 1 o'clock on December 25, 1903, by Mr. Brightwell, and that Mr. Brightwell told you it was not safe to put on the steam line that was used to connect up the receiver. Now are you willing to swear positively that no such statement was ever made to you by Mr. Brightwell at that time and place? A. I cannot recall it; no, sir. Q. But you won't swear positively that that did not occur? A. I won't swear positively that there was not a conversation. I recall some of it."

From the above it may be conceded that the elbow was the part of the pipe that exploded, and that by this means the injury occurred. It exploded on the same day and a few hours after it was put in. The elbow was taken from an old scrap pile. If

the testimony of the witnesses above named is true, Woodford was told about the unfitness and unsafeness of the elbow, and notwithstanding he directed that it be put in so that the engine might be started up. The jurors were the exclusive judges of the evidence and of the credibility of the witnesses. They had the right to give credit to the testimony, to draw all reasonable inferences from it and from the facts proven. In this case it would violate the settled practice of the courts of appeal for us to interfere with the verdict.

Counsel claim that the court erred in its instructions to the jury, and special stress is placed upon the giving of the following instructions at the request of the plaintiff: "First. The court instructs you that it is the duty of an employer to furnish his employes with reasonably safe tools and appliances for the doing of the work intended to be done thereby, to furnish them with a reasonably safe and suitable place to work, and to keep such tools, implements, and appliances and such place of work in that condition, and for his failure so to do resulting in injuries to his employes to which their own acts or omissions have not proximately contributed, he is responsible in damages. Second. If, therefore, you believe from all the evidence in the case that the plaintiff's intestate, while in the employment of the defendant, was injured as alleged in the complaint, and died as a result thereof, and such injuries were caused by the failure of the defendant to furnish reasonably safe and suitable tools, implements, or appliances with which to do the work intended to be done thereby, or from its failure to furnish plaintiff's intestate with a reasonably safe and suitable place in which to work, and that the acts or omissions of said deceased did not proximately contribute to such injuries, it will be your duty to render a verdict in favor of the plaintiff and against the defendant." It is claimed that the above instructions do not state the law correctly, for the reason that they state the law to be that it is the duty of the employer to furnish safe tools and appliances, whereas the law only requires that he should use reasonable and ordinary care in the selection of such tools and appliances.

Instructions must be read as a whole, and when so read, if they are not contradictory, and if, supplemented by each other, they fairly state the law, a case will not be reversed because any one instruction does not state all the rule with its modifications. Now under the law it is the duty of the employer to furnish his employes with reasonably safe tools and appliances for the doing of the work intended to be done thereby. The law is so stated by all the authorities. If it were not so, then we would have the converse—that it is not the duty of the employer to furnish his employes with safe

and suitable tools and appliances. The duty of the employer is performed, however, when he exercises reasonable and ordinary care, such as a reasonably prudent man would exercise, in the selection of tools and appliances for the uses and purposes for which they are intended. The instructions complained of do not give the last rule stated, or, in other words, they do not instruct the jury as to when or how the duty is performed; but elsewhere the jury are fully instructed as to such duty. We find that the court, in other parts of its instructions, plainly instructed the jury as follows: "If you believe from the evidence that the elbow in question was reasonably safe and proper to be used by the defendant, you must render your verdict in favor of the defendant. The defendant is not responsible for the use even of an elbow which is shown to be defective, unsafe, or unfit, unless the plaintiff has also proved that the defendant either knew, or had the means of knowing by the exercise of ordinary care, that the elbow was so defective, unsafe, or unfit." And again: "The defendant is not required by law to furnish appliances which are absolutely safe, nor is the defendant required by law to resort to all possible tests or methods of examination. The defendant is required only in this behalf to exercise that reasonable amount of care, skill, and prudence which reasonably careful men exercise in the transaction of their accustomed business." And again: "If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employé, it is all that can be required of the employer. This is the limit of his responsibility, and the sum total of his duty."

It seems to us that the instructions complained of could not have misled the jury, when the court, as we have shown, repeated time and again that the duty of the defendant was performed if it exercised reasonable and ordinary care in the selection of the elbow. The jury evidently believed from the testimony that defendant did not use that degree of care which a reasonably prudent man would use in the selection of the elbow. It is no doubt the general rule that, when the court instructs a jury upon what state of fact they may find a verdict, the instructions should include all the facts in controversy upon which evidence has been offered material to the rights of the defendant or the plaintiff as the case may be; but this rule must be reasonably applied, in view of the whole record and all the instructions, for the purpose of determining as to whether or not the jury may, as reasonable men, have been misled by the instruction. The views herein expressed are supported by the decision of our Supreme Court in *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407, which was decided by the court in banc after a petition for rehearing had been granted. It is there said: "The

following instruction was given at the request of the plaintiff: 'If the jury believe from the evidence that the defendant was guilty of negligence as charged in the complaint, and that the plaintiff was injured thereby, your verdict should be for the plaintiff, and that, whether such negligence appears or is proved by the testimony on the part of the plaintiff or by defendant's own witnesses.' This instruction entirely ignores the question of contributory negligence on the part of the plaintiff, and is therefore not in itself a complete and correct statement of the law; and the defendant insists that the judgment should be reversed for this reason. In answer to this contention it is sufficient to say that the rule is well settled here that instructions are to be read and considered as a whole; and the fact that when taken separately some of them may fail to enunciate in precise terms and with legal accuracy propositions of law does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point. *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; *People v. Lee Chuck*, 78 Cal. 339, 20 Pac. 719; *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 875; *Murray v. White*, 82 Cal. 119, 23 Pac. 35; *Doty v. O'Neil*, 95 Cal. 244, 30 Pac. 526; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461. Tested by this rule, we do not think the particular instruction complained of could possibly have misled the jury." In this case the instructions must be read as though, after stating, "it will be your duty to find a verdict in favor of the plaintiff and against the defendant," the following words were added: "But I instruct you that, if the defendant used reasonable and ordinary care in furnishing tools and appliances, it complied with the law, and must be deemed to have furnished reasonably safe and suitable implements or appliances." There is no merit in the claim that the instructions withdrew from the jury the question as to plaintiff's knowledge of any defect in the elbow, or of his assumption of the risk. We find no evidence even tending to show that plaintiff knew of any defect in the elbow, or that he assumed the risk of the danger from such defective elbow.

Other instructions are complained of, but it is sufficient to say that we have examined them, and find no prejudicial error in the giving or refusing of any instruction. The instructions as a whole fully and fairly stated the law to the jury applicable to the case.

The plaintiff testified that she was past 51 years of age; that her health was good. She was then asked, under the defendant's objection, if she had ever been sick in her life. She answered: "Not since I was nine years old." It is now claimed that the court erred in permitting the question and the au-

swer thereto. It seems to be conceded that the action being by a mother for the loss of her son, the evidence as to the health of plaintiff was material on the question as to her expectancy of life. We cannot say that the fact that plaintiff had not been ill since she was nine years old would not be a factor in determining her condition of health and her expectancy of life. There was no error in the ruling.

The witness Brightwell was permitted, under defendant's objection, to testify to a conversation he had with the deceased about five minutes before the accident. The testimony of the witness, being given in answer to a question, was as follows: "He said: 'I have a letter from some parties that we have met before, and I will let you read it after a while. I am going down to the engine room to look after the engine. I will put in a liner,' or something to that effect. 'I am afraid they are running hot on the boys.'" Defendant moved to strike out from this answer all except the words "I am going down to the engine room." The court in ruling said: "That portion of the answer can stand, that he was going down to the engine room to look after some liner, or something to that effect. The rest will be stricken out." The objection is to that portion of the answer as to the fact that the witness was going "to look after the engine." There is no objection to the portion of the answer in which deceased said he was going to the engine room. The fact that he stated his object in going could not have injured the defendant. It will be presumed that he was going there in and about the business of the defendant. There is no contention that deceased was at a place where he should not have been on an independent mission of his own at the time he was injured. The ruling was not erroneous.

The witness Brightwell was asked in redirect examination the following question: "Did you ever know of an instance in your career as a steam pipe fitter where an elbow was taken off a scrap pile where it had been lying for a year, and you didn't know how it got there or who took it off? In any such case did you ever know of an elbow being put on a steam line of the kind?" To this question the defendant objected on the ground that it was incompetent, irrelevant, and immaterial and not redirect examination, calling for the conclusion of the witness. The court overruled the objection, and the witness answered: "I have never known of any occurrence of that kind." It is now claimed that the question and the answer were immaterial, and that the court erred in not sustaining defendant's objection thereto. The witness had testified, in answer to questions by defendant in cross-examination, that there "are lots of such kind of elbows in use," and that "an old elbow which has stood the test is better than a new one;" and as to other matters in connection with getting

the elbow from the scrap pile. The question was evidently asked for the purpose of showing the knowledge of the witness as to the use of old elbows, and of this particular one that was taken from the scrap pile. It was to some extent going over the matters to which the witness had already testified, but for the purpose evidently of obtaining a more full explanation of his knowledge as to the use of such old elbows. In such cases much is left to the discretion of the lower court as to allowing a question of this kind. It would have to be a plain abuse of such discretion in a case where improper testimony material to the issue was by this means brought out that would justify us in interfering with the discretion of the trial court.

Many other rulings are excepted to and discussed in the briefs, but we have not deemed it necessary to consider them in detail. We have noticed those which we deem the most plausible; and, as we find no merit in them, we have not deemed it necessary to discuss the others.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 137

PEOPLE v. AMER. (Cr. 56.)

(Court of Appeal, Third District, California.
April 17, 1908. Rehearing Denied
June 16, 1908.)

1. CRIMINAL LAW—APPEAL—APPEALABLE ORDER—MOTION IN ARREST.

No appeal lies from an order in a criminal case denying a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2591.]

2. SAME—APPEAL—OBJECTIONS IN TRIAL COURT—MISCONDUCT OF DISTRICT ATTORNEY.

Misconduct of the district attorney in referring to the failure of accused to testify, aside from any ruling of the court in reference thereto, cannot be reviewed on appeal from the judgment; it not being a ground for a motion for a new trial.

3. SAME—CONDUCT OF TRIAL—REFERENCE TO FAILURE OR REFUSAL TO TESTIFY.

It does not follow from Pen. Code, § 1323, declaring that the neglect or refusal of defendant to be a witness shall not prejudice or be used against him, that every allusion of the district attorney to the subject constitutes prejudicial error.

4. SAME—APPEAL—REVIEW—HARMLESS ERROR.

Misconduct of the district attorney in the argument of a cause must be held to be error without prejudice, where it is inconceivable that an honest jury could have found any other verdict in the absence of such dereliction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3127.]

5. SAME—PRESUMPTIONS.

It will be presumed that the jury obeyed instructions to disregard improper remarks of the district attorney.

6. SAME—RESERVATION OF EXCEPTIONS.

A remark of the district attorney cannot be held to be error on which to reverse a case, unless a request is made for an instruction to disregard it, and a simple objection thereto is insufficient.

7. INDICTMENT AND INFORMATION—VENUE OF OFFENSE.

An information alleged that defendant, "on or about the month of January, 1906, * * * was the duly elected, qualified, and acting county treasurer of the county of M., state of California, and as such county treasurer, he, the said W. M. A., then and there had in his possession and under his control, by virtue of his trust and as such county treasurer, * * * the same then and there being public funds of said county of M., * * * which he had received as such county treasurer for the use and benefit of said county, and did then and there fraudulently appropriate such money," etc. Held to sufficiently allege that the offense was committed in M. county.

Appeal from Superior Court, Madera County; Wm. M. Conley, Judge.

William M. Amer was convicted of embezzlement, and he appeals. Affirmed.

See 151 Cal. 303, 90 Pac. 698.

Lewis H. Smith, F. G. Ostrander, Raleigh E. Rhodes, and Geo. G. Goucher, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for respondent.

BURNETT, J. Defendant was convicted of the crime of embezzlement. He has appealed from the judgment, and there is also an attempted appeal from the order denying defendant's motion in arrest of judgment. This latter must be disregarded. *People v. Cadot*, 138 Cal. 527, 71 Pac. 649.

Appellant seems to rely mainly upon the affirmation of error committed by virtue of certain remarks of the district attorney in his address to the jury. Among these is the statement that: "The court will instruct you that the defendant does not have to take the stand. That you were told when you were examined touching your qualifications as jurors in the case. He does not have to do it; but, gentlemen of the jury, if he wants to exercise that right with which the Constitution clothes him and extends to him—if he says, 'I will take chances on this proposition, and I will not take the stand, perhaps because of the embarrassing situation I will be placed in and the questions that will be propounded to me'—if he deems it proper to take that chance, why then that is his own business." And again: "And the court will instruct you that the defendant under the law does not have to take the stand; but it seems to me, if you were confronted with the same evidence, and if you were innocent, why a reasonable man would certainly seek to explain it." The court immediately instructed the jury as follows: "Gentlemen of the jury, you are to disregard the statement made by the district attorney. The defendant is not required to take the stand under any circumstances, nor is he ever required to go upon the stand and make any explanation, and you will consider this case as if the statement had not been made." The instruction of the court was given in view of section 1323 of the Penal Code, providing that: "A defendant in a criminal proceeding or action

cannot be compelled to be a witness against himself. * * * His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding." This alleged misconduct of the district attorney was urged strongly by defendant as a reason why a new trial should be given him, and his motion to that effect was granted by the trial court, but the order was afterwards reversed by the Supreme Court. *People v. Amer* (Cal.) 90 Pac. 698. In the discussion of the question it is said by the court, through Mr. Justice Angellotti: "It appears very clear to us that mere misconduct of the district attorney is not included within any of the statutory grounds upon which a trial court may grant a motion for a new trial. We are brought somewhat reluctantly to this conclusion, in view of the apparently well-settled doctrine in this state that the appellate court will order a new trial on account of such misconduct, where it is prejudicial to the rights of a defendant, and as long as this rule obtains, it is obviously preferable that the trial court should have the power to entertain a motion on this ground. But that such a ground can avail in support of the statutory motion for a new trial can, by no means, be held to be settled by the decisions, and such a conclusion would be so opposed to the plain terms of the statute that we cannot assent to it"—and in suggesting a redress that might be open to defendant for such misconduct it is declared: "In view of the fact that the misconduct of the district attorney has so often been held to constitute a sufficient ground for reversal of the judgment, it may be that it has become a settled rule that the question of the misconduct of the district attorney will be considered upon an appeal from the judgment, when presented by a proper record, and the points saved for review by exception."

But it is clear that there is no authority whatever in the statute for holding that such misconduct of the district attorney, aside from any ruling of the court in reference thereto, can be properly reviewed on appeal from the judgment, unless it is a ground for a motion for a new trial. As said in the dissenting opinion of Mr. Justice McFarland, *supra*: "The judgment would not show any erroneous rulings or action by the court; and on such appeal the judgment could be reversed only on the general ground that a verdict, founded in whole or in part upon the effect of a violation of the law by the district attorney, would be a verdict contrary to law." But, as declared by him, this is one of the grounds for a new trial, and "if a verdict founded upon the misconduct of the district attorney is not a verdict contrary to law, then it cannot be touched, either on appeal from the judgment, or on motion for a new trial." If any other rule has been established, it must be by virtue of judicial

legislation, as there is no statutory warrant for it. Section 1259 of the Penal Code provides what may be reviewed upon an appeal from the judgment, as follows: "Upon an appeal taken by the defendant from a judgment the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." In *People v. Keyser*, 53 Cal. 184, it is said: "The defendant may appeal from the judgment, without having made a motion for a new trial; and on appeal he may rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and in such case he must have a bill of exceptions settled, as provided in section 1171." It is obvious that said section 1170 does not apply here, as no complaint is made as to the action of the court in reference to said misconduct of the district attorney. In fact, the trial judge was prompt and active in a commendable endeavor to remove from the minds of the jury any prejudicial effect of said comments. It may be presumed that the Legislature intended to leave the matter to the discretion of the trial judge, knowing that his powers are ample to control the conduct of the officers of the court. It is at least unwarrantable to hold that the provisions of the statute contemplate that the correction of the error cannot be reached on motion for a new trial, but must await the more remote action of the appellate court on appeal from the judgment. But conceding that the question can be reviewed, it does not follow that every allusion on the part of the district attorney to the subject constitutes prejudicial error. Indeed, the statute does not expressly interdict any reference to the defendant's failure to testify, but declares that the circumstance shall not prejudice or be "used" against him. It is difficult to understand how a mere reference to or comment upon a fact known to the jury, made by the district attorney, can be considered prejudicial to the substantial rights of the defendant. That would be attaching a peculiar magic to the words of said official, which they ordinarily do not possess.

But admitting that it is error for the district attorney to comment upon the circumstance, notwithstanding it is within the knowledge of the jury, and it is referred to by defendant's counsel, and the judge of the court, it is clear in the case at bar that the error was without prejudice. This follows from the nature of the evidence against defendant. We shall not review it, but deem it sufficient to say that it is inconceivable that any honest jury could have found any other verdict, in the absence of any dereliction on the part of the district attorney. His objectionable remarks, in other words, could not have been considered nor used by the jury to the prejudice of the defendant. The rule is stated in 2 *Ency. of Pleading & Practice*, p. 725, as follows: "In any case it seems that a new trial will not be grant-

ed, when the evidence so conclusively shows the defendant's guilt that the jury could not have returned a verdict in his favor without willfully disregarding their duty." To the same effect in *People v. McRoberts*, 1 Cal. App. 28, 81 Pac. 735, it is said: "In the present case the homicide was admitted, and the evidence was such as to make it reasonably certain that the jury was not led by the misconduct of the district attorney to return a verdict which they otherwise would not have found." The same rule is announced in *People v. Salas*, 2 Cal. App. 540, 84 Pac. 295, and *State v. Ahern*, 54 Minn. 196, 55 N. W. 959. But, as we have already seen, the court promptly instructed the jurors as to their duty in the premises, and we must presume that they acted accordingly. There is much force in Mr. Justice Shaw's statement in the concurring opinion in *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497, that: "The language of the opinions in some of the previous decisions of this court goes too far in support of the theory that there is some sort of a presumption that the misconduct of a district attorney will prevail with the jury, and influence them in the face of the positive instructions of the court that they must not consider the instructions thus improperly made. The presumption should always be that a jury has obeyed the instructions of the court, and, unless the contrary is shown by the record, that presumption should prevail in the appellate courts." See, also, *People v. Hoch*, 150 N. Y. 293, 44 N. E. 976; *Blume v. State*, 154 Ind. 356, 56 N. E. 771.

Appellant also complains of a statement made by the district attorney in reference to witness Crow. In reply to an attack upon said witness by appellant's counsel, the district attorney said: "Now, then, as to Mr. Herman Crow, Mr. Crow has always held a position of respect in this community. I have known the gentleman for a number of years, and I have always heard him well spoken of. I never have heard anything against him, except that which was uttered by the attorneys in this case." If the defendant was dissatisfied with said comment, he should have requested the court to instruct the jury to disregard it. He contented himself, however, with a simple objection to the remark and the language of the court in *People v. Ye Foo*, 4 Cal. App. 730, 89 Pac. 450, is applicable here: "The court was not asked to strike out the objectionable remark, nor does it appear that the court ruled upon an exception. It is but fair to require defendant's attorney, in case of objectionable remarks by the district attorney, to call the court's attention to them then and there, and invoke the aid of the court to prevent the remarks from injuring the defendant, before he will be allowed to urge the matter as error in this court. In such case the court will not hold the remark error upon which to reverse the case. *People v. Shears*, 133

Cal. 150, 65 Pac. 295; *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Shem Ah Fook*, 64 Cal. 383, 1 Pac. 347; *People v. Kramer*, 117 Cal. 650, 49 Pac. 842; *Lunsford v. Dietrich*, 93 Ala. 565, 9 South. 308, 30 Am. St. Rep. 79."

The foregoing is a sufficient answer to the contention in reference to the district attorney's remark about the collection of the money from the surety company. Indeed, what he said was strictly responsive to a declaration of appellant's counsel, and, besides, it was not calculated to prejudice defendant.

There is no merit in the contention that the information is defective. It is assailed principally upon the ground that it does not appear therein that the offense was committed within Madera county. But we can see no uncertainty in that respect. The information alleges that "said W. M. Amer, on or about the month of January, 1906, * * * was the duly elected, qualified, and acting county treasurer of the county of Madera, state of California, and as such county treasurer, he, the said W. M. Amer, then and there had in his possession, and under his control, by virtue of his trust and as such county treasurer, * * * the same then and there being public funds of said county of Madera * * * which he had received as such county treasurer for the use and benefit of said county, and did then and there fraudulently appropriate such money," etc.

Appellant can hardly be serious in his claim that the venue of the offense is left in doubt. No one of ordinary understanding would be uncertain as to the reference of "then and there." *People v. Thompson* (Cal. App.) 95 Pac. 386, and cases cited.

The record discloses no prejudicial error, and the judgment is affirmed.

I concur in the judgment: **CHIPMAN, P. J.**

HART, J. I concur in the judgment. I desire, however, to explicitly place my assent to the conclusion reached by Mr. Justice BURNETT upon the point of practice discussed in his opinion with reference to the alleged misconduct of the district attorney, upon the ground that the evidence disclosed by the record appears to be so conclusive of the guilt of the appellant that, in my opinion, said misconduct could not have been prejudicial. Under the rule laid down by the Supreme Court in *People v. Amer* (Cal.) 90 Pac. 698, the misconduct of a district attorney in a criminal case, where the same is assigned as error, cannot be reviewed on an appeal from an order denying a motion for a new trial. Under the rule intimated by Mr. Justice BURNETT in the case at bar, such misconduct cannot be reviewed on an appeal from the judgment. Thus, if both conclusions be correct, a defendant in a criminal case is

afforded absolutely no protection against the most flagrant act of a prosecuting officer in his argument to the jury. Such officer may, with impunity, if he so pleases, import the most damaging extraneous matters into the case, and thus accomplish a conviction where, perhaps, the evidence is so slight that a verdict of acquittal would be the only just one, but which could not, under our constitutional provision limiting appellate courts to the consideration of questions of law alone, be disturbed by the reviewing courts. The settled rule in this state under the decision in *People v. Amer*, supra, now is, as we have seen, that the misconduct of the district attorney is not an error which can be considered on an appeal from the order refusing a motion for a new trial. While there seems to be no answer to the conclusion, suggested in the main opinion here, that such misconduct is not reviewable on an appeal from the judgment, I think that, under the circumstances, it should be held to be, even if such a ruling may be said to partake of the nature of "judicial legislation." I had always been under the impression that the point could be reviewed on the appeal from the order. It always struck me that, if it could be said that the misconduct of a prosecuting officer in a criminal case was prejudicial to the defendant, a verdict against him would, under such circumstances, be one against law; that, if it could be said that a verdict was thus brought about, then the defendant had not been convicted according to "the law of the land," for most certainly it would appear to be a proposition, logically unassailable, that if he had been convicted through remarks of the district attorney having no basis whatever in anything properly admitted into the record, such conviction would not be according to law, or, in other words, that the defendant had not been tried and found guilty through the fair and impartial trial guaranteed to him by the law of the land. The effect of the decision of the Supreme Court and of the conclusion, if tenable, in the main opinion in the case at bar on the point under consideration, is a declaration to public prosecutors that there is no limit to the extent to which they are privileged to go beyond the record in a criminal case in their argument to the jury.

I cannot subscribe to the proposition.

8 Cal. App. 215

BORELLO v. SUPERIOR COURT OF AMADOR COUNTY et al. (Civ. 471.)

(Court of Appeal, Third District, California.)

April 27, 1908.)

1. PROHIBITION—GROUNDS—JURISDICTION OF LOWER COURT.

The only question involved on an application for a writ of prohibition to restrain a lower court from proceeding with a criminal trial is whether or not that court has jurisdiction to determine the matter before it and of the person or persons accused.

2. SAME.

Where an indictment charges an offense of which the court has jurisdiction, and so far as the record discloses invests the court with jurisdiction of the person of accused, the court has jurisdiction, upon motion to set aside the indictment, to determine whatever questions of law or fact are involved in the motion, and hence rulings refusing, after indictment, to allow inquiry into the qualifications of individual grand jurors, or as to whether there was reason for a challenge to the panel, on the ground that accused had examined the grand jury when impaneled and had declined to exercise any challenge and had waived the right, were within the court's jurisdiction, and, even if erroneous, were not void, and cannot be reviewed on an application for prohibition.

3. GRAND JURY—QUALIFICATION OF JURORS—EXAMINATION BY ACCUSED BEFORE ACCEPTANCE.

Under the mode of initiating a prosecution by indictment, expressly authorized by Const. art. 1, § 8, and the laws passed in pursuance thereof, a trial court is not required to grant a person accused of a public offense who may be indicted, but who has not been held to answer, the privilege of examining persons summoned to serve on the grand jury as to their qualifications, before they have been impaneled and sworn; but, if such privilege is allowed, the court is not required, on motion to set aside the indictment, to allow accused to go over the same ground again.

4. PROHIBITION—GROUNDS—JURISDICTION OF LOWER COURT.

As the privilege granted an accused, who has not been held to answer, to examine grand jurors touching their qualifications before they are impaneled and sworn, is merely one of grace, and not of right, a restriction of accused to the examination of only a few of them could at the most only be error and could not be reviewed by prohibition.

5. INDICTMENT AND INFORMATION—MOTION TO SET ASIDE—GROUNDS.

Under Pen. Code, § 995, prescribing the grounds of a motion to set aside an indictment, but which does not specify among them the incompetency of the evidence received by the grand jury, that ground cannot be urged.

6. GRAND JURY—DISCLOSURE OF PROCEEDINGS.

Under Pen. Code, § 926, requiring the observance of secrecy regarding testimony before a grand jury, except where it is sought to ascertain whether it is consistent with that given by the witness before the court, or where the witness is charged with perjury in giving the testimony or upon trial thereof, the character of evidence received by the grand jury cannot be shown on motion to set aside the indictment.

7. PROHIBITION—GROUNDS—RULINGS ON ADMISSION OF EVIDENCE ON MOTIONS.

The ruling of a trial court refusing to allow the character of evidence received by the grand jury to be shown on a motion to set aside their indictment, being within the jurisdiction of the court, cannot be reviewed by prohibition.

Petition by Agostino Borello for a writ of prohibition to restrain the superior court of Amador county and E. C. Rust, judge thereof, from trying petitioner for arson. Writ denied.

Alfred H. Cohen, Jas. H. Creely, and D. B. Spaganati, for petitioner. C. P. Vicini, for respondents.

HART, J. The petitioner and three other persons were indicted by the grand jury of

Amador county for the crime of arson. A separate indictment was found against each of the parties. The object of the present proceeding is to secure a writ of prohibition from this court to restrain the court below and the judge thereof from putting the petitioner upon his trial upon the charge for which he was indicted, upon the ground, for certain alleged reasons, that respondents are without jurisdiction to try said petitioner. A petition for a like remedy has also been filed in behalf of each of the other defendants; but the specific grounds upon which it is sought to prohibit respondents from trying them are, confessedly, the same as those involved here, as are also the facts, and therefore the decision in those cases will follow the conclusion reached in the case under consideration.

The record shows that the petitioner had been arrested and was held in custody under a warrant of arrest issued by the justice of the peace of township No. 1 of Amador county, acting in his ex officio capacity of magistrate, upon a complaint filed with and before said officer, charging said petitioner with the crime of arson. Before the grand jury which found the indictment had been impaneled and sworn, the petitioner not having been preliminarily examined for the offense for which he had been arrested, the respondent judge of the superior court caused said petitioner, with the other defendants, to be brought into court, and thereupon notified them and their attorneys that a grand jury was about to be organized; that said body would probably inquire into the cases of the petitioner and the others; that they could be present during the impanelment of said jury, and would be accorded the privilege of examining each of said jury for the purpose of interposing challenges to such as they might determine upon such examination would not be likely to act fairly and impartially toward them. The proposition thus made by the judge was acceded to by all the parties and the impanelment of the grand jury proceeded with. Each of the jurors was questioned by the district attorney and counsel for the accused as to his qualifications to serve as such, and, after 19 had thus been examined, the court asked counsel if they desired to exercise the right of challenge, to which both the district attorney and the attorneys for the accused replied in the negative. Thereupon a foreman was appointed, and the jurors sworn. Thereafter the grand jury, as seen, returned indictments against all the defendants. Subsequently a motion was made to set aside said indictments upon all the statutory grounds. The court heard the motion, and, in support of some of the grounds thereof, permitted counsel for the accused to examine such of the grand jurors as they called to the witness stand. It is now claimed that the court refused to hear certain testimony which petitioner offered to introduce in substantiation of certain grounds upon which

he relied for the allowance of the motion to set aside the indictment. Accompanying the record here is a bill of exceptions, showing in full the proceedings had upon the motion. This bill is not only authenticated by the certificate of the judge, but is approved as correct by the attorneys representing both the people and the accused. The bill shows, among other things, that the petitioner, after his indictment, filed in writing, specifying therein the grounds thereof, challenges to certain individual grand jurors and also a challenge to the panel. The court denied the challenge to the panel, and also denied the challenges to the individual grand jurors, refusing to take testimony with respect thereto; the ruling as to the latter challenges being based upon the ground that "the defendant had been given an opportunity to examine said grand jury at the time the same was impaneled, as above set forth, and had done so and declined to exercise any challenges and had waived the right."

The refusal of the court to allow testimony to be received bearing upon the question of the qualifications of the individual grand jurors is one of the principal complaints of petitioner; but we think it is clear that, even if the rulings thereon were incorrect, they only constituted errors committed by the court in a proceeding of which it had jurisdiction, if such a proceeding as the "challenge to the panel" and "the challenges to the individual grand jurors" after indictment is to be viewed, as it must be so regarded if anything at all, as merely two of the grounds upon which the indictment is asked to be set aside. In addition to said written challenge to the panel and challenges to the individual jurors, there was filed by the petitioner a motion to set aside the indictment on the grounds specified in section 995 of the Penal Code other than "any ground which would have been good ground for a challenge, either to the panel or to any individual grand juror."

The only question which is involved in a proceeding of the nature of the one before us is whether or not the court has jurisdiction to hear and determine the matter before it and of the person of the petitioner. In the case at bar, the indictment charges an offense of which the court has jurisdiction, and, so far as the record discloses, it invested the court with jurisdiction of the person of the petitioner. The court therefore had jurisdiction, upon a motion to set aside said indictment, to hear and determine whatever questions of law or fact were involved in the motion, and its decision, although it may be erroneous, is not void. On the contrary, it is valid and binding until reversed on appeal. *Ex parte Nicholas*, 91 Cal. 641, 28 Pac. 47; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657; *Ex parte Fowler* (Cal. App.) 90 Pac. 958. Therefore the rulings of the court refusing, under the circumstances shown by the record, to allow inquiry into the question

of the qualifications of the individual jurors or as to whether there was reason for a challenge to the panel, were within the jurisdiction of the court to make on the motion, and if errors were thus committed they cannot be reviewed in this proceeding. It may be parenthetically stated that, if the court had refused absolutely to hear the motion at all, then a different question would arise, determinable in some appropriate proceeding. But no such proposition is presented here. The court did pass upon all the questions presented by the motion, and it had undoubted jurisdiction to do so, and, whether right or wrong, its action cannot be reviewed here. But we do not hesitate to go further and declare our opinion to be that the record shows that the action of the court refusing to hear the evidence offered relative to the qualifications of the jurors after the indictment was found and filed was justifiable and proper.

The opportunity granted to the petitioner of examining the individual grand jurors precedently to accepting and swearing them to serve as such jurors was, under our present system, only a privilege accorded to petitioner as of grace and not as of right, for the petitioner had not then been "held to answer." *Kitts v. Superior Court* (Cal. App.) 90 Pac. 977. In other words, under the mode of initiating a prosecution for a felony by indictment authorized by the present Constitution (article 1, § 8) and the laws passed in pursuance thereof, a trial court is not required, and therefore could not be compelled, to grant a person who may be accused of a public offense, and who may be indicted by the grand jury, and who has not been "held to answer," the privilege, before they are impaneled and sworn, of examining citizens summoned to serve on such jury touching their qualifications to inquire into and act upon his case. But the court having done so in this case, thus giving the petitioner an opportunity, before the jury was organized and at the time of its impanelment, of showing a cause for challenging any particular juror and fully going into the question of the qualifications of the entire panel, there was no legal reason, we think, requiring the court, on the motion to set aside the indictment, to receive testimony bearing upon matters into which full inquiry had already been made. The practice of allowing an accused person, whose case is likely to be inquired into by a grand jury about to be impaneled, an opportunity to challenge citizens summoned to serve on such jury during its impanelment and before the jury is legally organized, upon the grounds of challenge specified by the Code sections, is seldom resorted to or permitted now. We cannot, however, see any legal objection to the practice; but, when such a course is pursued, the accused person is given an advantage to which, where not previously held to answer, he is not entitled as of right, and in such case there is

no reason which suggests itself to this court why he should be allowed, on the motion to set aside the indictment, to go over ground which has already been fully exploited and explored.

There is no ground for the complaint that the court restricted the petitioner to the examination of only a few of the grand jurors upon matters involved in certain grounds of the motion other than those of which we have been speaking. The record shows that the judge stated to the attorneys that they could take the testimony of such of the grand jurors as they desired to call to the stand. Counsel seem to have failed to cause all the jurors to be present—at least, there were certain members thereof who failed to respond to their names when called. And, again it may be said, even if the court had ruled as counsel insist that it did upon this point, the ruling could only be error which, like the question previously discussed, cannot be reviewed in this proceeding.

One of the grounds specified in the motion is that the grand jury found its indictment against the petitioner on illegal evidence, contrary to the mandate on this subject of section 919 of the Penal Code. The question thus raised is not one, in our opinion, which can be considered on a motion to set aside an indictment. *Brobeck v. Superior Court* (Cal.) 92 Pac. 646. In other words, it is not specified by section 995 of the Penal Code as one of the grounds upon which an indictment may be set aside, and it has been held that where a statute prescribes the grounds of a motion to quash or set aside an indictment and omits as one of them the question of the competency of the evidence presented to and received by the grand jury, the effect is to remove that question from the field of inquiry. 6 Ency. of Ev. p. 255, and cases therein cited. We entertain no doubt that the Legislature with deliberate design omitted to include in the grounds for setting aside an indictment the question of the character of the evidence received and acted upon by the grand jury, for if the rule were otherwise no indictment would ever be preferred which would not be followed by a dragnet inquisition into all the "doings" and proceedings of the grand jury, thus uselessly entailing endless and vexatious trouble and confusion and disclosing secrets of the grand jury's deliberations which it is the policy of the law to preserve inviolate. Besides, section 926 of the Penal Code seems to restrict the purposes for which testimony given before a grand jury may be disclosed, and the proposition here does not come within either the letter or spirit of that section. In any event, the ruling of the court refusing to allow the character of the evidence received by the grand jury to be shown was within its jurisdiction and cannot be rectified or corrected in this proceeding.

For the foregoing reasons, the order to

show cause will be discharged, and the prayer for a peremptory writ denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 107

PEOPLE v. MAUGHS. (Cr. 59.)

(Court of Appeal, Third District, California.
April 15, 1908.)

1. JURY—JURORS—FORMATION OF OPINION—EFFECT.

Under the express terms of Pen. Code, § 1076, the formation and expression of an opinion upon a matter to be submitted to a jury, founded upon public rumor, statements in public journals, or common notoriety, do not disqualify one as a juror, if it appears to the court, upon his declaration, that he can and will act impartially.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 449-457, 461.]

2. CRIMINAL LAW—APPEAL—REVIEW—DISCRETION—CONDUCT OF TRIAL—CHALLENGES TO JURORS.

Where the answers of a juror upon his voir dire involve conflicting statements bearing upon his qualifications, it is for the trial court to decide whether he is qualified, and its finding thereon cannot be disturbed by a reviewing court unless it appears as matter of law that the court erred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3056.]

3. SAME—HARMLESS ERROR.

Error in disallowing a challenge to a juror for actual bias is not available upon a motion for a new trial or on appeal, where accused did not exercise all his peremptory challenges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3117.]

4. SAME—PRESUMPTIONS.

Where appellant complains of the disallowance of challenges for cause to jurors, it cannot be presumed, in the absence of a showing to the contrary, that he exhausted all his peremptory challenges.

5. SAME—HARMLESS ERROR—FAILURE TO STATE SPECIAL PLEAS TO JURY.

Though under Pen. Code, § 1093, subd. 1, the clerk at the trial should have stated to the jury all accused's pleas before any evidence was received, and a failure to state special pleas of "former acquittal" and "once in jeopardy," in addition to stating the general plea of not guilty, until after several witnesses had testified for the state, was error, the error was harmless where no proof was offered in support of the special pleas.

6. SAME—SEPARATION OF JURY—EFFECT.

Where the trial judge did not intend, and accused and his counsel did not understand, that an order directing the sheriff to take charge of jurors chosen pending the selection of the whole panel, was one authorized by Pen. Code, § 1121, authorizing a trial court to order jurors sworn to try an action to be kept in charge of an officer who must not allow them to communicate with others, etc., the separation of the jury during the trial, after such order, not shown by the record to have been prejudicial to the accused, was not reversible error.

7. DISTRICT AND PROSECUTING ATTORNEYS—DUTIES.

Practicing lawyers are supposed to watch reported cases, particularly where they dispose of questions with which they have to deal in some impending trial, and hence it was the state's attorney's duty, in the second trial of a murder case, to call the court's attention to

remarks of the Supreme Court in the same case on a former appeal, on a question before the trial court in the second trial.

8. WITNESSES—CROSS-EXAMINATION OF ACCUSED.

Under Pen. Code, § 1323, providing that if accused offers himself as a witness he may be cross-examined as to all matters about which he was examined in chief, where accused was asked on his direct examination why he shot decedent, and he answered that he did it to keep decedent from killing him, the state, on cross-examination, could inquire into all the circumstances of the homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 979-984.]

9. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—DISCRETION—RECEPTION OF EVIDENCE—ORDER OF PROOF.

The reception of evidence in the state's original case properly admissible in rebuttal is not reversible error, since, under Pen. Code, § 1094, the order of proof is largely within the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3063.]

10. SAME.

Though in a murder trial the corpus delicti should have been proved before the reception of testimony as to statements by accused concerning the circumstances of the homicide, failure to do so was not reversible error, since, under Pen. Code, § 1094, the order of proof is largely in the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3063.]

11. SAME—EVIDENCE—USE OF MODEL.

In a murder trial, it was not error to receive in evidence a model representing the porch upon which the homicide occurred because it failed to show vines and a tree, and fences between the porch and the place where the eye-witnesses to the homicide sat, where the state's attorney stated that it was not offered to show whether the witnesses could have seen what happened, where no other purpose was attempted to be accomplished in using it than to show the distances of certain points from the others on the porch as they existed when the homicide occurred, and where photographs and testimony were received showing the location of the vines, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 893.]

12. SAME—TRIAL—INSTRUCTIONS—REFUSAL—MATTER COVERED.

The refusal of instructions requested is not error where they are covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

13. SAME.

In a murder trial, it was not prejudicial error to instruct on the question of accused's flight, where a witness testified that he met accused riding away from the place where the homicide occurred, and that accused stated that he had killed decedent and desired to procure money with which to escape, though accused finally surrendered himself voluntarily.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

14. SAME.

An instruction based on Code Civ. Proc. § 2061, subd. 2, providing that a jury need not decide in conformity to the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, etc., was not prejudicial error, though part of it was ambiguous, where the matter was clearly presented in the other part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

15. SAME—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

It was not prejudicial error in a murder trial to refuse to give an instruction in the language of Code Civ. Proc. § 1845, providing that a witness can testify to those facts only which he knows personally, except, etc., and stating that a jury must disregard any testimony involving a witness' belief, inferences, etc., since if testimony of the latter character was received, it must have been received through accused's failure to object to it or to have it stricken out, and since if such testimony was given and then stricken, the jury must have known that they could not consider it from what the court told them in its general charge concerning their duties.

16. SAME—QUESTIONS TO WITNESSES.

In a murder trial, any error in allowing the state to ask witnesses whether they had heard testimony at the former trial describing the condition or situation of decedent's body after the homicide, was harmless where the witnesses either stated that they did not hear such testimony or could not recall it if they did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3129-3131.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Richard B. Maughs was convicted of murder in the first degree, and he appeals from the judgment and from an order refusing a new trial. Affirmed.

See 149 Cal. 253, 86 Pac. 187.

J. W. Knox, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The jury returned a verdict against the appellant of murder of the first degree, and, in the exercise of the discretion conferred upon it by section 190 of the Penal Code, fixed the penalty at imprisonment for life. After the presentation and denial of a motion for a new trial, the defendant was, in accordance with the terms of said verdict, sentenced by the court to imprisonment in the state penitentiary for the term of his natural life. This appeal is from the judgment and the order refusing defendant a new trial. The crime of which appellant was convicted grew out of the killing by him of one Charles Zander by means of a pistol or revolver.

This is the second trial of the cause, the first having resulted in the conviction of the defendant of murder in the first degree and the imposition of a judgment involving the death penalty, but the judgment and order therein were reversed upon appeal to the Supreme Court and the cause remanded for a new trial. *People v. Maughs*, 149 Cal. 255, 86 Pac. 187.

The defendant, for some time prior to the homicide, had been in the service, as a sort of general "utility man," of the deceased and one B. E. Cole, on a "ranch" in Merced county, not far from the line dividing said county and San Benito county, which the latter were working as copartners. The duties of the defendant (who, at the time of the homicide, was between 55 and 60 years of age) were to look after and care for the chickens,

keep the fences inclosing the ranch in repair, cook the meals, and, in short, to perform all such other services as ordinarily come within the duties of a domestic servant. Cole and Zander, during the morning hours of the day upon which the killing occurred, had been going over the ranch, repairing fences which had been through some cause broken down. While the partners were so engaged, a neighbor came along, and, addressing them, said that he had informed Maughs "about that break" in the fence two or three days before. This seemed to enrage Zander, who referred to Maughs in opprobrious language. Near the noon hour the deceased and Cole returned to the house. After they put their horses in the stable, Zander hastened, apparently in a state of anger, to the house, Cole remaining in a vacant lot near the barn. Zander, upon reaching the interior of the house, proceeded to chide Maughs for neglect in repairing the fence and for not getting "the cattle out of the horse corral." The defendant's version of what occurred in the house is to the effect that Zander called him (defendant) vile names, threatened to do him personal violence, and then started to leave the house in a state of intense anger and excitement, but had gone only a short distance when he turned around and ordered Maughs to "roll his blankets" and "get off this ranch," to which latter suggestion defendant replied, "All right, I can do that." The defendant testified that, being apprehensive that the deceased, who was young, strong, robust and active, might attempt to injure him, he went into a room where several different kinds of weapons were kept, and placed his own pistol in his pocket. Thereafter, Zander returned to the house by way of the back porch, and the defendant was then in the act of stepping out of the kitchen on to said porch, when the deceased renewed the quarrel, repeatedly addressing the defendant as a "son of a bitch," and applying to him other like epithets. The defendant declares that the deceased held an open knife in his hand at this time, and after threatening the defendant rushed toward the latter with his left hand, holding the knife, upraised, as if he were going to make an assault, whereupon the defendant drew his revolver and fired at Zander, "without taking aim," the ball entering the head and into the brain, and necessarily producing a mortal wound.

When the shooting occurred, Cole and a man named Gallagher were sitting on a wagon tongue something over 100 feet from where the deceased and the defendant were quarreling and from where the fatal shot was fired. A portion of that side of the porch, to the right of which Cole and Gallagher were sitting, was inclosed with trellis work, over and about which a thick vine extending from the ground to the top of the porch had grown. There were also between the point at which Cole and Gallagher were sitting and the porch on which the shooting took place two chicken

fences, about six feet high, made of pickets set together closely. Gallagher testified that, while he heard the voices of the deceased and the defendant just prior to hearing the shot, he paid no attention to what they were saying, and he could therefore give none of the language or words used by them. Cole testified that he was interested in the quarrel and could hear distinctly what was said. He testified that he saw Zander go to the pump located on the back porch; that he judged from Zander's voice that he was very angry; that he heard Maughs go into the kitchen from the sitting room, and before he got to the door he said he was "getting damn tired of this noise"; that he had heard enough of it, "and he says, 'Let this be your last word,'" and shot, and the witness stated that immediately following the shot he heard Zander "hit the floor," by which he meant that he heard the sound made by the falling of deceased's body upon and striking the floor. Cole claimed that he could see a part of the person of Zander when the latter was on the back porch and the shot was fired. The facts thus narrated are gleaned, it is to be observed, from the testimony of the two principal witnesses—Cole for the people, and the defendant in his own behalf.

There is no serious claim that the evidence is insufficient to justify the verdict. It is, however, contended that there are many errors in the record, any one of which is of sufficient force and importance to entitle the defendant to a new trial. These alleged errors are involved in the rulings of the court upon questions of the admissibility of testimony and in the giving and rejection and modification of instructions.

1. Appellant insists that the court erred in its rulings disallowing challenges to jurors Hardman and Phenegar on the grounds of actual bias. Each of these jurors, it clearly appears from the record, declared that he had read in the local newspapers accounts of the homicide, and of the verdict of the coroner's jury finding that the crime of murder had been committed, and had also heard the case discussed by neighbors and acquaintances, and from these had formed an opinion upon the question of the guilt or innocence of the defendant. Each stated that, notwithstanding the opinion thus formed, he could and would try the case fairly and impartially, and regardless of such opinion, and return a verdict in accordance with the evidence adduced at the trial and the instructions of the court. It does not appear from the examination of these jurors that either ever discussed the case with any one claiming to know the facts or with any of the witnesses who testified at the trial. The rule of law in this state—so well and generally understood that it is even familiar to laymen—is that the formation and expression of an opinion upon a matter to be submitted to a jury, founded upon public rumor, statements in public jour-

nals, or common notoriety, do not disqualify a person from serving upon such jury, if it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly in the trial and determination of the questions submitted to him. Pen. Code, § 1076. And even where the answers of a juror upon his voir dire involve conflicting statements bearing upon the question of his qualification to serve, it is with the trial court to decide whether he is qualified, and its finding thereon, whatever it may be, cannot be disturbed by a reviewing court, unless it can truthfully be said that the testimony thus adduced upon its face shows that, as a matter of law, the court erred in its ruling. *People v. Fredericks*, 106 Cal. 559, 39 Pac. 944; *People v. Ochoa*, 142 Cal. 274, 75 Pac. 847; *People v. Flannelly*, 128 Cal. 86, 60 Pac. 670; *People v. Evans*, 124 Cal. 210, 56 Pac. 1024; *People v. Owens*, 123 Cal. 487, 56 Pac. 251; *People v. Scott*, 123 Cal. 435, 56 Pac. 102. But, as a matter of fact, there is no conflict in the statements of the jurors in the case at bar. They each admitted entertaining the opinion, formed from what they had read and heard, that the defendant was guilty of the crime charged against him. This opinion having been founded on newspaper reports and common notoriety and public rumor, and each juror having declared that, notwithstanding such opinion, he could try the issues submitted to him impartially and fairly, neither was shown to be disqualified under the law. If the mere fact of forming and expressing an opinion thus founded would, per se, disqualify a citizen from serving as a juror in a criminal case, then, indeed, the trial and punishment of persons accused of crime would, under our system, be at an end, for it must be true that every person of ordinary intelligence necessarily forms an opinion of some kind upon every subject concerning which he has read accounts in the public journals or about which he has had discussions with other people. But, aside from these considerations, it is to be noted that it does not affirmatively appear from the record that the appellant had exhausted all the peremptory challenges which he was entitled to exercise, and we think it is well settled that even where the court errs in denying a challenge for actual bias, and the defendant has not exercised all his peremptory challenges upon the completion of the panel, the error of the court in disallowing the challenge cannot be made available either upon a motion for a new trial or on appeal to the advantage of appellant. The reason of this rule is, obviously, that the defendant has no ground for complaint when he has it in his power to remove the objectionable juror by other means than those he had unsuccessfully attempted to invoke. So, even if it could be said that the court erred in disallowing these challenges, the appellant has thus failed to affirmatively show through the record here,

as it was his duty to do if he could, that he was prejudiced thereby, for there can be indulged by this court no presumption, in the absence of a showing in the record to the contrary, that the defendant exhausted all his peremptory challenges.

2. It seems that, upon his arraignment, the defendant, in addition to entering a plea of "not guilty" to the charge alleged in the information, also interposed the pleas of "former acquittal" and "once in jeopardy," and that at the trial the clerk of the court, upon reading the information to the jury, stated to the latter that the defendant had entered a plea of "not guilty" to the information, but omitted to state that the special pleas mentioned had been also interposed. After a number of witnesses had given testimony for the prosecution and before the people closed their original case, the district attorney called the attention of the court to the omission by the clerk to state to the jury said special pleas. Thereupon the court, against the objection of counsel for appellant, directed the clerk to state to the jury all the pleas interposed by the defendant. It was undoubtedly the duty of the clerk to have stated to the jury all the pleas of the defendant to the crime charged against him in the information before any evidence was received (section 1093, subd. 1, Pen. Code), and failure to do so was error. But the record before us discloses that such omission here did not constitute prejudicial error. There is not the slightest proof in the record addressed to the issues tendered by the special pleas. Nor was there any attempt to introduce proof in support of such pleas. Under these circumstances, the defendant could not, of course, have been prejudiced by the oversight.

3. It is complained that the appellant suffered serious harm by the separation of the jury during the progress of the trial after it had been ordered by the court into the custody of the sheriff, the claim being that such order was made under the authority of section 1121 of the Penal Code. The record shows that before the panel was completed—that is, before 12 jurors had been sworn to try the case—the court made an order, to which counsel for defendant objected, that the sheriff take charge of the jury. After some colloquy between court and counsel relating to said order, the former inquired of the latter: "Do you consent that the order be made temporary?" to which Mr. Bogie, of counsel for defendant, replied: "Yes, we consent; the defendant consents that it will be just temporary; they are in the custody of the sheriff while retiring." While it is not clear what counsel exactly meant by the use of the language, "they are in the custody of the sheriff while retiring," we think it is clear from the record that it was not intended by the court, nor so understood by the defendant and his attorneys, that the order made was the one authorized and contemplated by section 1121 of the Penal Code. It

is evident that the court had some reason, the nature of which the record does not disclose, for keeping together, and consequently in the custody of the sheriff, pending the completion of the panel, such jurors as had been selected and accepted by both sides before the panel had been completed, and also, after the jury was completed, that they remain in the custody of that officer during the noon recesses only. The defendant not only expressly consented to this course, but even suggested it. We do not feel compelled to decide the question of whether, after the court, in the exercise of its discretion, under section 1121 of the Penal Code, has ordered the jury into the custody of the sheriff, the defendant, by consenting to a separation of the jurors, could be held, as a matter of law, to have thus waived the right to thereafter complain of such separation. But the record here does not make it appear very clear precisely to what extent the order was executed. So far as we are able to determine from the record, the court, as we have suggested, does not appear to have attempted to exercise the discretion conferred upon it by section 1121, *supra*, but when the order was first made seems only to have intended, for some reason which apparently appealed as well to the counsel for the defendant, that the order should have force temporarily and until the whole panel had been selected and sworn. It further appears that after all the evidence was received and before the argument began the court took a recess until the usual hour of opening the afternoon session, and at that time ordered the jury in charge of the sheriff. It does not appear that they were permitted to separate after that order was made. In the case of *People v. Maughs*, *supra*, it is held that where the court directs the sheriff to take charge of the jury under the power to make such an order conferred upon it by the section of the Penal Code referred to, and thereafter the jurors are permitted to separate, such separation in and of itself constitutes error, but it is not expressly declared therein to be such error as demands a reversal. But we do not think the case here, as to the point we are discussing, comes clearly within the rule as declared in that case. In any event, we do not think the action of the court in this particular justifies a reversal.

We cannot refrain from here remarking that it is very evident that the attorneys for the people and the learned judge of the trial court either did not before or during the trial of the present case read the opinion of the Supreme Court reversing the first trial hereof, or, if they did, paid little heed to what the court has to say, in language as clear as crystal, upon the subject now under consideration. If they had read the opinion even hastily it would at least seem as if no such chances for a reversal of the present appeal would have been taken as are apparent from the slipshod course pursued with reference to the order directing the sheriff to take charge of

the jury. It is often the case, perhaps, that trial judges have little time to read the opinions of the higher courts, and do not do so until such cases are cited upon some particular question pending before them. But practicing lawyers are supposed to watch the reported cases, particularly where they dispose of questions with which they have to deal in some impending trial. It was, therefore, the duty of the state's attorneys in the case at bar to have called the attention of the court to the remarks of the Supreme Court in this same case, relative to the exercise of the power by the court vested in it by section 1121 of the Penal Code. District attorneys should also remember that, while zeal is a very excellent quality in a prosecuting officer, it, perforce, becomes a menace rather than an advantage to a successful prosecution of a criminal case when it succeeds in usurping the place of sound and sane judgment. With the opinion in the *Maughs* Case before them, the prosecuting attorneys and the court can suggest no conceivable excuse for the occasion of the present discussion in this case, and but for the fact that we do not consider the action of the court in this respect under the circumstances as disclosed by the record prejudicial to the rights of the appellant, we would not hesitate to order a reversal for this very reason.

4. The contention that too much latitude was allowed in the cross-examination of the defendant is, we think, devoid of merit. After answering a few preliminary questions, the defendant was asked the following question by his attorney: "Now, take at the very instant the fatal shot was fired, why did you shoot Charlie Zander?" The defendant replied: "Well, he came at me with a knife and said he would cut my damned throat, and I thought he would do me some great bodily harm or kill me, and I fired at him to keep him from killing me." At the conclusion of this answer, the defendant was turned over to the prosecution for cross-examination. It was no doubt the assumption of counsel for the defendant that such brevity in the examination in chief would curtail the cross-examination or prevent an inquiry through cross-examination into all the circumstances immediately attending the homicide. Objection was, therefore, made to nearly every question propounded to the defendant by the district attorney, and the rulings of the court disallowing certain objections made to the extended cross-examination by the people are assigned as error.

We think the questions asked the defendant by the district attorney were well within the sphere of legitimate cross-examination. Section 1323 of the Penal Code provides, as does also section 13 of article 1 of the Constitution, that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but the Code section mentioned also provides that if a defendant in such an action or proceeding "of-

fers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." The cross-examination of the defendant in the case at bar involved an inquiry into all the pertinent circumstances immediately leading up to and connected with the act of killing. This course, as we have stated, was allowable under the section of the Code to which we have referred as interpreted by the Supreme Court in many cases. *People v. Rozelle*, 78 Cal. 91, 20 Pac. 36; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; *People v. Gallagher*, 100 Cal. 475, 35 Pac. 80; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016. In *People v. Rozelle*, supra, the court says: "The impression seems to prevail that the section quoted (1323, Pen. Code) has the effect to confine the examination of a defendant to narrower limits than in the case of any other witness. He can be only cross-examined as to matters about which he was examined in chief. The rule is precisely the same as to any other witness." In *People v. Gallagher*, supra, it is said: "Any question which would have the tendency to elicit from him (defendant) the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

The defendant admitted killing Zander, but claimed that the act was in necessary self-defense. On his examination in chief he declared that the act was committed in the defense of his person and life. This statement by the defendant was a mere bald statement, unaccompanied by a recital of any of the circumstances under which the homicide occurred, that the act was necessary for the protection of his own person or for the preservation of his own life. In fact, the answer amounted only to a conclusion drawn by the defendant from the circumstances of the homicide as he claimed to view and understand them. The people had a right to learn, if they could, by a cross-examination of the defendant, whether he had formed a correct conception of the circumstances under which he took the life of Zander. They were entitled to an opportunity to ascertain, through cross-examination of the accused, whether or not his statement carried with it the truth by inquiring into all the circumstances of the "matter about which he had testified." And we have been unable to find any question thus propounded to him and to which objection was made involving an inquiry into any other matter than that "about which he had testified in chief." His answer to the

single question asked on direct examination involved his whole case—his complete defense—and therefore opened up for full and thorough exploration by the people the entire field of legitimate inquiry into all the circumstances of the homicide.

5. The court did not err in permitting, over the objection of appellant, certain witnesses to give testimony in the people's original case concerning the alleged crippled condition of the left arm of the deceased. The claim is that the testimony was admissible only as rebuttal, and in that case only upon the interposition by the defendant of the defense of self-defense. The order of proof is largely in the discretion of the trial court. Pen. Code, § 1094. But we are not sure but that the testimony was properly admitted in the prosecution's chief case, for, prior to the reception of this evidence, the declarations of the defendant immediately after the homicide, relative to the shooting, had been received in evidence, and, among other things, it appeared therefrom that the accused claimed that the deceased rushed toward the defendant threateningly with an open knife in his left hand and his left arm raised in a menacing attitude. The object of the testimony with reference to the condition of the deceased's left arm was to show that he could not raise said arm in the position described by the defendant to the witnesses who testified to his declarations. But, admitting that the testimony was irregularly received as a part of the prosecution's original case, if it was, nevertheless, proper in rebuttal, the fact that it was introduced out of order would not justify a reversal of the case. *People v. Arrighini*, 122 Cal. 124, 54 Pac. 591; *People v. Grimes*, 132 Cal. 34, 64 Pac. 101. The testimony was clearly relevant in view of the defendant's testimony.

It is also urged that the court erred in allowing the witness Frank French to testify to statements made by the defendant concerning the circumstances connected with the killing before the corpus delicti had been proved. What we have heretofore said with reference to the order of proof resting in the sound discretion of the trial judge is pertinent and applicable to this point. The rule appears to be settled in this state that, while the corpus delicti should be the first point to which the evidence should be addressed, the order of proof is usually in the discretion of the court, and, unless it clearly appears that the defendant has been prejudiced by the manner in which that discretion has been exercised, it will not justify reversal of the judgment. *People v. Jones*, 123 Cal. 65, 55 Pac. 698. The corpus delicti was subsequently shown by clear and undisputed proof, so the defendant could not have sustained any damage by the order in which proof of his extrajudicial declarations was received.

6. A model, representing the porch upon which the fatal shooting occurred, was introduced in evidence for the purpose of il-

illustrating the testimony of the witnesses. The model was, except in certain particulars, a faithful representation of said porch. The excepted "particulars" to which we refer included an omission to show by the model some growing vines about the trellis work at the side of the porch, to the right of which some 100 feet distant, as we have seen, Cole and Gallagher, witnesses for the people, were sitting on a wagon tongue, when the shooting took place. The model omitted also to indicate a tree and two fences which were located between the porch and the point where Cole and Gallagher were in conversation when the quarrel was going on and the shot fired. The specific objection to the model was that it might lead the jury to believe that there were no obstructions to a clear view of the porch from the point at which Cole and Gallagher were sitting, and that they could therefore see all that was transpiring on the porch between the defendant and the deceased. The county surveyor testified that he made the model, and that it represented an accurate reproduction of the porch, except in the particulars mentioned, and Mr. Ostrander, for the prosecution, upon offering it in evidence, explained the extent to which the people desired to use it as follows: "We are not introducing it for the purpose of showing that Cole or anybody else could see from the point where they were what transpired on the porch. We are offering this for the purpose of showing the porch as it then existed, the distances, and the material objects on the porch. We are not offering it for the purpose of showing that the testimony of Cole or anybody else is true." And, as limited to the purpose as thus stated, the court admitted it, and it appears to have been confined, in its use by the people, to that purpose alone. We do not think the court erred in admitting the model under the circumstances disclosed by the record. There were photographs received in evidence, upon the motion of the defendant, showing an accurate representation of the house, of the porch with the trellis work and climbing vines, and of the trees and fences between the porch and the place where Cole and Gallagher sat. The conditions generally existing about the premises at the time of the homicide were not only thus fully and clearly displayed before the jury, but were minutely explained by the witnesses. We can see no difference between the model complained of and a mere skeleton diagram of a place where a crime is alleged to have been committed showing distances and the location of material objects necessary to be pointed out in order that the testimony may be the more clearly understood by the court, jury and counsel. Diagrams, which it is not pretended represent complete reproductions of the places thus sought to be illustrated, are often used at the trials of criminal cases, and where it is shown that, as far

as they go, they speak the truth, and in no degree prejudice the rights of the accused, they should not be rejected because they fail to show certain objects which are not material or important to the inquiry at hand and therefore could serve no useful purpose in illustrating or clarifying certain important points brought out by the testimony. It does not appear from the record that any other purpose was attempted to be accomplished by the use of the model than to show the distances of certain points from others on the porch as they existed when the homicide occurred—for instance, the location of a pump and its distance from the door of the house leading to the porch, the location of the sink near which the deceased stood, etc. It has often been held that models and diagrams thus used and having no tendency to convey false impressions of the real conditions existing on and about the premises when the crimes under investigation were alleged to have been perpetrated may properly be used for the purpose of making the testimony the more clearly understood. *People v. Durrant*, 116 Cal. 210, 48 Pac. 75; *People v. Shears*, 133 Cal. 158, 65 Pac. 295; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

7. We have carefully examined the instructions, in the giving, rejection, and modification of which it is declared the court erred to the prejudice of the defendant, and we think there is no foundation for the criticisms urged against the action of the court with respect thereto. The charge of the court was full, fair, and pertinent to all the material issues presented by the information and the evidence. The principles of law contained in the instructions submitted by the defendant and refused by the court were, where applicable to any important issue in the case, embodied in and declared to the jury in other instructions. The same is true where the court modified certain instructions handed in by the defendant, the portions stricken out or refused, where appropriate and proper, being given in other instructions. The instruction upon the question of flight was not altogether inappropriate, as contended. It is true that the defendant finally surrendered himself voluntarily; but one of the witnesses testified that he met the accused on horseback shortly after the homicide, and that the latter said to the witness that he had killed Zander and that he desired to see his (witness') father so that he could procure money with which to leave the country. The defendant was then riding away from the ranch where the shooting occurred. This testimony, though slight upon the subject of flight, constituted, we think, a sufficient predicate for the instruction complained of—at least, it was sufficient to preclude the presumption that the defendant was seriously prejudiced thereby.

The part of instruction No. 13 as given by the court, complained of by appellant, is cer-

tainly subject to the criticism that it is rather ambiguous. But what the court was trying to say to the jury in the criticised part is clearly enough stated in the latter part of the instruction. The instruction is based on subdivision 2 of section 2061 of the Code of Civil Procedure, and when given in the exact language of the section, as it should be given if at all, involves a mere commonplace. It ought not to be necessary to tell a jury composed of men of average intelligence that they need not accept the testimony of any number of witnesses if such testimony does not convince them of the truth of the fact to which it relates, and this is in effect all that the language of the subdivision of the section from which the instruction was taken declares. We cannot perceive how the appellant could have been prejudiced by the instruction as given.

The same may be said of instruction No. 27, requested by the defendant and refused by the court. The first part of this instruction is in the precise language of section 1845 of the Code of Civil Procedure, and the latter part is a declaration that the jury must disregard any part of the testimony of any witness which involves only his "belief or his inferences or his impressions or his deductions." It would have been well enough for the court to have given the instruction, yet we cannot see that the defendant was prejudiced by the refusal to give it. If testimony of the nature of that mentioned in the rejected instruction crept into the record it must have found its way there through the failure of the defendant to object to it or to have it stricken out after it got in, and if such testimony was given and then stricken out, it no longer remained in the record, and the jury, who must be assumed to be possessed of ordinary intelligence, must have known that they had no right to consider it in reaching a verdict from what the court told them in its general charge concerning their duties as jurors.

We have thus reviewed the record at some length. There are other alleged errors pointed out in the briefs of appellant, but we have carefully examined them, and as a result of such examination have concluded that they do not merit extended attention. The alleged misconduct of the district attorney and his assistant in the opening statement of the case and in the final arguments thereof is not, conceding it to be, strictly speaking, misconduct, of such a serious nature as to call for a reversal. The complaint against the alleged misconduct of the assistant prosecuting attorney in referring in his argument to the alleged attempted flight of the defendant immediately after the homicide is disposed of in what we have said relative to the instruction upon that subject. The questions asked certain witnesses by the district attorney as to whether they had heard the testimony of another witness at the former

trial of the case describing the condition or situation of the body of the deceased a few hours after the homicide elicited replies to the effect that either they did not hear such testimony or could not recall it if they did. Manifestly the replies were harmless, even if the questions were improper, and there is nothing in the phraseology or form of the questions themselves involving prejudicial insinuations or innuendoes against the defendant.

An examination of the whole record convinces us that the defendant was fairly tried.

For the reasons expressed in the foregoing, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 186

PEOPLE v. DUNCAN. (Cr. 18.)

(Court of Appeal, First District, California.
April 25, 1908. Rehearing Denied by Supreme Court June 24, 1908.)

1. JURY—COMPETENCY—CHALLENGES.

Pen. Code, § 1073, subd. 2, provides that a juror may be challenged for the existence of a state of mind in reference to the case or to either of the parties which will prevent him from acting without prejudice. A juror on his voir dire testified that he had no prejudice against organized labor though his men had joined in a strike; that he would believe a charge of conspiracy made against laboring men belonging to a labor organization more readily than the existence of a conspiracy between ordinary individuals, but such belief would not make him prejudiced. It was not shown that accused was a member of a labor organization or that any claim would be made that he was such a member. *Held*, that the overruling of a challenge for actual bias was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 431-437.]

2. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—DENIAL OF CHALLENGE OF JUROR.

The court on appeal is only allowed to review an order denying a challenge on the ground of actual bias when the evidence on the examination of a juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only on questions of law that the appellate court has jurisdiction in criminal cases.

3. JURY—OVERRULING CHALLENGE OF JUROR.

Where, in a murder case, a juror on his voir dire testified that he had formed the opinion from newspaper reports that decedent had been murdered, that he would put aside that opinion and act wholly on the evidence, and that he could act impartially in the case, the court did not err in overruling a challenge though some of the statements of the juror conflicted with such testimony.

4. WITNESSES—RIGHT TO CONTRADICT WITNESS.

It is error for a party calling a witness who fails to give expected testimony but does not give affirmative testimony against the party to prove statements of such witness made out of court.

5. HOMICIDE—ERRONEOUS ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where in a murder case, a witness for the prosecution testified that he did not remember

what accused had told him, and stated in reply to questions whether he had not stated on a designated occasion to persons named that accused had made a certain statement that he could not remember, the error in allowing the questions was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 709-713.]

6. WITNESSES—EXAMINATION—QUESTIONS TO REFRESH MEMORY OF WITNESS.

A witness may be asked concerning statements made by him for the purpose of refreshing his memory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 87.]

7. HOMICIDE—ERRONEOUS ADMISSION OF EVIDENCE—HARMLESS ERROR.

The error in permitting the prosecution in a murder case to prove that on the trial of a codefendant a witness for accused had given certain testimony in accord with the testimony he gave on the trial of accused was not prejudicial.

8. CRIMINAL LAW—EVIDENCE—RIGHT TO REBUT INCOMPETENT EVIDENCE.

Accused introducing hearsay and incompetent evidence cannot object to the prosecution rebutting such testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 861, 862.]

9. SAME—VACATING VERDICT—COMPETENCY OF JUROR—KNOWLEDGE OF ACCUSED—EVIDENCE.

A finding that counsel for accused had information prior to the submission of the cause to the jury that one of the jurors had substituted himself for a person summoned as a juror held authorized on the showing made on a motion to vacate the verdict on that ground in view of Code Civ. Proc. § 2061, subd. 6, providing that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is within the power of one side to produce and of the other to contradict.

10. ATTORNEY AND CLIENT—NOTICE TO ATTORNEY.

Accused is chargeable with knowledge of information obtained by his counsel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 92.]

11. JURY—TIME FOR OBJECTIONS.

The general rule is that any objection to a juror must be made before he is sworn and that it comes too late after verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 504.]

12. SAME.

Under Pen. Code, §§ 1060, 1069, providing that a challenge to the panel must be taken before a juror is sworn, and that a peremptory challenge can be taken by either party, etc., any challenge to the panel or to an individual juror must be taken before the juror is sworn to try the cause, and the fact that the disqualification was not discovered until after verdict makes no difference in the rights of the defeated party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 544, 556-558.]

13. CRIMINAL LAW—NEW TRIAL—GROUNDS—DISQUALIFICATION OF JUROR.

Under Code Civ. Proc. § 198, defining the qualification of a juror, and Pen. Code, §§ 1068, 1072, providing that a challenge to a juror must be taken when the juror appears and before he is sworn to try the cause, and declaring that the general causes of challenge are a want of any of the qualifications prescribed by law to render a person a competent juror, etc., a challenge on the ground that the offered juror is not the person whose name is in the box and who was summoned should be made when the juror appears, and a new trial will not be granted on the objection to the juror made for the first time after

verdict, especially where counsel for accused had information of the facts prior to the submission of the cause to the jury.

14. JURY—NUMBER OF JURORS.

Where a person who substituted himself for the person summoned as a juror was accepted and sworn as a juror and became a juror, the verdict rendered was not open to the objection that it was rendered by 11 jurors.

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Edward Duncan was convicted of murder in the second degree, and he appeals. Affirmed.

H. W. Hutton and John J. Barrett, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was jointly charged with three others, Wm. Buckley, Thomas Moran, and Charles Donnolly, with the crime of murder, for the killing of one George W. Rice, in the city and county of San Francisco on the 9th day of August, 1901. Upon his trial he was found guilty of murder in the second degree. He interposed a motion to vacate the verdict as well as a motion for a new trial, and, both motions being denied, judgment on the verdict was pronounced, and defendant in due time took this appeal from the orders denying his said motions and from the judgment.

Judgments against the other defendants have heretofore been sustained. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Donnolly*, 143 Cal. 394, 77 Pac. 177; *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

Several grounds are urged for the reversal of the judgment and orders, which we will discuss in the order presented in appellant's brief.

1. The defendant challenged two jurors, Axt and Peters, under subdivision 2 of section 1073 of the Penal Code. This section of the Code provides that a juror may be challenged "for the existence of a state of mind on the part of a juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party."

The juror Axt on his voir dire testified that he had no prejudice against organized labor though his men had joined in a strike; that he would believe a charge of conspiracy made against laboring men belonging to a labor organization "because there must be more organization there," and more to the effect that he would more readily believe that a member of a labor organization would enter into a conspiracy than an ordinary individual, though he further said that such belief would not make him prejudiced. The court disallowed defendant's challenge interposed for actual bias as above stated, and in so doing committed no error. At the time

the challenge was interposed there was nothing to indicate to the court that defendant was a member of any labor organization, or that any such claim would be made either by the prosecution or the defense. So far as the record shows, no statement or showing had been made by either counsel which would indicate that such condition existed or would be claimed to exist, or that the homicide grew out of or was connected with any labor trouble, or that defendant or any of his codefendants belonged to any labor organization. The evidence before the court at the time of the ruling complained of did not show any bias on the part of the juror either against defendant or with relation to the case. The court therefore did not err in disallowing the challenge to juror Axt.

The juror Peters testified that he had formed the opinion from newspaper reports that he had read, that George W. Rice had been murdered, but also said that he would put aside that opinion, and would act wholly upon the evidence brought before the court, and that he could act fairly and impartially upon the case. Some of his statements were somewhat in conflict with the above, but his whole examination presents a case for the judgment of the trial court. This court is only allowed to review an order denying a challenge upon the ground of actual bias, when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only upon questions of law that this court has appellate jurisdiction in criminal cases. *People v. Owens*, 123 Cal. 487, 56 Pac. 251. We cannot say that the court erred in its ruling upon the challenge to the juror Peters.

2. One Stewart, an acquaintance and former shopmate of defendant, was called as a witness for the prosecution, and testified that he saw defendant the evening that Rice was killed; that Duncan asked him (the witness) if he was a union man or a scab, and that he replied that he was neither. Thereupon the district attorney asked the question: "When Duncan asked you if you were a union man or a scab, and you told him you were neither, what did he say to you?" To this the witness answered, "I don't remember what he said." Several more questions were addressed to the witness in an attempt to learn from him what Duncan had said to him, and to which the witness answered that he could not remember. The district attorney then asked the witness if he had not stated on a designated occasion to Mr. Alford, Mr. Byington, Mr. Greany, and Officer Bailey that Duncan had said "that you would be an interested spectator?" To this question defendant objected, and the court overruled the objection, stating that he allowed the question solely for the purpose of refreshing the memory of the witness. The witness answered, "I don't know what it was exactly I said. They brought me in there, and I was

rattled, and don't know what I said." A similar question was then asked the witness, and allowed over the objection of defendant, to which he answered, "I don't remember what the words were that I used, or what I said."

If it be conceded that the court erred in its rulings upon these questions, the defendant was not harmed thereby. The prosecution did not attempt subsequently to contradict the witness, or to show what he did state to the four men named. The case is therefore not brought within the rule laid down in *People v. Creeks*, 141 Cal. 529, 75 Pac. 101, and the cases therein cited, that it is error for a party calling a witness, who fails to give expected testimony, but does not give affirmative testimony against the party, to prove statements of such witness. The witness answered that he did not remember what he did say to the men named, and no effort being thereafter made to show what he did say to them, no harm was done defendant. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650. But the court in allowing the question stated that it did so for the purpose of refreshing the recollection of the witness and none other. The witness had stated that Duncan had held a conversation with him, but said that he could not remember what Duncan had said. It has been held that a witness may be asked concerning statements made by such witness, for the purpose of refreshing his memory. *White v. State*, 87 Ala. 24, 5 South. 829; *Bullard v. Pearsall*, 53 N. Y. 230.

In *People v. Durrant*, 116 Cal. 212, 48 Pac. 75, a witness testified that when he returned to the church he found Durrant either standing in the lobby, or lying on the platform in the school room, but in which place he could not remember. It was held that the party calling the witness could, for the purpose of refreshing his memory, read to the witness his former testimony given on the same subject. But whether or not the court was justified in allowing the questions, it is clear from the answers of the witness that no harm was done. *People v. Wallace*, supra.

3. One Rohrer was examined as a witness on behalf of the defendant. He testified that he was driving a team, was moving slowly, heard two shots, and that he turned himself around towards Shotwell street. From this point on he was an eyewitness to what occurred and gave testimony as to what he saw. Over the objection of defendant the district attorney was allowed to prove by one Elderkin, a shorthand reporter, that on the trial of a codefendant of the appellant, Rohrer had testified as follows: "Q. Did you stop your horses after you heard the shots? A. No, sir. Q. You did not? A. No, sir." Rohrer had not been asked anything about his testimony given on the trial of the codefendant, and it certainly is difficult to understand on what theory the testimony of Elderkin was allowed. It certainly did not contradict anything that Rohrer had testified to in this case. The record shows that defend-

ant moved to strike out this testimony of Elderkin "on the ground that it is not inconsistent with what the witness testified to here, but, on the contrary, it is precisely at this trial as it now appears from the testimony of the rebuttal that he testified to at some other time and place." With the statement as to the testimony of Rohrer on the two different occasions we entirely agree. The testimony read by Elderkin did not in any degree tend to contradict what the witness Rohrer testified to in this case, but is in entire accord with it. For this reason it is inconceivable that the introduction of the evidence in question could have prejudiced the defendant. It could not have had the effect to discredit the witness Rohrer, for it in no way contradicted him, but, as stated by counsel in his motion to strike out, it was precisely in accord with his present testimony. While the court should have sustained defendant's objection to the evidence of Elderkin, it is clear that the ruling of the court could not have injured defendant.

4. Appellant's next point is not supported by anything that we can find in the record. In his brief he says that upon the trial of Duncan (appellant) one Oppenheim was a witness, and that the prosecution was allowed to prove by one Mann that Oppenheim was not a witness upon the trial of appellant's codefendant Buckley, and urges that this was done to discredit the witness Oppenheim, whose testimony he claims was favorable to defendant. After a careful examination of the record we fail to find that Oppenheim was a witness on the trial of defendant, and we are equally unable to find that Mann testified that Oppenheim had not been a witness on the trial of Buckley. Appellant's contention thus falls for want of the necessary premise to support it.

5. The court did not err in allowing the witness Graham to testify that the witness Kinnear had said nothing about a hat. This was rebuttal of testimony given by the witness Kinnear on behalf of the defense upon his redirect examination by counsel for defendant. He testified that in a conversation with officer Fitzgerald, "I told him I saw by the papers that the fellow had a white hat, but I would have to say he had a dark hat on." It may be said that this was hearsay and incompetent, but as it was introduced by defendant it does not lie in his mouth to say that the prosecution should not be allowed to rebut and contradict such testimony. This was all that was done by the evidence of the witness Graham now complained of.

6. The last point presented by appellant for consideration is the one most strongly urged by his counsel, and is predicated on the fact that one Bernard Sherry appeared at the trial, and substituted himself as a juror in place of John H. Sherry, whose name was upon the jury list, and who had been regularly subpoenaed to attend court as a

trial juror. From the record it appears that upon the impanelment of the jury to try defendant the name of John H. Sherry was drawn from the jury box, and in answer to such name a person took his place in the box, and was sworn to answer questions as to his qualifications to act as a juror, and was examined by the court, by the district attorney, and by the attorney for defendant, was accepted and sworn as a juror, and acted as such throughout the trial of the case. After the announcement by the foreman of the jury of their verdict, the jury were, at the request of counsel for the defendant, polled, and each answered that the verdict rendered was his verdict, and the court directed that the verdict be recorded. Thereupon one of the counsel for defendant addressed the court in the following language: "Before this jury is discharged, I will ask is there any juror in the box who was not subpoenaed in this case, whose name was never in the jury box, and who was not sworn under his true name to try this case?" At the request of counsel for defendant a poll of the jury was taken upon the question thus propounded, and when the name of John H. Sherry was called one of the jurors answered that his name was Bernard Sherry, that his son John H. Sherry had been subpoenaed, but that he, Bernard Sherry, had served in place of his son. Counsel for defendant at once moved to vacate the verdict because of the irregularity thus brought to light. The motion was denied. Upon the arraignment of defendant for judgment defendant renewed his motion to vacate the verdict, and also made a motion for a new trial. The two motions were heard together, and were both denied.

Upon the hearing of the motions affidavits and evidence from the record were read, mainly directed to the point as to when defendant or his counsel learned or received information of the substitution of Bernard Sherry in place of John H. Sherry. In passing upon each of said motions the court expressly found "that counsel for defendant had information prior to the submission of the cause to the jury concerning the substitution of Bernard Sherry for John H. Sherry on the jury panel and as a juror in said cause." Appellant upon this appeal challenges this finding as not being supported by the evidence, and especially does he insist that no weight should be given to an affidavit by one T. J. Bailey, to the effect that in a conversation which he held with one of the counsel for defendant, said counsel stated that he did not know of the substitution of Bernard Sherry for John H. Sherry until the Thursday preceeding the day of the rendition of the verdict. The record discloses that the cause was submitted to the jury on Friday, and its verdict rendered the same day.

Among other reasons urged for rejecting the affidavit of Bailey is that the statement of counsel for defendant to the affidavit was,

as against defendant, mere hearsay, and therefore incompetent evidence as against him. But we are of the opinion that the court was justified in finding as it did irrespective of anything contained in the affidavit of Bailey. Immediately upon the rendition of the verdict Mr. Barrett, one of the counsel for defendant, propounded the question, "Is there any juror in the box who was not subpoenaed in this case, whose name was never in the jury box, and who was not sworn under his true name to try this case?" The propounding of this question is quite convincing that counsel at that time had information of the facts suggested by the question. It is not at all reasonable to suppose that counsel was engaged in what is sometimes called "a fishing excursion." Further, upon the hearing of the motions appellant filed an affidavit by himself, and affidavits by each of his counsel. In his own affidavit he stated that he had no knowledge and no information of the substitution now complained of until after rendition of the verdict. In the affidavits made by counsel each states that he had no knowledge of such substitution until after rendition of the verdict, but makes no mention of when he obtained information on the subject. That this was not an inadvertence, but was intentional and designed, is made perfectly clear by what subsequently transpired. Counsel for the people called attention to the omission of any statement in the affidavits of counsel as to when they obtained information concerning the substitution, and made an earnest effort to induce such counsel to submit to an examination under oath as to such matter, which counsel refused to do; and during the discussion which ensued before the court counsel for defendant made this statement: "There is no issue in the first place tendered on the question of information by that affidavit. There is no issue tendered by us." What information counsel had received that prompted the question that brought forth the disclosure of the substitution was a matter peculiarly within their knowledge and within their power to prove, and the same is true as to when they received such information. Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is within the power of one side to produce, and of the other to contradict. Code Civ. Proc. § 2061, subd. 6. From the foregoing facts we are satisfied that appellant cannot justly complain of the finding made by the court. There can be no doubt that a defendant is chargeable with knowledge of information obtained by his counsel. 17 Am. & Eng. Ency. of Law, 1169.

There is nothing in the record to suggest, and there is no claim made, that either the court, the district attorney, or any one connected with his office or the prosecution, had any knowledge or information concerning the substitution of Bernard Sherry for John H.

Sherry until the disclosure elicited by counsel for defendant after the rendition of the verdict. And no claim is made that Bernard Sherry was not in fact a fair and impartial person to act as a juror. His examination on his voir dire discloses that he was entirely impartial.

The question is thus presented, may a verdict be vacated and a new trial granted upon an objection to a juror made for the first time after verdict rendered that he was not the person who was selected, subpoenaed, and returned to serve upon the panel? Upon the question the authorities in other states are not in accord. The rule generally followed is that any objection to a juror must be made before he is sworn, and comes too late after verdict. "In many cases it has been expressly decided that the right to attack a verdict for the disqualification of a juror does not exist even when the moving party was perfectly ignorant of such disqualification, and that to allow a subsequent attack upon the verdict for that cause would give a wide opening for fraud. In a still larger number of cases it is simply stated that there is no right to attack a verdict on this ground, without any reference to the question of previous ignorance or knowledge, and that may be considered also to support the proposition that ignorance is immaterial." 17 Am. & Eng. Ency. of Law (2d Ed.) 1163.

In England there seems to be considerable flexibility in the practice where a substitution has occurred such as exists in the case at bar, it being considered a matter of discretion with the court. In the very early case of *Norman v. Beaumont*, Willes' Reports, 484, a new trial was ordered; so, also, in *Dovey v. Hobson*, 6 Taunton, 460, a new trial was ordered, as a matter of discretion, though the irregularity was discovered before verdict; while in *Hill v. Yates*, 12 East, 229, where the substitution was discovered after verdict, a new trial was refused, the court saying that it was a matter of discretion. Coming to the United States, we find, as before stated, that the authorities are not in accord.

In *Dayton v. Church*, 7 Abb. (N. C.) 367, a stranger answered and served in place of one of the panel, which was not discovered until after verdict, and a new trial was ordered.

In *McGill v. State*, 34 Ohio St. 228, a new trial was ordered, though the substitution was not discovered until after verdict, but in Ohio the law concerning the granting of new trials is much broader than in this state.

In *Urquhart v. Powell*, 59 Ga. 721, it was held that the fact that the name of one of the jurors who tried the case was neither in the jury box nor on the jury list was no ground for a new trial after verdict; but in the latter case of *Stripling v. State*, 77 Ga. 108, 3 S. E. 277, a new trial was granted because of a substitution, the court saying, also, that it made no difference whether the court's atten-

tion had been called to it before verdict or not.

In a still later case, however, *Dasher v. State*, 113 Ga. 4, 38 S. E. 348, the case of *Urquhart v. Powell*, supra, is cited with approval. So too in *Stripling v. State*, supra, the court cited the earlier case of *Anderson v. Green*, 46 Ga. 361, with apparent approval, where it was held that a substitution such as exists in this case was no ground for a new trial. The Georgia statute seems to authorize the court to order a new trial, in cases not expressly provided for by the Code of that state, in the exercise of a sound discretion, "according to the provisions of the common law and practice of the court." The new trial in the *Stripling Case* seems to have been ordered in the exercise of this discretion.

Upon the other hand, in *Mann v. Fairlee*, 44 Vt. 672, where the wrong man was summoned and served without discovery until after verdict, a new trial was refused. To the same effect is *Commonwealth v. Beucher*, 10 Pa. Co. Ct. R. 3. So, too, in *Commonwealth v. Parsons*, 139 Mass. 381, 31 N. E. 767, the wrong juror answered to a name that was called, and served, and a new trial was refused.

In *Tolbert v. State*, 71 Miss. 179, 14 South. 462, 42 Am. St. Rep. 454, the wrong man was summoned and served, the mistake not being discovered until after verdict. A new trial was refused, the court saying: "The right of the defendant is to have an impartial jury rather than one composed of particular persons, and where this right has been enjoyed there is little cause for complaint, ordinarily, after verdict. An acquittal by such a jury would avail the defendant, and having had a chance of escape at the hands of the jury, he could not be allowed to profit by an innocent mistake or inadvertence which fact did him no harm."

No case has arisen in this state precisely like the case at bar in its facts. But by reason of the provisions of our statute and the decisions thereon, we think it must be held that the objection to the juror came too late. The statutes clearly intend that any challenge to the panel or to an individual juror must be taken before the juror is sworn to try the cause (Pen. Code, §§ 1060, 1069), and the fact that the disqualification was not discovered until after verdict makes no difference in the rights of the defendant.

In *Thrall v. Smiley*, 9 Cal. 529, the name of one of the jurymen was not on the venire returned by the sheriff, though he had in fact been summoned, and his name placed in the box and entered in the minutes of the court. In disposing of an objection made for the first time after verdict the court said: "The objection, if it had any validity, should have been urged at the trial; it comes too late after verdict. The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence

in what order, or at what time during the term, they are summoned. It would be productive of great hardship to permit a second trial upon a ground so technical and unsubstantial. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their verdict, their verdict should not be disturbed"—and quoted with approval similar language used by Shaw, C. J., in *Page v. Inhabitants of Danvers*, 7 Metc. (Mass.) 327.

In *People v. Chung Lit*, 17 Cal. 321, it was held that objection because of the fact that one of the jurors was an alien cannot be taken for the first time on motion for a new trial, although the fact was not known until after the verdict. The court said: "The defendants might have examined him upon the subject, and exercised their right of challenge before he was sworn, but having failed to do that they must suffer the consequences of their own neglect."

In *People v. Fair*, 43 Cal. 137, it was held that the fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused is not, under our practice, ground for a new trial, when the objection is taken for the first time after verdict; nor is it a ground for an arrest of judgment or a new trial under the statutes of this state. This case arose under the provisions of the criminal practice act, which are identical in this respect with the provisions of the Penal Code. In this case the court points out that the subsequently discovered disqualification of a juror is not made either a ground for an arrest of judgment or a new trial; that the statute provides in what cases a judgment may be arrested, and in what cases a new trial may be granted, and that the grounds thus provided are exclusive of all others. The reasoning of the *Fair Case* seems to be conclusive of the case at bar, for although appellants in form made a separate motion to "set aside the verdict," no such motion is provided for in our Code as distinct from a motion for a new trial or in arrest of judgment. In its effect it was a motion for a new trial, and under our practice it must be so regarded.

In *People v. Mortier*, 58 Cal. 262, the court again discussed at great length the right to raise, after verdict, the question of the disqualification of a juror, and held, notwithstanding the conflict in authorities in other states, that a judgment in such case should not be reversed because of the disqualification of a juror discovered after verdict. The court quoted with approval from the opinion of the court in *Bristow's Case*, 15 Grat. (Va.) 648: "To permit prisoners to avail themselves after verdict of pre-existing objections to the competency of jurors, as a matter of right, would not only be unreasonable, but most mischievous in its consequences. The delays in the administration of criminal justice and the chances for the escape of the guilty would

be greatly increased. Proper verdicts, specially in trials for grave offenses, would be continually set aside. A prisoner knowing, or willfully remaining ignorant of the incompetency of a juror, would take the chances of a favorable verdict with him upon the jury, and if the verdict should be adverse would readily enough make the affidavit necessary to avoid its effect." To the same effect are *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061, *People v. Evans*, 124 Cal. 206, 56 Pac. 1024, and *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, in each of which it was held that it was too late after verdict to object to the competency of a juror.

The California cases above cited are all cases where the objection went to an individual juror, but the same rule has been applied to an objection to the entire panel. In *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933, the jury had been selected from a panel drawn by a judge who was disqualified to act in the case. In disposing of the question raised on a motion for a new trial the court said: "But if the jurors drawn and summoned in pursuance of Judge Angellotti's order were incompetent to try this cause, the objection should have been taken by a challenge to the panel, and if, for the purposes of this case, the act of the judge in ordering the jurors drawn was void, as counsel contend, then certainly the statute (Pen. Code, § 1059) is broad enough to have given the defendant good ground for challenge to the panel. And that was the regular and only way to raise the question. If it had been made at that time, and sustained, a special venire could at once have been issued. Raised for the first time after verdict it comes too late."

Our statute providing for challenges to an individual juror is certainly broad enough to allow a challenge upon the ground that the offered juror is not the man whose name is in the box and who was summoned. Such a person is not a qualified juror (section 1072, Pen. Code) because not selected and returned (section 198, Code Civ. Proc.), and for that reason could be challenged before being sworn. *State v. Sternberg*, 59 Mo. 410; *Goodwin v. State*, 102 Ala. 87, 15 South. 571. A challenge should be made when the juror appears. That is the regular and only way to raise the question of his competency. Section 1068, Pen. Code. The objection to the juror Bernard Shaw came too late. The argument that he never became a juror because he was not selected and returned as required, and that therefore the verdict was but the verdict of 11 jurors, we think begs the question. He was accepted and sworn as a juror. He became a juror irregularly, it is true, but, to paraphrase the language of the court in *People v. Chung Lit*, *supra*, the defendant might have examined him upon the subject, and exercised his right to challenge or objection before he was sworn, but having failed

to do this, he must suffer the consequences of his own neglect.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(153 Cal. 718)

**BOTHIN et al. v. CALIFORNIA TITLE INS.
& TRUST CO. (S. F. 4,493.)**

(Supreme Court of California. June 10, 1908.)

**1. INSURANCE — TITLE INSURANCE — ADVERSE
POSSESSION.**

Where a policy of title insurance excepted
claims of tenure by present occupants, together

with instruments, liens, incumbrances, judicial proceedings, and pending suits not shown by any public record, etc., the policy covered the record title only, and did not insure against a claim sustainable only by proof of adverse possession.

2. WORDS AND PHRASES—"TENURE."

The word "tenure" is a term of extensive signification, and while it means the mode by which one holds an estate in land, it imports any kind of a holding, from mere possession to the owning of the inheritance.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6915, 6916.]

3. QUIETING TITLE—CLOUD ON TITLE.

A deed by one, not connected by any conveyance with the record title to land, does not create any defect in the record title of the record owner, nor constitute a cloud on the record title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 14-33.]

4. VENDOR AND PURCHASER—NOTICE—CONSTRUCTIVE NOTICE—RECORD.

Civ. Code, § 1213, providing that every conveyance of real property, acknowledged and recorded, is, from the date of recordation, constructive notice of its contents to subsequent purchasers and mortgagees, only contemplates conveyances by one having legal title to the property conveyed, and is applicable where there are conflicting conveyances made by persons claiming under the same common grantor, and has no application to a deed by a stranger to the record title.

5. INSURANCE—TITLE INSURANCE.

Where a policy of title insurance excepted the tenure of present occupants and incumbrances not shown by any public record, etc., the insurer merely guaranteed the record title, and the record of a deed of trust by him, a stranger to the record title, did not constitute a defect insured against.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Henry E. Bothin and others against the California Title Insurance & Trust Company. From a judgment for defendant, and from an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

Frank McGowan and Geo. D. Squires, for appellants. Olney & Olney, for respondent.

LORIGAN, J. This action was brought to recover damages for breach of a covenant in a title insurance policy. The facts, either admitted or proven, are as follows: On March 1, 1900, the plaintiff H. E. Bothin, having entered into a contract for the purchase, from the Sharon Estate Company, of city slip lots 71 and 72 in the city and county of San Francisco, applied to the defendant, a corporation engaged in issuing title insurance policies, for a policy insuring the title to said lots. On December 13, 1900, the defendant duly issued its policy of insurance on said lots, guaranteeing the title to the same to be in plaintiff, who, at the same time, took a conveyance thereof from the Sharon Estate Company. Among other things, the policy provided that the defendant, California Title Insurance & Trust Company, covenanted to indemnify and insure said plaintiff "from all loss or damage, not exceeding

\$10,000, which the said assured shall sustain by reason of defects in the title of the assured to the estate or interest described in Schedule A, or by reason of liens or incumbrances affecting the same on the 13th day of December, 1900, * * * excepting only such as are specified in Schedule B; subject to the conditions and stipulations on the third page hereof, which with the schedules aforesaid are a part of this policy." Schedule B referred to provides, in part, as follows: "Schedule B—defects of or objections to the title, and liens, charges and incumbrances thereon against which the company does not insure; 1. Tenure of the present occupants; * * *

4. Instruments, liens, incumbrances, judicial proceedings and pending suits not shown by any public record thereof in the city and county of San Francisco; and secret trusts known to the assured and not disclosed to the company." It appears that when this policy was issued there was, and for some time prior thereto had been, on record, in the recorder's office of the city and county of San Francisco, a deed of trust by which one P. M. Partridge conveyed to the trustees of the San Francisco Savings Union about 14 feet of the westerly portion of said lot 71. Subsequent to the issuance of the policy to plaintiff, it was discovered that the adjoining owners of property to the west of lots 71 and 72, described in the policy, had encroached about 14 feet thereon with their buildings, and that the buildings of plaintiff encroached to a like extent upon the owners of city slip lots 73 and 74 on the east. In fact, it appeared that neither the owners of property to the west of the lots purchased by plaintiff, nor the predecessors in title of plaintiff, had erected their buildings on the true line, but, respectively, about 14 feet easterly thereof. One of said encroaching owners was said P. M. Partridge, whose trust deed, above referred to, was on record when the policy was issued. The description in that deed did not refer to lot 71 by name, and that it embraced any portion thereof could only be determined by a survey according to the calls of the trust deed. Some question arising subsequent to the issuance of the policy as to the lines between them, Partridge brought an action against plaintiff to quiet his title to the 14 feet of the westerly portion of lot 71 which was in his actual occupancy, and which was embraced in his trust deed, and one John A. Schmidt, adjoining him on the north, brought a similar suit against plaintiff, to quiet title to about the same number of feet of the westerly portion of lot 72, which was in his possession and occupied by his buildings. Judgments in these actions went in favor of the plaintiffs to the portions of lots 71 and 72, and their title quieted thereto. Plaintiff here likewise brought actions against parties claiming under the record title to about 14 feet of the property to the east of said lots and beyond the easterly line thereof, but of which he was actually in the occupancy with

his buildings, and obtained judgments quieting his title thereto. It further appears from the findings that plaintiff here, while not obtaining possession of the entire property embraced within lots 71 and 72, obtained the identical property that he had looked at and had in mind when he obtained his deed from the Sharon Estate Company, and substantially of the same dimensions as there called for. There is no claim that P. M. Partridge had any title of record to any portion of lot 71, or that the trust deed executed by him embraced, in its description, any of the improvements of plaintiff which were supposed to cover the entire lot. Neither is there any claim that lot 72 was embraced within the calls of any instruments in writing, save those constituting the chain of title of plaintiff, and it is conceded that the plaintiff had the record title to both these lots. The claim of plaintiff was that he had sustained damages embracing an amount which he had paid for attorney's fees, and expenses in defending the actions brought by Partridge and Schmidt, as also damages for alleged depreciation in value of the property described in the policy, occasioned through the irregular shape in which the judgments in these suits left the remainder of the lots. The court awarded judgment in favor of defendant, and from said judgment, and the order denying his motion for a new trial, the plaintiff appeals.

The main point on this appeal is relative to the title of Partridge to the portion of lot 71 which was included in his deed of trust; it being insisted by appellant that there was a breach of the covenants contained in the policy by reason of this trust deed being upon the record. Taking, however, into consideration the covenants of the policy, this claim is not tenable. It is quite clear from the conditions of that instrument that what was insured by the respondent was that the record title to the lot was in appellant. It is not insisted, nor could it be, that Partridge had a record title to any portion of the lot in question. The evidence shows that he had not. In fact, it was admitted that the record title to the lot was in the appellant, and it is evident from the policy that this was all that the respondent insured. The only title which Partridge had was a title to a portion of the lot acquired by adverse possession, but this the respondent not only did not insure, but expressly declared it did not, in that provision of Schedule B wherein it is stated that, among other defects of or objections to the title not insured against, was the "tenure of the present occupants." "Tenure" is a term of extensive signification. While it means the mode by which one holds an estate in land, it imports any kind of holding, from mere possession to the owning of the inheritance. *Bouvier's Law Dic.*; *Anderson's Law Dic.*, term "Tenure."

Now the only title that Partridge held to the lot was the title acquired by adverse pos-

session. His tenure of the property was exclusively that of an adverse occupant. He had no title of record, and against his title, acquired by reason of his adverse occupancy, the policy expressly declared it did not insure, when it provided it did not insure against the "tenure of the present occupant." As far as the record title to the lot is concerned, the respondent did insure it to be in appellant; but, as against any title or right to the property asserted by one who might be in possession thereof, holding adversely to the record title, insurance was expressly denied. It was left to the appellant to determine, by an inspection and examination of the property, whether there was adverse occupancy or not, to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any character by the occupants of the whole or any portion of the premises. Necessarily the record title is all that a title insurance company can safely or judiciously insure. While the title to real property may be disclosed by the record to be in one person, it may, in fact, be in another through adverse possession, or in one in occupation of the property under an unrecorded conveyance. It is the possibility of the existence of these conditions as to the title which an insurance company provides against by insuring the record title, and none other. In the case at bar the policy only insured the record title, and as that is conceded to have been in appellant, and the title of Partridge to the portion of the lot in question resting solely upon adverse possession, against which respondent did not insure, there was no breach of the policy of insurance.

But it is claimed, by counsel for appellant, that the provision in Schedule B of the policy that the insurance company did not insure against "the tenure of the present occupants" is not controlling as to the responsibility of the respondent under the evidence in the case, but it is insisted that there was a breach of the policy as to the Partridge title under the fourth subdivision of Schedule B, which provides that the company does not insure instruments, liens, or incumbrances not shown by any public record. The claim is that, under this subdivision, appellant was insured against any "defect" in the title disclosed by public records of the city and county of San Francisco, and that the deed of trust from Partridge to the San Francisco Savings Union was a "defect" in the title, as that term is used in the policy of insurance. Undoubtedly, the policy does insure against any defect in the record title, but the trust deed of Partridge was not a defect in such title. There was no title appearing of record in Partridge to any portion of the lot in question. There was no instrument of any kind, or character of record, which purported to convey any interest in this lot to him.

He was not connected with the chain of title in any respect. That chain, produced from the records, showed the title to be in appellant. This being true, the deed of trust from Partridge created no defect in the record title. As far as the record title was concerned, Partridge was a mere interloper. One who is not connected by any conveyance whatever with the record title to a piece of property, and makes a conveyance thereof, does not thereby create any defect in the record title of another, when such title is deducible by intermediate, effective conveyances from the original owners to that other. This we think so clear that it is idle to attempt to elaborate it. Such a deed would not even be constructive notice. Our Code provides that every conveyance of real property, acknowledged and recorded, is, from the date of recordation, constructive notice of its contents to subsequent purchasers and mortgagees. Civ. Code, § 1213. This language is very general, applying, in terms, to every conveyance; but it is held that this only contemplates conveyances by one having legal title to the property conveyed, and is applied where there are conflicting conveyances, made by persons claiming under the same common grantor. It does not apply to a deed by a stranger, one who is not connected in any manner with the title of record. No notice whatever is conveyed by such a deed. *Long v. Dollarhide*, 24 Cal. 218; *Garber v. Gianella*, 98 Cal. 529, 33 Pac. 458; *Sharon v. Minnock*, 6 Nev. 377; *Rankin v. Miller*, 43 Iowa, 19; *Edwards v. McKernan*, 55 Mich. 526, 22 N. W. 20.

It may be suggested, too, in this connection, that the loss to appellant of a portion of his lot 71 did not arise out of the alleged defect in the record title of appellant created by the trust deed from Partridge, but for a cause entirely independent of it. It arose from the fact that Partridge had acquired title by adverse possession of the land, not from any defect in appellant's record title. This title by adverse possession respondent did not insure against, but expressly provided that it did not.

While there is involved in the appeal a claim of breach of the covenants as to that portion of lot 72 to which Schmidt had title by adverse possession, little need be said on the subject. What we have said relative to the Partridge title applies equally to the Schmidt title. As to this lot 72, there were no instruments of any character on record embracing any portion of it, except such instruments as made out the record title of appellant. Schmidt's tenure of the portion of lot 72, at the time of the issuance of the policy, was solely that of an adverse occupant or claimant. He had no title of record, and his title by adverse possession was not insured against, because, as we have seen, it was expressly provided in the policy that the respondent did not insure against "the tenure of the present occupants."

The judgment and order denying the motion for a new trial are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 456

GROOM v. BANGS. (S. F. 4,563.)

(Supreme Court of California. April 29, 1908.)

1. DEATH—ACTION FOR CAUSING DEATH—ACTION BY HUSBAND AS HEIR—PLEADING—SUFFICIENCY OF COMPLAINT.

In an action by plaintiff for the death of his wife, a complaint alleged that deceased was his wife at the time of her death, and defendant, a licensed physician, was employed to treat her, and under his careless and unskillful treatment, as set out particularly, she died, to plaintiff's damage, etc. Code Civ. Proc. § 377, provides that when the death of a person is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. *Held*, the complaint stated a good cause of action by the husband as heir of the wife; it not being necessary to expressly allege that he was her heir.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 64-66.]

2. SAME—SEPARATE CAUSE OF ACTION.

The complaint was not uncertain as not showing whether the action was for damages during her lifetime, or for damages to the husband on her death, and the only cause of action stated was an action for damages to the husband as heir of the wife for negligently causing her death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 60, 69.]

3. PLEADING—NEW CAUSE OF ACTION.

Where an original complaint was filed by plaintiff and his wife before her death for injuries to the wife, and after her death an amended complaint was filed by plaintiff alone, to recover as heir of his wife for negligently causing her death, the filing of the amended complaint was, in effect, a discontinuance of the previous action, and the beginning of a new cause of action, and the sufficiency of amended complaint was to be determined solely by its own allegation, without reference to the original complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686-700, 734, 735.]

4. APPEARANCE—PROCEEDINGS CONSTITUTING—WAIVER OF PROCESS.

Where plaintiff and his wife brought an action for injuries to the wife caused by defendant's negligence, and after the wife's death, plaintiff filed an amended complaint with leave, in his own name, as heir, for her death by defendant's negligence, and defendant appeared in the second action and demurred to the amended complaint, he thereby waived process thereon, and may not object that the amended complaint was, in effect, the beginning of a new cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 91-102.]

5. PLEADING—MOTION—STRIKING OUT MOTION—SUBSTITUTING NEW CAUSE OF ACTION.

Where an amended complaint substituted a new cause of action, if defendant did not wish to consent to the substitution, the proper practice was to move to strike the new complaint from the files, on the ground that it stated a different cause of action; but the question could not be raised by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 408-443, 1096-1119.]

6. APPEAL AND ERROR — PRESENTATION OF GROUND OF REVIEW—NEW CAUSE OF ACTION—MOTION TO STRIKE—FAILURE TO OBJECT.

Where plaintiff and his wife joined in an action for injuries to the wife by defendant's negligence, and on the wife's death plaintiff thereafter filed a purported amended complaint, in his own name, to recover, as heir, for her death, the second complaint stating a new cause of action, and defendant demurred to the new complaint, but did not move to strike it out, the court having jurisdiction of the subject-matter and of the parties in the second action, and no objection having been properly made by motion to the substitution of the new cause of action, the objection that the amended petition was a new cause of action cannot be made for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1490; vol. 39, Pleading, §§ 1409-1412.]

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Marshall W. Groom against Fred Bangs. From a judgment for defendant, and an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Wm. P. Venoe and L. B. Archer, for appellant. Samuel G. Tompkins, for respondent.

SHAW, J. This is an appeal from a judgment after an order sustaining a demurrer to the complaint. The complaint demurred to purports to state a cause of action in favor of Marshall W. Groom, to recover damages alleged to have been sustained by him from the death of Hattie L. Groom, his wife. It alleges that she was, at all the times mentioned, his wife; that the defendant, a licensed physician, was employed by plaintiff to treat her; that she was thereupon placed under his care, and that he was negligent, careless, ignorant, and unskillful; that in consequence of his ignorant, unskillful, negligent, and careless treatment of her, the particulars whereof are set forth at length, she died; and that, by reason of said negligent and wrongful acts resulting in her death, the plaintiff has suffered damage in the amount of \$25,000. We cannot discern wherein the complaint lacks in the averments essential to a good cause of action by the husband, as an heir of the wife, for damages accruing by reason of her death, occasioned by the wrongful act or neglect of another, a right of action expressly given by section 377 of the Code of Civil Procedure. It was not necessary to expressly allege that he was her heir. It is alleged that she was his wife at the time of her death, and, as surviving husband, he would, under any ordinary circumstances, be her heir. *Knott v. McGilvray*, 124 Cal. 129, 56 Pac. 789. The respondent points out no particular wherein it is defective as a cause of action of that character.

One ground of demurrer was that the complaint was uncertain, because it could not be ascertained therefrom whether the action was for damages to the wife during her lifetime, or for damages to the husband re-

sulting from injuries to the wife. Another ground was that there was a misjoinder of actions, in that it stated a cause of action for each of the above-mentioned injuries. The only damage alleged is that to the husband resulting from the death of the wife. It could not be upheld as an action for damages caused, either to the husband or wife, during her lifetime. There is no such uncertainty, and but one cause of action is stated, namely, an action for damages to the husband as an heir of the wife, for a negligent injury causing her death.

The complaint we are here considering is designated an amended and supplemental complaint, and was filed by leave of court. The original complaint, also appearing in the record, was filed before the death of the wife. In that complaint the husband and wife were both joined as plaintiffs, and it stated a cause of action for damages to the wife from bodily pain and injury suffered by her, caused by the alleged negligent and unskillful treatment of her by the defendant. The briefs discuss at length the question whether or not an action of that character survived to the husband upon the death of the wife. We deem the question immaterial. The original complaint is not before the court. The sufficiency of the amended complaint, upon demurrer, as to the point of the right of the plaintiff to maintain the action, is to be determined solely by its own allegations, without reference to those of the original complaint. In the new complaint neither Hattie L. Groom, nor any one representing her interest, is joined as plaintiff. The husband is the sole plaintiff therein. He sues in his own right, and he states a cause of action for an injury to himself alone, arising from the death of the wife, an injury and cause of action which did not exist in her lifetime, and which accrued only upon her death. It is a cause of action entirely different from that sued on in the original complaint. The filing of the amended and supplemental complaint was, in effect, a discontinuance of the previous action, and the beginning of a new action for a new cause. This method of procedure was irregular, but no objection was made upon that ground. On the contrary, the defendant appeared to this new action, and demurred to the new complaint, thus waiving process thereon. The proper practice, if the defendant did not wish to consent to the mode of proceeding, was to move to strike the new complaint from the files, on the ground that it was not an amended or supplemental complaint, but stated a new and different cause of action. No such motion was made. The demurrer does not raise the point. It is a case in which the court had jurisdiction of the subject-matter and of the parties, and where no objection has been properly made in the court below to the manner of procedure by which the cause was brought before that court. In such cases the objection can-

not be made for the first time on appeal. *Santa Barbara v. Eldred*, 95 Cal. 381, 30 Pac. 562; *Power v. Fairbanks*, 146 Cal. 613, 80 Pac. 1075; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 163, 35 Pac. 633; *De Jarnatt v. Marquez*, 132 Cal. 702, 64 Pac. 1090.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

8 Cal. App. 234

GALINDO v. WALTER, City Clerk. (Civ. 526.)

(Court of Appeal, First District, California.
May 7, 1908.)

1. MUNICIPAL CORPORATIONS — LEGISLATIVE POWER—DELEGATION.

Legislative power having been conferred exclusively by San José Charter (St. 1897, pp. 600-603, c. 15) art. 3, cc. 1, 2, on the city council, without any referendum provision, such power cannot be delegated to the electors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 153, 154.]

2. SAME—POWERS OF MUNICIPALITY.

The powers of a municipal corporation are such as are granted in express words, or are necessarily or fairly implied in or incident to the powers expressly granted or indispensable to the declared objects and purposes of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 144, 149.]

3. SAME — PUBLIC QUESTIONS — WISHES OF VOTERS—SUBMISSION TO VOTE.

Under San José Charter (St. 1897, p. 601, c. 15) art. 3, c. 2, § 1, enumerating the subjects of legislation delegated to the city council, the council had no power to pass an ordinance directing the city clerk to place on the ballot, at the next city election, the question whether the sale of intoxicating liquor as a beverage should be allowed in the city, for the purpose of ascertaining the will of the voters thereon.

Petition by John A. Galindo for a peremptory writ of mandate against Roy E. Walter, city clerk of the city of San José. Writ granted.

E. M. Rea, for petitioner. Frank H. Benson, for respondent.

KERRIGAN, J. This is an application for a peremptory writ of mandate, requiring respondent to prepare the sample ballot, to be mailed to the voters of the city of San José, for the election to be held there on the third Monday of May, 1908, and the voting machines to be used at that election, according to law, by omitting from said ballots and from the voting machines the following: "Shall the sale of intoxicating liquor as a beverage be allowed in the city of San José?" and the words "Yes" and "No" placed in such juxtaposition to said question as to enable the elector to vote for or against the matter referred to therein, the petitioner alleging that the respondent threatens and intends to place such words on said ballots and on said voting machines. The city of San José is a municipal corporation operating under a freeholder's charter, formed and

adopted under the provisions of section 8 of article 11 of the Constitution, and approved by the Legislature March 5, 1897 (St. 1897, p. 592, c. 15). April 15, 1908, the common council passed and adopted an ordinance which was approved by the mayor, by the terms of which the city clerk (respondent herein) was directed and authorized to place upon the ballot on each voting machine the above-quoted question, in order to submit to the voters at the said election the proposition embodied in such question. There is no referendum provision in the San José charter, the legislative power being conferred exclusively on the common council (article 3, cc. 1, 2). Such power cannot be delegated to the electors (1 Abbott on Municipal Law, § 110, p. 195; *City of Oakland v. Carpentier et al.*, 13 Cal. 544; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425); nor does the ordinance in question attempt to do so, it being admitted by both petitioner and respondent that its object is merely, in this way, to ascertain whether it is the desire of the electors of the municipality that the common council shall, by proper ordinance, prohibit the sale of intoxicating liquor. The question for decision then is: Has the common council the power to adopt this method for ascertaining the electors' wishes? "The powers of a municipal corporation are such as are granted in express words, or are necessarily or fairly implied in or incident to the powers expressly granted, or indispensable to the declared objects and purposes of the corporation." 20 Am. & Eng. Ency. of Law, p. 1139; *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41. Section 1 of chapter 2, art. 3, of the charter of San José enumerates the subjects of legislation; and when this provision is examined, with the rule just noticed in mind, it is found to vest no power in the common council to pass the ordinance in question. The ordinance is therefore void, and affords no authority whatever to the threatened action of the city clerk complained of in this proceeding, and, as no other authority is relied upon, it follows that the ballot and the voting machines should be prepared according to the provision of the charter governing city elections, and that the matter to which objection is made should be omitted therefrom. A writ of mandate will issue to compel an officer to omit from a ballot anything placed thereon not authorized by law. *Partridge v. Devoto*, 148 Cal. 167, 82 Pac. 775.

It follows that the writ should issue as prayed for, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 241

McRAE v. LACKMANN, Sheriff. (Civ. 493.)
(Court of Appeal, First District, California.
May 11, 1908.)

1. CHATTEL MORTGAGES—VALIDITY.

A chattel mortgage given to secure a loan is valid between the parties, though the arti-

cles covered by the mortgage are not such as may be mortgaged under the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 149.]

2. SAME—POSSESSION BY MORTGAGEE.

A mortgagee, who has taken possession under a chattel mortgage, stipulating that he may take possession of the property on default in payments called for, is rightfully in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 286-293.]

3. SHERIFFS AND CONSTABLES — WRONGFUL ATTACHMENT—LIABILITY—COMPLAINT.

In an action by a mortgagee, in a chattel mortgage, who had, as authorized by the mortgage, taken possession of the chattels on default of the mortgagor, against a sheriff, for his taking the chattels under a writ of attachment against the mortgagor, a complaint which does not show affirmatively that the plaintiff in the attachment suit was a creditor of the mortgagor or otherwise entitled to question the validity of the mortgage states a cause of action as against a demurrer, since the officer must, to justify the levy, show that the attachment plaintiff was a creditor of the mortgagor and entitled to question the validity of the mortgage.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Donald McRae against John Lackmann, as sheriff of the city and county of San Francisco. From a judgment entered on sustaining a demurrer to the complaint, plaintiff appeals. Order and judgment reversed.

Julian Pinto, Warner Temple, Nathan C. Coghlan, and J. B. Gibson, for appellant. George D. Squires, for respondent.

HALL, J. This is an appeal by plaintiff from the order of the court sustaining defendant's demurrer to plaintiff's third amended complaint, and from the judgment against plaintiff entered thereon. The action is for conversion, for the taking from the possession of plaintiff certain personal property, which had been theretofore mortgaged to plaintiff by one E. A. Kosta, to secure the sum of \$1,500, loaned by plaintiff to Kosta on the 15th day of January, 1902, to be repaid one month thereafter. By the condition of the mortgage, if Kosta made default in any payment, then plaintiff might take possession of the property. It is alleged that he did make default in such payment, and on the 10th day of April, 1902, plaintiff took possession of all of the mortgaged property. It is then alleged that: "On the 11th day of April, 1902, and while plaintiff was justly in possession of said chattels and effects, the defendant, as sheriff as aforesaid, under a writ of attachment issued from the justice's court of said city and county, in an action wherein one W. S. Morrow was plaintiff, and the said C. [E.] A. Kosta was defendant, levied on and seized all of the said chattels and effects included in said mortgage and schedule hereto, and converted the same to defendant's use, to the great detriment of plaintiff, to wit, to his damage in the sum of \$1,585." Defendant

seems to have based his demurrer upon the proposition that the articles covered by the mortgage are not such as may be mortgaged under our statute. But, whether they are or not, the mortgage was good as between the parties thereto. *Perkins v. Maier & Zobelein Brewery*, 133 Cal. 496, 65 Pac. 1030; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *Bank of Ukiah v. Gibson*, 109 Cal. 198, 41 Pac. 1008. By the terms of the mortgage plaintiff had the right to take possession of the articles upon default in the payments called for by the mortgage, and he was thus rightfully in possession when the writ was served. *Perkins v. Maier & Zobelein Brewery*, supra. The writ was not issued against plaintiff, but was against Kosta, and it does not appear from the complaint that the plaintiff in the attachment suit was a creditor of Kosta, or was in any position to question the validity of the mortgage under which plaintiff was in possession of the articles taken by the sheriff.

According to the allegations of the complaint, the defendant, as sheriff, took the property from the possession of plaintiff, under a writ issued against Kosta, upon the suit of one Morrow. "When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere possession of the writ will not justify its seizure thereunder. It rests upon the officer to go further, and prove that the attachment defendant was indebted to the attachment plaintiff. If in the attachment suit judgment was rendered in favor of the plaintiff, that will establish the indebtedness of the defendant; if not, the officer must otherwise prove the indebtedness in order to justify his proceeding." *Drake on Attachment*, § 185a; *Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316; *Horn v. Corvarubias*, 51 Cal. 524; *Jones v. McQueen*, 13 Utah, 178, 45 Pac. 202. In *James v. Van Duyn*, 45 Wis. 512, it was held that an officer who seized property in possession of the mortgagee, under an attachment against the mortgagor, could not question the validity of the mortgage until he had shown that the plaintiff in the attachment suit was a creditor of the mortgagor. In the case at bar, the property having been taken from the possession of plaintiff, a mortgagee, under a writ against the mortgagor, and it not affirmatively appearing from the complaint that the plaintiff in the attachment suit was a creditor of the mortgagor, or otherwise entitled to question the validity of the mortgage, defendant's demurrer should have been overruled.

The order and judgment are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 229

FLANNIGAN et al. v. TOWLE et al.

(Civ. 459.)

(Court of Appeal, Third District, California.
April 28, 1908.)**1. APPEAL AND ERROR—OMISSION IN RECORD—CORRECTION.**

Where, at the submission of an appeal, appellants suggested a diminution of the record in accordance with Supreme and appellate courts rule 14 (78 Pac. x), and the certificate of the trial clerk shows that the printed record contains an incomplete transcript of the bill of exceptions as actually settled by the trial judge, in that objections by appellants to the admission of particular evidence, and exceptions to the overruling of the objections are omitted, appellants' motion to supply the omission will be granted, and the certificate will be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2819-2822.]

2. SAME — PERSONS ENTITLED TO APPEAL — "AGGRIEVED PARTIES."

Plaintiffs in an action to quiet title, having admitted that they could not show title to particular tracts, are not aggrieved parties so far as the judgment relates to such tracts, within Code Civ. Proc. § 938, authorizing appeals by aggrieved parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 947.

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569-7570.]

3. TAXATION—TAX SALES—ACTION TO TRY TITLE—CONDITION PRECEDENT—TENDER OF TAX.

The original owners of land sold for taxes cannot quiet title to it as against a purchaser from the state because the deed on which the purchaser relies shows that less than three weeks' notice of the tax sale was given by publication, where the suit was brought 12 years after the sale, and there is no claim that the assessment of the taxes was irregular, that the taxes were paid or tendered, that any fraud was perpetrated or that defendant was not a bona fide purchaser or did not pay the full amount that was due; the original owners' failure to offer to do equity compelling the assumption that they are unwilling to pay the tax for which the land was sold.

Appeal from Superior Court, Modoc County; N. D. Arnot, Judge.

Action by P. L. Flannigan and another against C. H. Towle and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

N. J. Barry, for appellants. J. H. Stewart, for respondents.

BURNETT, J. At the time of the submission of this cause, in accordance with rule 14 of the Supreme and appellate courts (78 Pac. x), there was a suggestion by appellants of diminution of the record. According to the certificate of the clerk below, the printed record contains an incomplete transcript of the bill of exceptions as actually settled by the trial judge. The defect consists in the omission of the objections made by appellants to the introduction in evidence of the deeds upon which defendant Towle relies for his title and the exceptions taken to the orders of the court overruling said objections. As the record should speak the truth, the motion of appellants to supply said omission is grant-

ed, and the said certificate filed in this court will be considered. The result is that we have a record containing no challenge of the sufficiency of the evidence to support the findings, and the only specification of error is that "the court erred in admitting in evidence defendants' Exhibits A, B, C, D, E, and F."

Plaintiffs admitted at the trial that they could show no title to the land described in any of these deeds except that contained in Exhibit B. Hence they are not aggrieved parties so far as the judgment relates to the other tracts. Section 938, Code Civ. Proc.; Estate of Piper, 147 Cal. 606, 82 Pac. 246. The objection to said deed, B, is that the recitals therein contained show that the sale of the land to the state for delinquent taxes was not in accordance with the requirement of the statute, as less than three weeks' notice of said sale was given by publication. We think, however, that under the circumstances disclosed by the record appellants should not be permitted to urge that as a ground for a reversal of the judgment. There is no pretense that the assessment of the taxes was not regular. It is not claimed that appellants ever paid the tax or offered to do so. There is no contention that any fraud was perpetrated, or that defendant Towle did not act in good faith in purchasing the land from the state or that he did not pay the full amount that was due. Plaintiffs, 12 years after the land was sold to the state, bring this action in equity to quiet title, without offering to do equity. It would be grossly inequitable to grant them the relief which they seek without requiring them to reimburse respondent for the money which he has paid in reliance upon the state's title. But from the record before us we must assume that appellants are unwilling to pay the tax, and therefore the court was justified in finding against them.

In *Esterbrook v. O'Brien*, 98 Cal. 673, 33 Pac. 766, it is said: "Courts of equity do not review the proceedings of officers intrusted with the assessment of property. If proceedings taken by them are void, no title will pass by a sale of the real estate, and the party claiming to be injured must litigate his right in an action at law for the possession of the premises." In *Ellis v. Witmer*, 134 Cal. 253, 66 Pac. 303, it is said: "The assessment and bond being valid, it appears that the plaintiffs are indebted for the amount assessed or such proportionate part of it as may correspond to their land. This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them. Here no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief." In *Couts v. Cornell*, 147 Cal. 561, 82 Pac. 194; 109 Am. St. Rep. 168, we find this language:

"The plaintiff comes into a court of equity admitting that he should have paid on account of this property the exact sum originally charged against it; that this was no more than his fair share of the public burden which he, in common with all other taxpayers, must bear for the support of the government whose protection he enjoys. We think the case thus presented is without equity, and that on the familiar principle that he who seeks equity must do equity the plaintiff should be denied the equitable relief which he demands. * * * The original tax was not unjust, and, if we concede that the defective descriptions were so material as to make the sales void, that consequently, under the provisions of section 3806 of the Political Code, the tax collector should not have offered the lands for sale, and hence that the penalties and costs are unjust, the plaintiff cannot ask to have the sales canceled nor the assessment set aside unless he shows that he has paid, or offers to pay, the amount which of right he ought to pay." See, also, *Steele v. County of San Luis Obispo* (Cal.) 93 Pac. 1020.

We think the principle announced in the foregoing cases is applicable here, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 258

WOOD et al. v. JOHNSTON et al. (Civ. 492.)
(Court of Appeal, Second District, California.
May 15, 1908. Rehearing Denied June 12,
1908; Denied by Supreme Court, July
9, 1908.)

1. PLEADING—CROSS-COMPLAINT—SERVICE ON ATTORNEY.

Code Civ. Proc. § 465, provides that all pleadings subsequent to the complaint must be served on the adverse party or his attorney. Section 442, as amended by Act March 20, 1907 (St. 1907, p. 706, c. 372), provides that, whenever defendant seeks affirmative relief against any party to the action, he may file a cross-complaint which must be served on the parties affected thereby, and designates the cross-complaint as a pleading on the part of the defendant. *Held*, that service of a cross-complaint is sufficient if made either on the adverse party or his attorney.

2. SAME—PROOF OF SERVICE.

Written acknowledgment of service of a cross-complaint indorsed thereon and signed by plaintiff's attorney is sufficient proof of due service to warrant the entry of a default on plaintiff's failure to answer.

3. APPEAL AND ERROR—PRESUMPTION—REVIEW.

An order setting aside a default judgment on defendant's cross-complaint must be affirmed on appeal, unless it affirmatively appears from the record that there were no grounds on which the order could have been properly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3785.]

4. SAME—RECORD.

Where, on appeal from an order setting aside a default judgment for plaintiff's failure to answer the cross-complaint, it appeared from the order that affidavits other than those set out in the transcript were used at the hearing and filed, the appellate court would presume that

such omitted affidavits contained a sufficient showing to justify the decision.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by James F. Wood and another against Franklin H. Johnston and another. From an order setting aside plaintiffs' default for failure to answer defendants' cross-complaint, and vacating a judgment rendered thereon, defendants appeal. Affirmed.

Taylor & Forgy and Jas. E. Byrne, for appellants. G. A. Gibbs, for respondents.

SHAW, J. This is an appeal from an order of court setting aside plaintiffs' default for failure to answer defendants' cross-complaint and vacating a judgment rendered thereon.

At the same time, and with their answer, defendants filed a cross-complaint, wherein they asked for affirmative relief against plaintiffs. Copies of both the answer and cross-complaint were delivered to plaintiffs' attorney, who acknowledged service thereof by indorsing thereon the following: "Received copy of the within answer and cross-complaint this 18th day of November, 1907"—followed by his signature as the attorney of plaintiffs. Plaintiffs failed to answer or otherwise plead to the cross-complaint within the time required; whereupon defendants caused their default to be entered, and judgment thereon was duly rendered by the court as prayed for in the cross-complaint. Thereafter plaintiffs moved the court to set aside the default and vacate said judgment on the ground of inadvertence, excusable neglect, and surprise. The motion was made upon the files and records in the case and supported by an affidavit of plaintiffs' attorney setting forth the facts alleged to constitute the excusable neglect, surprise, and inadvertence. Upon the hearing the court made an order granting the motion, not, however, upon the grounds upon which the same was made, but, as expressed in the order, upon "the ground that said default and judgment were entered without jurisdiction, no sufficient proof of service of said cross-complaint appearing to have been furnished." The question, therefore, fairly presented by the appeal is the sufficiency of the service of the cross-complaint. The record clearly shows that it was duly served upon plaintiffs' attorney of record. The effect of the order as made was to hold that such service was a nullity, and hence the failure of plaintiffs to answer did not warrant the entry of their default, nor confer upon the court jurisdiction to render judgment thereon. In thus holding we think the court erred.

Section 442, Code Civ. Proc., as amended by act approved March 20, 1907 (St. 1907, p. 706, c. 372), provides that "whenever the defendant seeks affirmative relief against any party to the action," etc. (the amendment consists in adding the last three words italicized after the word "party"), he may, in a proper

case, file a cross-complaint, which must be served upon the parties affected thereby. There is nothing contained in the section which indicates how the service may be made upon such party. By reference, however, to section 465, Code Civ. Proc., we find that "all pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party, or his attorney." By the express provisions of section 422, Code Civ. Proc., as amended by act approved March 20, 1907 (Stats. and Amends. to Code 1907, p. 705, c. 372), the cross-complaint is designated as a pleading on the part of the defendant. This being true, it follows that the service is sufficient under said section 465 if made upon either the adverse party or his attorney. In the case at bar the written acknowledgment of service of the cross-complaint indorsed thereon and signed by plaintiffs' attorney is sufficient proof of due service of the cross-complaint, and warranted the entry of default and conferred upon the court jurisdiction to render the judgment thereon.

Respondents contend that, conceding the service of the cross-complaint to have been sufficient, the order appealed from should nevertheless be sustained under the provisions of section 473, Code Civ. Proc., upon the ground of inadvertence, surprise, and excusable neglect. The motion was granted, and, as every Intendment is in favor of the judgment of the trial court, its action must be sustained, unless it affirmatively appear that the order granting the motion was erroneously made. In other words, unless it appear from the record that there were no grounds upon which the order could have been made, we must presume it was properly made. It appears from the order from which the appeal is prosecuted that affidavits other than the one set out in the transcript were used at the hearing and filed herein. As these affidavits are not before this court, we are unable to say that they did not contain a sufficient showing, both as to the grounds for the motion and merits of the action, to justify the granting of the motion.

There is no merit in the contention that the motion should be limited to an attack upon the judgment only. Taken as a whole, the notice is sufficient to support the motion to vacate both default and judgment.

The order is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 263

O'ROURKE v. FINCH et al. (Civ. 511.)(Court of Appeal, First District, California.
May 18, 1908.)**1. APPEAL AND ERROR—TIME FOR TAKING APPEAL.**

An order denying defendants a new trial having been entered on plaintiff consenting to a reduction of the judgment, defendants, or either of them, could immediately appeal therefrom under Code Civ. Proc. § 939, subd. 3; their appeal not being premature, because, when notice of appeal was given, the judgment, as reduced, had not been made nor entered.

2. SAME—ADVERSE PARTIES—NOTICE OF APPEAL.

In determining who are adverse parties to an appeal within the statute requiring notice of appeal to be served upon the adverse parties, the appellate court can look to the record only, and hence an appeal by one defendant from an order denying a new trial on a verdict for plaintiff is not defective, because notice of appeal was not served on his codefendants, where it appears that all the defendants moved for a new trial; plaintiff being the adverse party under the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137-2139.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Henry Joseph O'Rourke, by Frank J. O'Rourke, his guardian ad litem, against T. J. Finch and others. From an order denying a new trial on verdict for plaintiff, defendant Finch appealed, and plaintiff respondent moves to dismiss the appeal. Motion denied.

Lynch & Drury, for appellant. W. H. Morrissey, for respondents.

COOPER, P. J. Motion to dismiss appeal. The jury returned a verdict in favor of the plaintiff for \$1,000 in an action for personal injuries. In due time the defendants, who appeared by the same attorneys, served notice of their intention to move for a new trial, specifying the grounds upon which the motion would be made. On the hearing of the motion, December 2, 1907, the court made an order granting the said motion, unless the plaintiff should, within 20 days, consent that the judgment be reduced to \$750, in which "event an order will be made denying said motion." Within the 20 days plaintiff filed his written consent that the judgment might be reduced to \$750, and the court thereupon, on December 12, 1907, made an order "that the motion for a new trial be and the same is hereby denied." On January 7, 1908, the defendant Finch (appellant herein) duly filed and served upon plaintiff a notice of appeal from the order, so made and entered on December 12th denying the motion. On February 4, 1908, the court made an order directing that the judgment be reduced, according to the prior consent of the plaintiff, to \$750; that such order be entered nunc pro tunc as of December 12, 1907.

Upon the above facts, as shown by the record, the plaintiff moves to dismiss the appeal upon two grounds: First. It is claimed that the appeal was prematurely taken, for the reason that, at the time the notice of appeal was given, the judgment, as modified, reducing the original judgment to \$750, had not been made or entered. It is not necessary that it should have been. The order denying the new trial had been made and entered in the minutes of the court, and the defendants, or either of them, had immediately the right to appeal therefrom. Code Civ. Proc. § 939, subd. 3. Second. It is further urged that this court has no jurisdiction of the appeal, for the reason that it is by one only of the defendants, and that the notice of appeal was not served upon the other defendants; it being claimed that the other defendants were adverse parties. The statute provides that the notice of appeal must be served upon the adverse parties or their attorneys. The motion for a new trial was made by all the defendants. Its object was to set aside the judgment, and have a retrial of the issues of fact. The plaintiff was the adverse party under such motion. He was the party to whom the motion was directed. We must look to the record, and that alone, for the

purpose of determining the question as to who were adverse parties. *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *In re Ryer*, 110 Cal. 557, 42 Pac. 1082; *Niles v. Gonzales et al.* (Cal.) 92 Pac. 74.

The motion is therefore denied.

We concur: KERRIGAN, J.; HALL, J.

8 Cal. App. 250

NIMS v. CUNNINGHAM. (Civ. 433.)

(Court of Appeal, First District, California. May 15, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for services and expenditures in the care and medical treatment of defendant's daughter during her last illness, a witness testified to the untidy condition of the rooms occupied by the daughter, and to the fact that after her death the rooms had been cleaned up, the error in permitting him to state whether he wished to leave the impression that the rooms had been transformed for the purpose of inspection was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

2. SAME.

Where, in an action by a physician for services and expenses in the care and medical treatment of defendant's daughter during her last illness, defendant in his answer set forth the friendship that existed between his daughter and a member of plaintiff's family, the admission of evidence that plaintiff's daughter and defendant's daughter were schoolmates, thereby showing that plaintiff was called on in the first place only as a friend, was not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4054.]

3. PHYSICIANS AND SURGEONS—ACTIONS FOR MEDICAL SERVICES—RECOVERY.

The fact that a physician is employed to give defendant's daughter medical treatment by reason of the friendship that existed between the daughter and the member of the physician's family does not excuse defendant from paying the legal obligation incurred by him to the physician.

4. SAME.

Where, in an action by a physician for medical treatment of defendant's daughter during her last illness, it appeared that defendant had placed his daughter in charge of plaintiff, and had sent her to another city to be placed in proper rooms, and with proper nurses, and to be cared for, it was not error to permit plaintiff, on defendant's cross-examination, to show that defendant did not have his daughter's address, and did not accompany her to the city, and did not visit the rooms to which she was taken, since such fact showed that the entire charge of the daughter was left to plaintiff.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Herbert J. Nims against C. P. Cunningham. From an order denying a new trial and judgment for plaintiff, defendant appeals. Affirmed.

W. A. Beasley, for appellant. John E. Richards, for respondent.

COOPER, P. J. This action was brought to recover \$1,500 for services rendered, expenditures incurred, and money paid out by

the plaintiff for defendant, in connection with the care and medical treatment of defendant's daughter during her last illness, all done at defendant's special instance and request. The case was tried before a jury, and a verdict rendered for plaintiff in the sum of \$1,100. Upon this verdict judgment was entered, and the court subsequently made an order denying the motion of defendant for a new trial. This appeal is from the order so made.

The evidence as to the value of the plaintiff's services, and as to whether or not suitable and proper care was taken of the deceased during her unfortunate illness, was conflicting, and we cannot, even if disposed to do so, interfere with the province of the jury in this regard, and it is not insisted that we should do so.

The appellant relies entirely upon certain rulings in the admission or rejection of evidence, which he claims to have been of such a serious and prejudicial nature as to call for a reversal of the order.

The first error assigned is in relation to the evidence of one Cody, who was called as a witness for the plaintiff. After this witness had testified to visiting the room where deceased was being cared for, and that there were dishes in the rooms; that they were "mussed up," and the bedclothing covered with coffee stains; and, as to the condition of the nightgown of deceased, he testified that he afterwards visited the rooms with the coroner's jury, and found that they had been considerably changed and cleaned up, so they were in a different condition from that in which they were when the witness first saw them. Plaintiff's counsel then asked the witness the following question: "Q. You did not wish, therefore, to leave the impression, in whatever you say, that the rooms had been in any way transformed for the purpose of inspection or anything of that kind?" Counsel objected to this question, on the ground it was immaterial as to what impression the witness wished to leave. The court overruled the objection, and the defendant excepted. The witness answered: "That is a fact; yes, sir." Counsel then asked the witness: "Q. Then, with the exception of tidying up, the rooms were substantially the same when you went there the second time as they were when you was there the first time? A. Yes, sir; they were just about the same after they were cleaned." It would have been better practice for the court to have sustained the objection to the question, but the evidence was harmless. As to the impression the witness desired to leave, it was not necessary to determine. He had testified to the facts as he understood them, and the jury could draw its own inference therefrom. The answer of the witness was to the effect that he did not desire to convey such impression. It is argued by counsel: "His impression, therefore, carried great weight with the jury." It does not appear to us that

the impression of the witness could have carried great weight with the jury when he only testified that he did not intend to convey any impression. Whether he conveyed such impression or not was for the jury to say. Whether he intended to convey such impression was wholly immaterial; and, being so immaterial, the answer was harmless.

The next error assigned is in regard to a ruling on a question asked of plaintiff, which ruling is said to be "equally vicious." Plaintiff was a physician, and the deceased had consulted him as a physician and friend. After testifying that he had had two daughters attending the high school with the deceased, Gladys Cunningham, he was asked this question: "Q. Did you know what, if any, was the relation between your daughters and herself?" Defendant's objection to this question was overruled, and the witness answered: "The relations existing between my daughters and Gladys Cunningham were those of schoolmates. The first time I met her she came to our house one evening with her brother." The question and answer were merely introductory, and were proper. The relations that existed between the families of the plaintiff and the defendant, and the fact that the daughters were schoolmates, tended to show why the plaintiff was employed. It probably was not very material, but it was certainly harmless. In fact, the defendant in his answer set forth the friendship that existed between his daughter and the members of the plaintiff's family. The fact that the plaintiff was employed by reason of such friendship would not excuse the defendant from paying the legal obligation incurred by him to plaintiff. If the evidence tended to show that the plaintiff was called upon, in the first place, only as a friend, it certainly was not injurious to defendant, but it might have been to plaintiff.

In the cross-examination of defendant the plaintiff was permitted, under defendant's objection, to show that defendant did not write to his daughter while she was in San Francisco in charge of plaintiff; that he did not have her address; that he did not accompany her to San Francisco, and did not visit the room to which she was taken. It is claimed that this course of examination tended to prejudice the defendant in the eyes of the jury, as showing that he was wanting in affection or solicitude for his daughter. He had placed his daughter in the charge of plaintiff, and sent her to San Francisco to be placed in proper rooms and with proper nurses, and to be cared for; and while a parent would ordinarily know the address of his daughter, and visit her himself, we cannot say that under the circumstances the testimony was sufficiently prejudicial to justify a reversal of the case. In cross-examination much latitude is allowed, and much is left to the discretion of the trial court. This evidence was brought out in cross-examination, and it might, to a certain extent, tend to

show the fact that the entire charge of the deceased was left to plaintiff, and that it was his duty to look out for her and care for her.

There are other assignments of error, but not of sufficient importance to justify us in discussing them. We find no error in the rulings of the court that would justify us in reversing the order denying a new trial.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

8 Cal. App. 247

HENDERSON et al. v. WESTERN GAS ENGINE CO. (Civ. 466.)

(Court of Appeal, Second District, California. May 14, 1908.)

1. CORPORATIONS—OFFICERS—EMPLOYMENT OF AGENTS—AUTHORITY.

A corporation adopted through its board of directors a resolution authorizing its president to sell at par corporate stock. The president, after making ineffectual attempts to sell the stock, listed it with a broker, and agreed to pay the broker a commission for procuring a purchaser. The broker procured a purchaser. There was a custom that corporate officers, unless otherwise directed, when authorized to sell corporate stock, could list the same with brokers on a commission basis. *Held*, that since, under Civ. Code, § 2319, an agent has authority to do everything necessary and usual for effecting the purpose of his agency, the president had authority to employ the broker, and he might recover from the corporation the reasonable agreed commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1615, 1616.]

2. SAME.

A corporation which suffers appearances to exist, and its officers to so act, as to give one employed by them reason to believe that he is employed by the corporation, becomes liable to such person to pay for the services rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1707-1716.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by C. M. Henderson and another, partners under the firm name of Henderson-Macomber Company, against the Western Gas Engine Company. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Reversed and remanded.

Edward G. Kuster and C. E. Woodside, for appellants. Clair S. Tappan and Parker & Tappan for respondent.

ALLEN, P. J. Action by brokers to recover commissions for services in selling corporate stock. Findings and judgment for defendant. Plaintiffs appeal from the judgment, and from an order denying a new trial.

The record discloses that defendant corporation, through its board of directors, passed resolutions authorizing its president to sell at par certain of its corporate stock then in the treasury; that when said action was taken there was a custom and usage throughout California that officers, unless otherwise directed, when so authorized, in the usual and

ordinary course of business placed and listed such stock with brokers on a commission basis, without express instructions from the board of directors, and in cases where such stock was so listed, to pay commissions to such brokers. That the president, after ineffectual attempts to sell the stock by advertisement and otherwise, listed the stock with plaintiffs, who were then engaged in the brokerage business in Los Angeles, and agreed, if the stock was sold to a customer introduced by plaintiffs, to pay them a commission of 7½ per cent. It is conceded that plaintiffs found a customer, and introduced him to the president, to whom the stock was sold at par, and that the commission of 7½ per cent. was a reasonable one. The court found that no services were rendered by plaintiffs, and no indebtedness against the corporation arose by reason of the transaction. The specifications of error relate to the insufficiency of the evidence to support such findings.

We are of opinion that from the record it appears, without contradiction, that the services were rendered under a valid agreement; and, it being stipulated that the commission claimed was a reasonable one, that the indebtedness was clearly established for the amount claimed in the complaint. Treating the president, under the authority given him by the resolution, as a mere agent of the corporation, his power to employ plaintiffs as such brokers existed under section 2319, Civ. Code: "An agent has authority: (1) To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." The trial court, that it might know what was proper and usual in the ordinary course of business in such transactions, admitted proof of the custom obtaining in relation thereto. Such custom being established, knowledge thereof must be imputed to the board when it passed the resolution ordering the sale, and such resolution is susceptible of no construction other than it authorized a sale by the president at par in the usual and ordinary manner. That such manner was observed is uncontradicted; that in its observance the employment of plaintiffs resulted, and that they performed the services and earned the commission, is unquestioned. If, as a fact, the corporation did not desire the usual custom of business to be followed in connection with this sale, it was incumbent upon it to so specify its desire in its resolution directing the same; otherwise, the plaintiffs had a right to assume that the employment was warranted. "A corporation, which suffers appearances to exist, and its officers, and agents to so act, as to give one employed by such officers and agents reasons to believe that he is employed by the company, becomes liable to such person, as his employé, to pay for the services rendered." *Crowley v. Genesee Mining Co.*, 55 Cal. 276. The defendant having given this general authority to its president, the plaintiffs had a right to as-

sume, under the custom of business, that it was the intention of the corporation that the usual manner of business in such transactions should be observed, and their employment authorized. The matter of an agent's employment of a subagent is not here involved, but rather the use, by the agent, of the instrumentalities necessary in the prosecution of the business, the use of which by fair inference may be said to have been contemplated by the principal in his appointment.

The order denying a new trial is reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 261

BURNS et al. v. GLOVER, Justice of the Peace. (Civ. 502.)

(Court of Appeal, Second District, California. May 15, 1908.)

PROHIBITION—GROUNDS—WANT OF JURISDICTION.

An allegation in the complaint, in an action in justice's court, on a note reciting "on the first * * * day of July, I promise to pay * * * the sum of \$one hundred and eighteen cents with interest," that by mistake the figures "1906" were omitted after the word "July," and that by mistake the word "dollars" was omitted after the word "hundred," without demanding a reformation of the note, is surplusage, and does not convert the action into a suit in equity beyond the jurisdiction of the justice, and prohibition will not lie to prohibit him from proceeding with the trial, for it cannot be assumed that he will exceed his jurisdiction by undertaking to reform the note.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Petition by Alice Burns and another for a writ of prohibition against G. E. Glover, justice of the peace. From a judgment dissolving the alternative writ, petitioners appeal. Affirmed.

H. C. Dillon, for appellants. Rolfe B. Bidwell, for respondent.

SHAW, J. This is an appeal from a judgment of the superior court of Los Angeles county, dissolving an alternative writ of prohibition theretofore issued against respondent, as justice of the peace, prohibiting him from proceeding with the trial of an action. Fraulob and Wicks, as copartners, instituted suit before said justice to recover upon a promissory note, alleged to have been made and delivered to plaintiffs by Alice Burns, one of the petitioners. The promissory note, copy of which was set out in the complaint, was in the following form: "Nov. 1, 1905. On the first, the first day of July, I promise to pay Fraulob and Wicks, for value received, the sum of \$one hundred and eighteen cents with interest at six per cent. [Signed] Alice Burns." Nonpayment is alleged, and judgment asked against said Burns for \$100.18. This proceeding grows out of the fact that there was inserted in the complaint

an allegation as follows: "That by mistake of the party writing said note, the figures '1906' were omitted after the word 'July' in said note; that by mistake of the party writing said note the word 'dollars' was omitted after the word 'hundred' in the body of said note." The contention of the petitioners is that, by reason of said allegation contained in the complaint, the action is one in equity, for the reformation of a written instrument. No demand for such relief is made in the complaint, and no sufficient facts are alleged which could entitle plaintiffs to a reformation of the instrument. The allegation as so inserted serves no purpose whatsoever, and, on motion, should be stricken from the complaint as surplusage. By their action plaintiffs seek a judgment against Alice Burns for \$100.18, basing their right thereto upon an alleged promissory note. This action is within the jurisdiction of the justice of the peace. We cannot assume that in the trial of the case the justice court will exceed its jurisdiction by undertaking to reform a written contract, particularly when no facts are alleged entitling the parties to such relief, and no demand therefor made.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 266.

FARNHAM et al. v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (Civ. 420.)

(Court of Appeal, First District, California. May 18, 1908.)

1. MECHANICS' LIENS — TIME FOR FILING—ENTIRETY OF UNDERTAKING.

Though it took nearly two years to make improvements consisting of a large building, a barn, and a tankhouse, and the work was done in a somewhat fragmentary fashion, they should be treated as one entire undertaking, making the time for filing mechanics' liens commence to run when all the improvements were actually or constructively completed; an architect having been employed to superintend the work, having made plans and specifications as the work progressed, there having been no general contract for the whole work and the labor having been employed and the material furnished by the owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 195-198.]

2. SAME—OCCUPATION OF IMPROVEMENTS.

Under Code Civ. Proc. § 1187, providing that the occupation of improvements by the owner shall be deemed equivalent to a completion of the improvements, as affecting the time for filing a mechanic's lien, the occupation of improvements while the work was in active progress and only one-half completed, though the house was so far finished that the upper portions could be occupied, did not start running the time for filing liens.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 198.]

3. SAME.

Under the express terms of Code Civ. Proc. § 1187, where the owner of improvements fails to file notice of their completion, mechanics' liens may be filed at any time within 90 days from the actual completion of the improvements.

4. SAME.

Under the express terms of Code Civ. Proc. § 1187, improvements are deemed completed within 30 days from the cessation of labor thereon, as affecting the time for filing mechanics' liens.

5. MORTGAGES—MECHANICS' LIENS—PRIORITIES.

Under the express terms of Code Civ. Proc. § 1187, the lien of a deed of trust given a year after the commencement of building improvements and after the furnishing of materials therefor is inferior to a mechanic's lien for work and materials.

6. MECHANICS' LIENS—CONTRACTS IN WRITING—NECESSITY FOR.

Code Civ. Proc. § 1183, requiring contracts for improvements costing more than \$1,000 to be in writing, does not affect the mechanic's lien of a carpenter for a claim exceeding \$1,000, where he did not undertake employment as a contractor, but was employed at \$3.50 a day for an indefinite period to do an indefinite amount of work, and where it could not have been ascertained when he was employed whether his aggregate wages would exceed \$1,000.

7. SAME—INTEREST—RIGHT TO.

Under Civ. Code, § 3287, authorizing the recovery of interest on recovery of damages certain or susceptible of being made certain, interest is recoverable in an action to foreclose a mechanic's lien on the claim from the time of suing, where the claim is susceptible of being made certain either by computation or reference to market rates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 283, 606.]

8. SAME.

The right of mechanic's lienors to recover interest on their claims under the express terms of Civ. Code, § 3287, is not affected because defendant owners were not parties to the claims, and that the claims were contracted without their knowledge, where such parties claim under him who incurred the claims, and under an instrument executed after they had become liens against the property.

9. SAME—RIGHT TO PERSONAL JUDGMENT.

Work and materials for an improvement having been furnished directly to the owner, and he having agreed to pay therefor, claimants are entitled to personal judgment against him as well as judgment foreclosing the liens.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 632-635.]

10. SAME—ATTORNEY'S FEES.

Code Civ. Proc. § 1195, authorizing the imposition of attorney's fees in actions to foreclose mechanics' liens, being unconstitutional, it is improper to assess them in such cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 651.]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Consolidated suits to foreclose mechanics' liens by F. J. Farnham and another against the California Safe Deposit & Trust Company, the California Home Building Loan Company and others. From a judgment for plaintiffs, defendant companies appeal. Modified and affirmed.

Joseph Hutchinson, for appellants. J. B. McElroy and C. L. Colvin, for respondents.

KERRIGAN, J. Three suits to foreclose mechanics' liens were brought against T. E. Pope, George M. Seaton, and Mary Shinn Seaton, and the two corporations above named, which were by order of the court consolidated.

Plaintiffs obtained judgment, which provided, among other things, that the amounts found due constituted liens upon the premises described in the complaint. From this judgment the two defendant corporations have appealed.

Briefly the facts are as follows: The improvements consisted of a large three-story building comprising about 17 rooms, a barn, and a tankhouse. The court found that the lots upon which the barn and tankhouse were situated were separate from that upon which the principal building stood, and that the labor done and materials furnished for said barn and tankhouse had been paid for in full. No lien is claimed on either of these improvements. In March, 1901, the property involved in this action belonged to Bertha Thorndike and Starr M. Bruce who, about that time agreed to sell it to the defendants Seaton. There were defects in the title which the vendors agreed to correct, but it was agreed that the Seaton's might in the meantime occupy the premises, and, if they desired, make alterations in the building. The defects in the title were corrected, and the property was conveyed to Mary Shinn Seaton February 25, 1902. In March or April, 1901, Mary Shinn Seaton took possession of the premises and began making alterations in the buildings, and continued to make the same until June 30, 1903, when, according to the findings of the court, all work ceased. An architect was employed to superintend the work, and he made plans and specifications as the work progressed. There was no general contract for the whole work, but the labor was employed by the owners and the materials were furnished to them. The appellants claim under a deed of trust executed and recorded while these alterations were in actual progress, and before the owners had gone into occupation of the improvements as a residence. The lower court held the liens of the plaintiffs valid and prior to the claim of the California Home Building Loan Company. It is from this decision that the defendant corporations appeal. The appeal is from the judgment and from the order denying the motion for a new trial.

1. It took nearly two years to make these alterations; and, while we believe with appellants that the work was done in a somewhat fragmentary fashion, yet we do not think that it was done in separate and distinct sections, or that the materials were furnished on separate orders so as to constitute each a separate contract. On the contrary, we are of the view that the trial court was right in holding, as it did, that the matter of making the alterations was one entire undertaking, and that the time for filing liens commenced to run when they all were actually or constructively completed.

2. Were the liens filed in time? In discussing these liens, we will take Farnham's for illustration, although it is subject to at-

tacks from which the others are exempt. All the liens were filed August 17, 1903. Thomas E. Pope and the Seatons entered into the occupation of the improvements in August, 1902; and appellants contend that, under the terms of section 1187 of the Code of Civil Procedure, the building should be deemed completed as of that date. To support this contention they cite *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419. But the record shows that at this time the work was in active progress, and that but about one-half of the alterations had been made, although the house was finished up to a point where the upper portions could be occupied. Under these circumstances the occupation of the building was not such as was inconsistent with further work on the building, or such as to start the time running for the filing of liens. *Orlandi v. Gray*, 125 Cal. 372, 58 Pac. 15; *Willamette, etc., Co. v. College Co.*, 94 Cal. 229, 29 Pac. 629.

3. But appellants assert that, even if the occupation be held not to determine the time of completion of the work, the lien was nevertheless filed too late. Farnham's work ceased on the building March 21, 1903, and no notice of cessation of work, as provided for by section 1187 of the Code of Civil Procedure was ever filed by the owners. Appellants claim in this behalf that Farnham's time to file a lien commenced to run when he ceased work; and that, allowing him, under the authority of *Buell v. Brown*, 131 Cal. 159, 63 Pac. 167, 120 days thereafter, it was 27 days too late, having been filed August 17, 1903. To support this position, they repeat their point already considered that the work of reconstruction was a series of disconnected jobs, and not one piece of work carried on in furtherance of one general design. They also assert that the painting, which was the last work on the building, and which was done June 30, 1903, was done for the purpose of keeping alive the liens. The painter was not employed by any of the lienholders, but by the owner, and, so far as appears from the record, he filed no lien. There is nothing in the case to show that the delay was caused by the connivance of Farnham or any other lienholder. A fair inference from the evidence is that this work was done in the regular progress of the undertaking, and not for the purpose of extending the time. The court, upon what we think is sufficient evidence, found that all work on the building ceased June 30, 1903. Therefore, if the structure was actually completed on that date, the lien was filed in time, because no notice of completion having been filed the lien might be filed at any time within 90 days from actual completion. If it was not actually completed June 30, 1903, when labor ceased, it was deemed completed 30 days thereafter, and in that event the lien was filed in time. Code Civ. Proc. § 1187; *Buell v. Brown*, *supra*. This point applies to all the building lienholders.

4. Appellants contend that Farnham's lien was not prior to their claims, and that the court erred in giving it such priority. In support of this contention, they again argue that the work was done in separate sections, and that, as all the work done prior to the recording of the deed has been paid for, the deed of trust is prior to this lien. The work of reconstruction was commenced and the materials therefor were furnished about a year before the deed of trust was executed or recorded. Section 1186 of the Code of Civil Procedure provides: "The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished. * * *" Under the terms of this section it is clear that this lien is prior to the deed of trust.

In *McClain v. Hutton*, 131 Cal. 144, 61 Pac. 273, 63 Pac. 182, 622, it is held that, when the labor and materials are furnished at the instance of the owner without the intervention of a contractor, each relates back to the time the work was done or the materials were commenced to be furnished. In *Pacific M. L. I. Co. v. Fisher*, 106 Cal. 236, 39 Pac. 761, the court says: "The notice of intention specified that the evidence was insufficient to show that the materials for which these defendants claimed a lien 'were furnished or commenced to be furnished prior to the 11th day of November, 1891, the day on which plaintiff's said mortgage was recorded.' It is sufficient to say that there was evidence that a portion of the materials for which they claimed a lien was furnished in September of that year. 'Their lien for all the materials that they furnished for the building would relate to this date, notwithstanding the fact that another portion was furnished subsequent to November 11th, and under an express contract. The lien commences when the claimant begins to furnish the materials, and includes all the materials that he may thereafter furnish for the building (*McCrea v. Craig*, 23 Cal. 525), whether they are furnished under an express contract, in which the terms and quantity are fixed, or under a contract implied from their purchase and use in the building, from time to time, as they are needed. The materialman cannot file his claim of lien until after the completion of the building, but he must then include in it all the materials which he has furnished, and not file a separate lien for those furnished under different contracts; and the lien for which the claim is thus filed will relate to the time when he first began to furnish the materials." The argument of appellants that Farnham had been paid for all work done before the recording of the deed of trust, and therefore that his lien was subject to it, applies to the lien of Vockel. As to the liens of the materialmen, no claim is made that the

amount of money received by them, or either of them, was sufficient to pay for the materials furnished up to the time when the deed of trust was recorded, and the accounts of the Humboldt Lumber Company and the California Mill & Manufacturing Company show that only a small portion of the amount due for the materials so furnished has been paid.

5. Appellants assert that Farnham's contract necessarily exceeded in amount \$1,000, and that, as it was not reduced to writing, it is void under the terms of section 1183 of the Code of Civil Procedure. Farnham agreed to act as a foreman carpenter for all the carpenter work necessary in the alterations, additions, and repairs in the Seaton three-story frame dwelling house. He was to receive \$3.50 a day for his own services, and was to employ two men to work under him, who were to get \$3.50 and \$2 per day respectively. The work was to be done according to plans and specifications to be made by the architect. Farnham had earned under the contract \$1,869, of which \$1,218 had been paid. Appellants' contention in this respect is untenable. Farnham did not undertake the employment as a contractor, but merely as a carpenter at a fixed rate per day. Moreover, his employment was neither for a definite period nor for a definite amount of work, and it could not have been ascertained at the time of his employment whether the aggregate of his wages would exceed the sum of \$1,000. The case of *Smith v. Bradbury*, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189, cited in support of appellants' position, is not in point. There the contractor agreed with the owner to do all the plastering work on a four-story hotel at stipulated prices per square yard, the contractor supplying the materials; and the evidence clearly showed that at the time the contract was made the work to be done under it would necessarily amount to more than \$1,000. The court accordingly held that the contract, not having been filed for record as required by section 1183 of the Code of Civil Procedure, must be deemed void, and that the materials furnished to the contractor were to be deemed furnished at the personal instance of the owner. That case is inapplicable here for another reason. There the contractor agreed to employ the labor and furnish the materials; and, of course, in such a case, the contract being for over \$1,000, it must be in writing and filed for the information of the laborers and materialmen. Here there was no one under Farnham who could claim a lien against his wages. Farnham's lien is the only one subject to the objection just discussed.

6. Appellants claim that the judgment is erroneous, in that it allows interest on all the claims from the date of the beginning of the suits. They argue that all the claims were disputed, and unliquidated, and that there was no way short of litigation by which appellants, who were strangers to the ar-

rangements between the owners and the lien claimants, could ascertain what the proper amounts were. Its right to recover on all the claims was vested in the lienholders at or before the suits were commenced. Farnham's and Vockel's claims were for services at a fixed rate of compensation per day. The claims of the California Mill & Manufacturing Company, of the Humboldt Lumber Company, and of W. L. Taylor were for materials sold at the market prices. McCarl's claim was not allowed. The claim of Weeks was upon a quantum meruit. All the claims except the last one were capable of being made certain either by computation or reference to market rates, and consequently respondents were entitled to recover interest thereon. *Macomber v. Bigelow*, 126 Cal. 15, 58 Pac. 312; Civ. Code, § 3287. The claim of Weeks being for the reasonable value of his services was not capable of being made certain by calculation, and hence was not entitled to bear interest prior to the judgment. The judgment should be modified in this respect. *Cox v. McLaughlin*, 76 Cal. 67, 18 Pac. 100, 9 Am. St. Rep. 164; *Fox v. Davidson*, 111 App. Div. 174, 97 N. Y. Supp. 603; *Swinerton v. Argonaut L. & D. Co.*, 112 Cal. 379, 44 Pac. 719. The circumstance that the appellants were not parties to any of the claims, and that they were contracted without their knowledge, does not affect the right of the lienholders to interest. The appellants claim under the person who incurred the liability, and under an instrument executed after the liability had become a lien against the property, and consequently they have only the rights in the property which the owner had when the deed of trust was executed. In speaking of this matter of interest the Supreme Court, in *Pac. Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758, said: "And the lien which the statute gives him is as extensive as the claim which it is intended to protect. If a claimant has furnished materials from time to time as they were needed, and receives payment on account, his claim is not 'unliquidated and open to be adjudicated,' as urged by the appellant. At the time he commenced his action to foreclose his lien his right to recover that open account was vested in him, and was capable of being made certain by calculation, and he was also entitled to recover interest thereon from that date." In the case of *Macomber v. Bigelow*, supra, relied upon by appellants, the court, in deciding that the lien claimant was not entitled to interest, said that his complaint was against Belyea and Rogers as original debtors to Madigan; that Madigan had no right to a personal judgment against Bigelow, the owner, except to enforce a lien against her property; that, "in case of unrecorded contracts, it is provided by section 1183 of the Code of Civil Procedure that all persons by whom labor is done and materials furnished 'shall have a lien for the value thereof.' No personal liability is incurred by the owner,

but the land upon which the improvement is made is subjected to a lien therefor in favor of these persons. * * * Under these facts the court was not authorized to allow interest upon his claim prior to the rendition of its judgment." In the present case the services were rendered and the materials furnished directly to the owner, and he promised to pay for them. The claimants here are entitled to a personal judgment against the owner, as well as a judgment foreclosing the liens. In that case (*Macomber v. Bigelow*) in regard to interest the court further said: "Tuttle and Dupuy were, however, employed by Madigan at fixed rates of compensation, which they were entitled to receive from him upon the completion of their work, and the court properly allowed them interest thereon (citing authorities), and made the amount of their judgments liens upon the property of Bigelow."

7. The present case was decided prior to the decision of the Supreme Court declaring the provision in section 1195 of the Code of Civil Procedure concerning attorney's fees in mechanic's lien cases unconstitutional. Three hundred and seventy-five dollars was allowed as counsel fees in the case at bar, and to that extent the judgment is erroneous. *Builders' Supply Depot v. Dennis O'Connor*, 150 Cal. 265, 88 Pac. 982; *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, 1081.

8. Appellants also complain of the court's action in permitting witness Farnham to answer a certain question, and that the claims of lien are not true for a number of specified reasons. We have carefully examined these matters, and find no error in respect to any of them.

The judgment is ordered modified by striking therefrom \$375 allowed as counsel fees, and \$18.45, being the amount of interest allowed on the claim of Weeks from the date of the filing of the complaint to the date of the entry of the judgment; and, as thus modified, the judgment and order will stand affirmed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 254

In re GRAVES' ESTATE. (Civ. 490.)

(Court of Appeal, Second District, California.
May 15, 1908. Rehearing Denied
June 13, 1908.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF ADMINISTRATORS—RIGHT TO CONTEST—"PERSON INTERESTED."

A public administrator and nonresident heirs are "persons interested," within the meaning of Code Civ. Proc. § 1374, providing that any person interested may contest a petition for letters of administrator, on the ground of incompetency of the applicant, and they may contest the appointment, not only in the lower court, but on appeal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3702-3706.]

2. EXECUTORS AND ADMINISTRATORS—RIGHT TO APPOINTMENT—PUBLIC ADMINISTRATOR—COUNTY OF DECEDENT'S RESIDENCE OR TO WHICH CAUSE IS TRANSFERRED.

Code Civ. Proc. § 1431, provides that on petition for administration, where no judge of the superior court is qualified to act, an order must be made transferring the proceedings to a superior court of an adjoining county, which shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction; and section 1432 provides that the transfer shall not affect the right of any person to letters of administration. Section 1365 provides the order of persons entitled to administer, which includes the public administrator; section 1726 provides that the public administrator must take charge of estates of persons dying within his county, for which no administrators are appointed. The alleged will of a resident of R. county was probated in the superior court thereof, and letters of administration issued to M., the public administrator of that county. Thereafter a petition for revocation of the probate was filed, and the judge, deeming himself disqualified, ordered the estate transferred to the superior court of S. county, where the probate of the will was revoked. Thereupon L., the public administrator of S. county, filed his petition for letters of administration, as did M. Held, that M. was entitled to the appointment.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Applications by L. R. Bradley, public administrator of San Bernardino county, and by M. S. Bowman, public administrator of Riverside county, for letters of administration on the estate of Sarah Graves. From an order appointing M. S. Bowman administrator of the estate, Bradley and others appeal. Affirmed.

Goodcell & Goodcell and Chas. R. Gray, for appellants. C. L. McFarland and Purington & Adair, for respondent.

TAGGART, J. Appeal from an order appointing an administrator. Sarah Graves died January 7, 1906, in the county of Riverside, being at the time of her death, a resident of that county, and leaving estate therein consisting of real and personal property. On February 5, 1906, a document, purporting to be her last will and testament, was admitted to probate in the superior court of the said county of Riverside, and letters of administration with the will annexed issued thereon to M. S. Bowman, the public administrator of that county. Thereafter certain heirs of the deceased filed a petition for the revocation of the probate of said will, issues were joined upon the allegations of said petition, and the judge of said superior court, deeming himself disqualified to try the same, made an order transferring the estate to the superior court of San Bernardino county. Upon trial being had in the court last named, a judgment was made and entered revoking the probate of said will. Thereupon L. R. Bradley, the public administrator of San Bernardino county, filed his petition for letters of administration upon said estate, and

the said M. S. Bowman, as the public administrator of Riverside county, also filed his petition praying for letters of administration thereon. Certain nonresident heirs of the deceased filed an opposition to the latter application. The matter coming on for hearing, the superior court of San Bernardino county made its order appointing M. S. Bowman, public administrator of Riverside county, administrator of said estate. L. R. Bradley and said nonresident heirs join in an appeal from this order.

The question of law for consideration on the appeal is whether the public administrator of San Bernardino county or the public administrator of Riverside county is entitled to administer upon the estate. Respondent also questions the right of the nonresident heirs to appeal, and presents this upon appeal and by separate motion to dismiss. It is also suggested that L. R. Bradley has resigned the office of public administrator of San Bernardino county, and this is made to appear by an affidavit showing his resignation, the proper acceptance thereof, and the appointment and qualification of his successor. This affidavit is made the basis of another motion to dismiss the appeal. The motions to dismiss and the appeal were argued and submitted together. If it be conceded that the application of Bradley for letters of administration was based upon a right, in part at least, personal, and that his successor in office could not be substituted in this action, and, therefore, upon the showing of his resignation and the appointment of such successor, respondent is entitled to have the appeal of Bradley dismissed (*Estate of Lermond*, 142 Cal. 585, 76 Pac. 488), the appeal must still be heard upon its merits, as we are of opinion that the other appellants are entitled to prosecute the appeal. Section 1374 of the Code of Civil Procedure provides that any "person interested" may contest a petition for letters of administration, on the grounds stated in the opposition of the appealing nonresident heirs. It is not necessary that the contestant shall be competent to assert the right to administer himself, nor be entitled to nominate the appointee in order to contest. If the facts constituting the incompetency of the applicant were not properly or sufficiently stated, this would not be a ground for the dismissal of the appeal. An appeal lies from an order granting or denying letters of administration, and no reason is given why the right of the "person interested" to contest should cease upon the adverse order being made by the superior court. The public administrator is a "person interested" in the estate, so as to contest for letters of administration, and he may appeal from an adverse order. *Estate of Damke*, 133 Cal. 433, 65 Pac. 888. We are satisfied that the heir has a like right of appeal; otherwise, the right of contest would be of little avail. The motion to dismiss the appeal of the nonresident heirs is denied.

When the proceedings in the estate of Graves were transferred to the superior court of San Bernardino county, that court was empowered thereafter to "exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate." Code Civ. Proc. § 1431. The transfer, however, did "not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinafter (hereinbefore) provided." Section 1432. Upon the revocation of the probate of the will, the letters of administration with the will annexed ceased to have any effect, and the estate was subject to administration as if the deceased had died intestate. None of the persons entitled to priority over the public administrator having applied for letters, the public administrator was entitled to administer. Section 1365, subd. 8, Code Civ. Proc. The right of the public administrator of Riverside county to administer upon the estate, as alleged in his petition, is based upon the facts which, under section 1726, Code Civ. Proc., entitled him to letters, to wit, that Sarah Graves died in Riverside county, was a resident thereof, and left estate therein, and that no administrator for the estate had been appointed. That of the public administrator of San Bernardino county rests solely upon the transfer of the estate to that county. The evident purpose and intent of sections 1430-1433, Code Civ. Proc., is to provide a proper forum for the administration of estates of persons dying resident in a county in which the judge is disqualified to admit the will to probate or to appoint an executor or administrator of the estate. This is made apparent by the proviso in section 1431 that a transfer is not necessary when some judge, qualified to act, attends upon the court in the county in which the petition is filed, and the requirement of section 1432 that a retransfer of the proceedings must be made should the disqualified judge cease to act before the settlement of the estate. The public administrator of one county is entitled to contest the right of another public administrator to administer upon an estate in the superior court of the county of which the applicant is the public administrator, and the conflicting claims of the applicants must be determined by ascertaining the residence of the deceased at the time of his death. *Estate of Damke*, 133 Cal. 437, 65 Pac. 888. It is the duty of the public administrator to take charge of the estates of persons dying within his county (section 1726). No burden is imposed upon him of administering estates which have been transferred to his county by reason of the disqualification of the judge of the superior court of an adjoining county. As he is the public trustee appointed by the law to take charge of the estates of persons within his

county, who die leaving no one competent to administer such estates, every intendment would seem to be in favor of a construction of the law which imposes the trust upon the resident officer, rather than upon an officer of an adjoining county. That he owes his appointment to the fact that he is a county officer does not offer any reason why he should be excepted from the provision of section 1432 of the Code of Civil Procedure that the transfer of the proceedings "shall not affect the right of any person to letters testamentary or of administration on the estate transferred."

The order of the court appointing the public administrator of Riverside county to administer upon the estate should be affirmed.

Order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

153 Cal. 776

CITY ST. IMPROVEMENT CO. v. REGENTS OF UNIVERSITY OF CALIFORNIA. (S. F. 4,558.)

(Supreme Court of California. June 30, 1908.)

1. CONSTITUTIONAL LAW—STATE CONSTITUTION—POWERS.

The Constitution of the state being but a restriction on the power of the Legislature, the limitations therein contained will not be extended beyond the legitimate meaning and use of the terms employed.

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—PROPERTY OF STATE UNIVERSITY.

Const. art. 13, § 1, exempting the property of California University from taxation, did not exempt unimproved vacant property in which the university's funds were invested from liability for the payment of special assessments imposed for street improvements benefiting such property.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the City Street Improvement Company against the Regents of the University of California. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Bishop, Wheeler & Hoefler (Alfred J. Harwood, of counsel), for appellant. J. C. Bates and R. M. Royce, as amici curiæ. Chas. E. Snook, for respondents.

HENSHAW, J. By this action plaintiff sought to enforce a street assessment lien acquired by virtue of a public contract upon certain real property situated in the city and county of San Francisco, legal title to which stands in the name of the Regents of the University of California. The allegations usual and pertinent to such an action were pleaded, and, in addition thereto, it was alleged that the land upon which it was sought to impose the lien was entirely unimproved, vacant, and unoccupied, and was and is held and devoted solely to the private uses of the defendant, and is not incidental to the performance of any public function, nor actually appropriated to any public use whatsoever, and, further, that by the doing of the street work the land was enhanced in value at least to the amount of the assessment, and derived an equal benefit with all other lots of land assessed. A general demurrer was interposed by the defendant, which demurrer was sustained. From the judgment which followed, plaintiff appeals, and there is thus presented the single question whether, under the state of facts represented by the complaint, the land of the defendant is or is not subject to assessment and liable for the lien following thereon, under the general laws for the improvement of streets.

As to the character, status, and powers of the defendant corporation, little more need be said than that it is a private corporation charged with the public trust of the general government and superintendence of the University of California. St. 1867-68, p. 252, c.

244. This corporation has the power to hold, purchase, and convey such real estate as the purposes of the corporation shall require. It may receive donations from private individuals of moneys or other property for the benefit of the university, and it has, under restrictions, the power of distribution of its funds. Its principal source of income is derived from the state by tax levy. One-half of the moneys received from this tax must be devoted to the purpose of acquiring lands, buildings, and permanent improvements for the university, while the other moiety is under the general control of the board. St. 1897, p. 44, c. 48.

Article 9, § 7, Const., declares that the University of California shall constitute a public trust, and its organization and government shall be perpetually continued. Article 13, § 1, it is not disputed, exempts the property of the University of California from taxation. But the Constitution of the state being but a restriction upon the power of the Legislature, the limitations therein contained will not be extended beyond the legitimate meaning and use of the terms employed. There is a broad and well-recognized distinction between a tax levied for the general public good and without special regard to the benefit conferred upon the individual or property subject to the tax, and a special assessment levied to force the payment of a benefit, of value corresponding and equal to the amount of the assessment, levied upon the property. This matter need not be discussed, since it has been elaborately considered and expounded in *San Diego v. Linda Vista Irrigation Dist.*, 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33. The opinion in that case quotes from *Hassan v. City of Rochester*, 67 N. Y. 528, as follows: "The collection and enforcement of assessments made for local improvements has never been the subject of general regulation by statute, and there is no provision which exempts the property of the state from liability for such assessments. Not being excepted by the statute law of the state it is left for the Legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper." *Hamilton, Special Assessments*, § 318, summarizes the matter in the following language: "Exemptions made by general laws in favor of such property apply only to the general purposes of government, state, county, and municipal, even where the statute exempts the specific property from taxation of every kind, or from being taxed by any law of the state, and do not apply to the system of special assessment for local improvements."

With this distinction in mind between a general tax and a special assessment for benefits, no authority has been pointed out to us in the Constitution, the statute law, or in the decisions of this court which forbids the application of the street law to land whose title and use are such as here pleaded

The question cannot arise as to this being an effort to subject lands of the state, owned and used in its sovereign capacity, to an assessment lien, since, as declared in *Estate of Royer*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364, the University, while a governmental institution and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign. The lands, title to which is in the board of regents, are lands held for the public educational purposes of the state, and their holdings and their use do not differ in principle from the lands which may be held by boards of school directors or trustees of school districts. The principle is well established that, where any of such lands are not directly and necessarily used for a public purpose, they may be subjected to the payment of special assessments for benefits. And this is in consonance with justice and equity; for, to assess certain lot owners upon a street for all the cost of the work, part of which is for the benefit of a public institution, is to enhance the value of the university property at the expense of the few, instead of by taxation upon all the people at the expense of all. So it is said in *Hassan v. City of Rochester*, supra: "A different rule would compel individual lot owners to pay assessments levied for improvements which were of benefit to the state lands without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice. This could not have been intended." The limitation upon the powers thus to subject lands held for public purposes to such assessments is indicated by the case of *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, where an attempt was made to subject a schoolhouse erected by a public school district to a mechanic's lien. It was there held that the state is not bound by the general words of a statute which will operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions. The principle is that public policy itself will deny and forbid the application of general laws to property so held in trust for public purposes, as public school buildings, city or county municipal buildings and the necessary land upon which they stand, because of the grave interference with necessary public functions, governmental or educational, which would thus result. The private right of the individual must give way to the general good of all. But the rule goes no further, and wherever lands, though owned by some public agent or mandatary of the government, school boards, counties, or cities, penal, or reform institutions, or institutions for the feeble minded or insane, are not in use in the performance of a public function, such lands, in the absence of a constitutional or legislative restriction (such as we have seen does

not exist in this state), are justly compelled to bear their part of the expense which goes directly to increase their values. So it was declared in *San Diego v. Linda Vista Ir. Dist.*, supra, where pueblo lands of the city of San Diego had been subjected to and sold under the lien of an irrigation district assessment. And in *Witter v. Mission School District*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33, where an attempt was made to enforce a street assessment against lots used for school purposes, while sustaining a demurrer because of the absence of facts here pleaded, namely, that the lands were not in use for a public purpose, after referring to *San Diego v. Linda Vista Ir. Dist.*, supra, this court said: "So far as shown, the lots in question may have school buildings upon them and may be used and occupied exclusively for school purposes, in which case we do not think this action could be maintained. As a private owner, however, of land not used exclusively for school purposes, but held as an investment or from which to derive rentals, as property of an individual is held and owned, we see no reason why the lands of a school district should not be assessed for improvements the same as those of any other private owner. That these rulings are in accord with the great weight of authority may be seen by reference to *City of Chicago*, etc., v. *City of Chicago*, 207 Ill. 37, 69 N. E. 580; *State v. Robertson*, 24 N. J. Law, 504; *School Dist. v. Board of Improvements*, 65 Ark. 343, 46 S. W. 418; *Sioux City v. School Dist.*, 55 Iowa, 150, 7 N. W. 488; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 737, 13 S. E. 252, 12 L. R. A. 852; *Hassan v. City of Rochester*, 67 N. Y. 528; *Sewickley M. E. Church Appeal*, 165 Pa. 475, 30 Atl. 1007; *Essex County v. City of Salem*, 153 Mass. 141, 26 N. E. 431. A reading of these cases will disclose that in many of the states, upon the theory that, in the absence of express prohibition, even the state should bear its share of benefits for special assessments, it is held that property, although devoted to public use, is liable to such assessment. The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not.

The complaint in this action sufficiently pleads facts rendering the land in question liable to the assessment. Its ultimate liability, of course, must depend upon proof of the facts alleged, but the complaint was not obnoxious to demurrer, and the judgment is therefore reversed and the cause remanded, with directions to the trial court to overrule the demurrer and permit defendant to plead to the merits.

We concur: LORIGAN, J.; SLOSS, J.; McFARLAND, J.; SHAW, J.; ANGELOTT, J.

153 Cal. 753

ANGLO-CALIFORNIAN BANK, Limited, v.
SUPERIOR COURT OF CALIFORNIA
et al. (S. F. 4978.)

(Supreme Court of California. June 24, 1908.
Rehearing Denied July 24, 1908.)

1. CERTIORARI — WHEN PROPER REMEDY BY
APPEAL.

An order in an action by the state to liquidate the affairs of an insolvent corporation, directing a bank to pay to the receiver funds belonging to insolvent being appealable, the bank was not entitled to a writ of review to review the order, which was a final adjudication of the bank's claim that, since third parties claim the funds, it has the right to retain the funds until the determination of their claim, or to pay the money into a court having jurisdiction thereof to abide such determination and a final adjudication of an intervener's claim to part of the funds, though the order was made the day before the day set for a hearing on the intervener's petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 5, 6.]

2. APPEAL AND ERROR—PARTIES ENTITLED TO
APPEAL.

An order in an action by the state to liquidate the affairs of an insolvent, directing a bank to show cause why it should not be required to pay to the receiver funds belonging to the insolvent, made the bank a party to the record, entitling it to appeal from an order requiring it to pay the funds over.

In Bank. Petition by the Anglo-Californian Bank, Limited, for a writ of review against the superior court of the state of California in and for the city and county of San Francisco and another. Writ discharged.

Jesse W. Lilienthal, for petitioner. E. De Los Magee and J. V. De Laveaga, for respondents.

ANGELLOTTI, J. Upon the petition of plaintiff filed in this court, a writ of review was issued commanding defendants to certify to this court, in order that the same might be reviewed, a transcript of the record and proceedings culminating in an order of said superior court requiring plaintiff to pay to Edward J. Le Breton, as receiver of the California Safe Deposit & Trust Company, an insolvent corporation, \$47,637.55 held by it as the agent of said insolvent at the time of the adjudication of insolvency. The claim of plaintiff was that such order was in excess of the jurisdiction of the court, and therefore void. Defendants duly certified to this court a transcript of such record and proceedings, and the matter has been submitted for decision.

It appears from the record that in a proceeding instituted in said superior court under the bank commission act, by the people of the state of California by the Attorney General against said California Safe Deposit & Trust Company and its directors, judgment was given on January 14, 1908, decreeing said corporation insolvent, ordering it into involuntary liquidation, and appointing Edward J. Le Breton as receiver thereof to take possession of all its property, and to do all things necessary in the liquidation of its af-

fairs. Plaintiff, a banking corporation, was at such time an agent of the insolvent corporation for certain purposes, and as such agent had in its possession \$94,469.23, carried on its books to the credit of said insolvent. The receiver having demanded an accounting of plaintiff as to the money in its possession belonging or credited to the insolvent, plaintiff on January 22, 1908, rendered an account showing the above facts. On January 24, 1908, plaintiff notified the receiver that it had received written notice from the partnership firm of Stewart & McKee that said firm claimed that \$3,349.77 of said sum was its own property, and was not the property of the insolvent, and that plaintiff must not pay the same or any part thereof to the receiver. On the same day it also notified the receiver of the receipt of a similar notice from the Western Pacific Railway Company as to \$44,287.78. Solely because of said claims by said third parties, and not claiming any beneficial interest on its own part, plaintiff refused to pay to the receiver any part of either of the said amounts, and paid only the balance of said \$94,469.23, viz., \$46,831.68. These facts having been brought to the knowledge of the superior court by written petition by the receiver, said court made its order to show cause directed to plaintiff, neither of said third persons being made parties thereto, requiring it to show cause on February 26, 1908, why an order should not be made requiring the payment by plaintiff to the receiver of said amounts. On February 25, 1908, said firm of Stewart & McKee filed their petition in intervention in the proceeding pending in said superior court, setting up the facts upon which it based its claim to the \$3,349.77, and asking for an order decreeing the same to be its property and directing the receiver to direct plaintiff to pay the same to it, or directing plaintiff to make such payment. The court on the same day made its order allowing said Stewart & McKee to file said petition and intervene in the matter. By order of the court, a citation was thereupon issued to the receiver and plaintiff requiring them to show cause on March 18, 1908, why said petition should not be granted. Before the date so fixed, viz., on March 3, 1908, the court, after a hearing on the order to show cause based on the receiver's petition, made its order requiring plaintiff to forthwith pay said amount, together with the \$44,287.78 claimed by the Western Pacific Railway Company, to the receiver. This is the order which plaintiff seeks to have annulled in this proceeding.

We can see no good answer to the claim made by defendants in their brief to the effect that plaintiff had the right to appeal from the order complained of, and that, therefore, the writ of review was improperly issued. It is, of course, not disputed that, if a party has the right of appeal from an order made in excess of jurisdiction, he cannot have such order reviewed in certiorari proceedings.

Such is the express provision of our statute (Code Civ. Proc. § 1068), and it has been uniformly so held by this court. That an order of the character of the one under consideration is generally appealable by one affected thereby who is a party to the record is practically conceded by learned counsel for plaintiff, and it must be under the decisions of this court. The theory upon which the decisions sustain such right of appeal by such a party from such an order is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit. See *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604; *Grant v. Los Angeles, etc., Ry. Co.*, 116 Cal. 71, 47 Pac. 872; *Los Angeles v. Los Angeles, etc., Co.*, 134 Cal. 121, 66 Pac. 198. Plaintiff's position on the merits is that, by reason of the claim made against it by the third parties as to this money, it cannot safely pay the same to the receiver except in pursuance of some judgment or order made in a proceeding to which such claimants are parties, and that it is entitled either to retain the money until such controversy is determined, or to pay the money into a court having jurisdiction thereof, to abide such determination. The order in question is a final adjudication against plaintiff upon these matters. Its effect, if valid, is to require plaintiff to forthwith pay such money to the receiver, and finally deprive it of possession thereof without securing it against the claims of such third parties. It is clearly within the class of orders referred to in the cases last cited. Plaintiff was, of course, a party to the record, so far as such collateral proceeding was concerned, having been brought in as such a party by the order to show cause, and is fully within the rule of *Elliott v. Superior Court*, 144 Cal. 506, 77 Pac. 1109, 103 Am. St. Rep. 102, in regard to parties entitled to appeal.

It is claimed, however, that this order is not now appealable, because there has been no final determination on the petition of *Stewart & McKee* as to \$3,349.77 of said money, filed by leave of the court and which had not been heard at the time of the making of the order. The rule invoked is the one applied in *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166, to the effect that a judgment is not a final judgment within the meaning of section 939 of the Code of Civil Procedure relative to appeals, unless it be one which finally disposes of the rights of all the parties to the action in relation to the matter in controversy, and thus, in effect, ends the proceeding in the court in which it is entered. Assuming in aid of plaintiff that the intervention of *Stewart & McKee* was made in the collateral proceeding instituted by the receiver for the obtaining of the possession of the money from plaintiff, rather than in

the main proceeding pending in the superior court, the rule invoked has no application here. The order did finally determine the rights of all the parties, including such interveners, in relation to the matter in controversy. It was such a disposition of the whole subject-matter of the controversy as to completely dispose of the petition of the interveners, and deny them the relief sought thereby. The mere fact that it was made before the day set for a hearing on the interveners' petition and without any such hearing, however erroneous such a course may have been, does not change the situation. The whole controversy was regarding the present disposition of the money in the possession of plaintiff. The receiver claims that it should be forthwith delivered to him by plaintiff, the interveners claim that \$3,349.77 thereof should be paid to them by plaintiff, and sought an order requiring such payment, and the plaintiff claimed that it should not be required to deliver up the money to the receiver in the face of the adverse claim made by the interveners, until the question of ownership had been determined. The order made purported to dispose of this whole controversy by decreeing immediate payment by plaintiff of the whole amount to the receiver, and, in effect, ended in the superior court the particular proceeding under consideration. We are satisfied that it must be held to be an adjudication of the subject-matter of the controversy as to all of the parties thereto.

It follows from what we have said that the writ of review was improperly issued.

The writ is discharged, and the proceeding dismissed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 767

Ex parte GREENALL. (Cr. 1,441.)

(Supreme Court of California. June 25, 1908.)

1. PHYSICIANS AND SURGEONS — PRACTICING WITHOUT AUTHORITY—CRIMINAL PROSECUTION—COMPLAINT—SUFFICIENCY—"PRACTICING MEDICINE OR SURGERY."

In a prosecution for violation of Act March 14, 1907 (St. 1907, p. 252, c. 212), providing that any person who shall practice * * * medicine or surgery, etc., or any other system of treating the sick, without having a certificate, etc., shall be guilty of a misdemeanor, it must appear that defendant practiced, or attempted to practice, medicine, etc., as a business or calling, or advertised or held himself out as so doing, the term "practicing medicine or surgery," etc., meaning that one is engaged in that line of work as a business; and a complaint, charging that defendant did unlawfully "treat the sick" by practicing the system or mode known as "chiropractic," without having a certificate, etc., was insufficient, the words "by practicing the system or mode," etc., being simply descriptive of the method by which defendant treated the sick.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 5488, 5491; vol. 8, pp. 7758-7759.]

2. HABEAS CORPUS—COMPLAINT IN CRIMINAL CASES—SUFFICIENCY.

The sufficiency of the complaint in criminal cases in inferior courts such as a justice's court will be considered by the appellate court on habeas corpus proceedings.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Habeas corpus by C. D. Greenall. Petitioner ordered discharged, and his bail exonerated.

Philaetha S. Michelsen and Gavin W. Craig, for petitioner. William C. Tait, for respondent.

ANGELLOTTI, J. The petitioner was convicted in the justice's court of Los Angeles township of the county of Los Angeles on a complaint charging that he did, on or about the 18th day of June, 1907, "willfully and unlawfully treat the sick or afflicted by practicing the system or mode known as 'chiropractic' without having at the time of so practicing a valid, unrevoked certificate from the Board of Medical Examiners of the state of California entitling him so to do, as provided by an act of the Legislature of the state of California entitled 'An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the state of California, and for the appointment of a board of medical examiners in the matter of said regulation,' approved March 14, 1907." St. 1907, p. 252, c. 212. The judgment pronounced on said conviction was affirmed on appeal by the superior court of said county. Having been delivered into the custody of the sheriff of said county under such judgment, he sought to be discharged by this court on habeas corpus, and a writ having been issued, he was released on bail pending a determination of this proceeding.

It is contended that the complaint in the justice's court did not state facts constituting a public offense. We are of the opinion that this contention must be held to be well founded. The act of March 14, 1907, provides that: "Any person who shall practice or attempt to practice or advertise or hold himself out as practicing medicine or surgery, osteopathy, or any other system or mode of treating the sick or afflicted, in this state, without having, at the time of so doing, a valid, unrevoked certificate, as provided in this act, shall be guilty of a misdemeanor." The act nowhere states, as did the act of 1901 (St. 1901, p. 56, c. 51), which was limited to a regulation of the practice of "medicine and surgery," what is meant by the term "practice" as used therein. The act of 1901, after providing that "any person practicing medicine or surgery" without a license shall be deemed guilty of a misdemeanor, provided, in section 16: "The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: (1) Those who profess to be, or

hold themselves out as being, engaged as doctors, physicians or surgeons in the treatment of disease, injury or deformity of human beings. (2) Those who, for pecuniary or valuable consideration, shall prescribe medicine, magnetism or electricity in the treatment of disease, injury or deformity of human beings. (3) Those who, for pecuniary or valuable consideration, shall employ surgical or medical means or appliances for the treatment of disease, injury or deformity of human beings * * * (4) Those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease." There was thus given by that act to the term "practicing medicine or surgery" a definite meaning, corresponding substantially with the popular understanding of the term. When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, holding himself out as being so engaged, or for a consideration treating those who will accept his professional services, and we would not apply the term to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is "sick or afflicted." We are satisfied that the term "practice" in the act of 1907 should not be given any broader meaning than it had in the act of 1901. One who within this meaning "practices" medicine or surgery or osteopathy, or any other recognized mode of treatment of the sick, without a certificate, violates the provisions of the act. It might be sufficient in the complaint to charge simply that one had practiced medicine, or osteopathy, or chiropractics, without such certificate. In such an allegation, the word "practice" would, in view of the accepted meaning it is given when used in such connection, naturally and reasonably bear no other construction than the one we have described, and so construed would show an offense. But the complaint in the case before us, as we read it, contains no such allegation. The allegation was simply that the defendant did willfully and unlawfully "treat the sick or afflicted" without having at the time a valid unrevoked certificate as required by the act, the words "by practicing the system or mode known as 'chiropractic,'" being simply descriptive of the method by which he treated the sick. As thus used, the word "practicing" cannot reasonably be given the meaning we have described, but is synonymous with the word "using." We are informed in the briefs that the word "chiropractic" means a treatment somewhat analogous to that of osteopathy, the removal of the cause of disease without the use of drugs or any other means except the adjustment of the vertebra of the spine by manipulating them with the hand. If this be correct, the com-

plaint simply charges that the defendant used this method in "treating" the sick or afflicted, without having any certificate under the act, and the allegations of the complaint would be fully sustained by proof that he had incidentally and gratuitously attempted to administer aid to one who was sick or afflicted by the use of this method. It might as well be contended that a complaint simply charging that one treated a sick person by administering medicine, without having a certificate, would state a public offense under this act. To bring a person within the provisions of the act, it must appear that he practices, or attempts to practice, medicine, etc., as a business or calling, or advertises or holds himself out as so doing, and, as we have said above, an allegation that one "practiced medicine" or surgery, etc., might show this. As we read the act, the allegations of the complaint in the justice's court in this case are entirely consistent with the innocence of the defendant of any violation of its provisions. It therefore fails to show a public offense.

Counsel for respondent contends that, if there is in this state such an offense or crime as that of which petitioner was convicted, the insufficiency of the complaint is immaterial on habeas corpus, citing *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605. The rule of the *Ruef* Case has never been applied by this court to proceedings in courts of inferior, as distinguished from courts of general, jurisdiction. To the contrary, it has been the uniform practice to consider on habeas corpus the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state. This matter was fully considered in *Ex parte Kearny*, 55 Cal. 212, where the distinction between the two classes of courts was stated, and where the prisoner was discharged solely because of the insufficiency of the complaint in this regard. That decision has never been modified. In the *Ruef* Case we were considering the question with relation to a proceeding pending in a court of general jurisdiction, the superior court of the city and county of San Francisco, while here we have a proceeding in a court which has uniformly been treated as an inferior court, a justice's court. *Ex parte Kearny*, supra. It may be that a strong argument can be made in favor of the proposition that there is no logical basis for a distinction in this regard between courts of general jurisdiction and those of inferior jurisdiction, but the distinction has the support of no less an authority than Chief Justice Marshall in the celebrated case of *Tobias Watkins*, 3 Pet. (U. S.) 193, 7 L. Ed. 650, and has been constantly adhered to by this court.

In view of our conclusion upon the question of the sufficiency of the complaint, it is unnecessary to consider the contention

of petitioner that the act of 1907 is unconstitutional.

It is ordered that the petitioner be discharged, and his bail exonerated.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 788

KAISER v. BARRON. (L. A. 2,090.)

(Supreme Court of California. July 1, 1908.)

SPECIFIC PERFORMANCE — CROSS-COMPLAINT — CONTRACT — CONSIDERATION — REASONABLENESS.

Civ. Code, § 3391, provides that specific performance cannot be enforced against a party to a contract, if he has not received an adequate consideration, or if it is not as to him just and reasonable, etc. *Held*, that where a cross-complaint in ejectment sought specific performance of a contract for the sale of land, but neither alleged in general terms the adequacy of the consideration or the fairness of the contract, nor pleaded facts which would justify an inference that such conditions existed, it was insufficient to sustain a decree for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 373.]

Department 1. Appeal from Superior Court, Orange County; J. W. Taggart, Judge.

Action by Emil Kaiser against U. M. Barron. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

See 95 Pac. 879.

F. C. Spencer, for appellant. Chas. S. McKelvey, for respondent.

SLOSS, J. This is an action of ejectment brought by plaintiff to recover the possession of the south 10 acres of a 25-acre tract of land in Orange county. The defendant answered, denying plaintiff's ownership and right of possession, and filed a cross-complaint, in which he sought a decree specifically enforcing the performance of a contract between himself and one Sisson, plaintiff's predecessor in interest, for the conveyance by Sisson to defendant of the ten-acre parcel in dispute. It is alleged that plaintiff bought subject to this contract, and that its terms have been fully performed on defendant's part. The court made findings in accordance with the allegations of the cross-complaint, and entered a judgment denying the plaintiff any relief, and requiring him to execute a deed conveying to the defendant the 10 acres in controversy. The plaintiff appeals from the judgment.

In a prior action between the same parties the plaintiff sued to quiet his title to the 25 acres, of which the property here involved is a part. The judgment there rendered in favor of defendant was reversed by this court. *Kaiser v. Barron* (Cal.) 95 Pac. 879. The defense in that case was based upon the contract here sought to be specifically enforced.

The substance of that contract, as stated in the opinion in the earlier appeal, was "that defendant would plant the northern 15 acres (of the 25-acre tract) in walnut trees, and would nurture and care for them until the 1st day of January, 1906, at which time, defendant having fulfilled the conditions of his contract, plaintiff's predecessor in interest agreed to convey to him the southerly 10 acres." These terms appear to have been modified by the parties in a manner which is not material to this discussion. No answer can be made to the appellant's contention that the defendant (cross-complainant) failed to establish a right to specific relief, in that he did not allege or prove that the plaintiff had received an adequate consideration for the contract, or that it was as to him just and reasonable. Civ. Code, § 3391. The cross-complaint does not allege in general terms the adequacy of the consideration or the fairness of the contract, nor does it set forth facts which would justify the inference that these conditions existed. There is no allegation of the value of the 10 acres agreed to be conveyed, or of the value of the services to be performed as a consideration for the conveyance, nor is there any proof on these subjects.

That such allegation and proof are prerequisites to the granting of a decree of specific performance is thoroughly settled. "A court of equity must be satisfied that the claim for a deed is fair and just and reasonable, and the contract equal in all its parts, and founded upon an adequate consideration, before it will interpose this extraordinary assistance." *Bruck v. Tucker*, 42 Cal. 354. See, also, *Agard v. Valencia*, 39 Cal. 302; *Nicholson v. Tarpey*, 70 Cal. 609, 12 Pac. 778; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231. In *White v. Sage*, 149 Cal. 613, 87 Pac. 193, the court, after citing these cases, said that "there must be a showing of the value, at least, so that the court can determine whether it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements." It is true that the court made a finding that "the terms and conditions of said contract and the consideration therefor was fair and reasonable." But this finding, regardless of the fact that it is without the issues, is not supported by any evidence. The plaintiff's demurrer to the cross-complaint should have been sustained. It will not be necessary to consider other points made by appellant.

The judgment is reversed, with directions to the court below to sustain the demurrer to the amended cross-complaint and for further proceedings.

We concur: ANGELLOTTI, J.; SHAW, J.

(153 Cal. 711)

CHARLES A. WARREN CO. v. SAN FRANCISCO SAVINGS UNION et al. (S. F. 4,932.)

(Supreme Court of California. June 26, 1908.)

1. QUIETING TITLE—ESTATE—AUTHORIZING ACTION—TRUSTORS.

One who has given a deed of trust on property as security retains an "estate of inheritance," and so, under St. 1906, p. 78, c. 59, § 1, may bring an action to quiet title, notwithstanding Civ. Code, § 863, provides that every express trust in real estate "vests the whole estate in the trustees, subject only to the execution of the trust," and that "the beneficiaries take no estate or interest in the property"; section 864 providing that the trustor may transfer or devise the property, subject to the execution of the trust, section 865 providing that his grantee or devisee acquires a legal estate in the property, except as against the trustees, and section 866 providing that every estate not embraced in the trust is left in the trustor or his successor.

2. SAME.

That it is intended that one may maintain an action to quiet title under St. 1906, p. 79, c. 59, notwithstanding he has given a deed of trust thereon as security, is shown by section 5, requiring plaintiff to file, with the complaint, an affidavit setting forth all subsisting mortgages, "deeds of trust," and other liens on the land.

3. SAME—"POSSESSION."

Though one gives a deed of trust on land as security, he still retains the possession within St. 1906, p. 78, c. 59, § 1, limiting the right to bring action to quiet title to one who is by himself or his tenant or other person in the actual and peaceable possession of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 44.

For other definitions, see Words and Phrases, vol. 6, pp. 5464-5470; vol. 8, pp. 7757-7758.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Charles A. Warren Company against all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof. Judgment for plaintiff. Defendants the San Francisco Savings Union and the Mercantile Trust Company of San Francisco appeal. Affirmed.

Campbell & Baldwin, for appellants. J. C. Bates, for respondent.

SLOSS, J. This is an action to quiet title, brought under the provisions of the act of June, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." St. 1906, p. 78, c. 59. The plaintiff, claiming the ownership of a lot of land in the city and county of San Francisco, filed a complaint in the form described in section 2 of the act. Accompanying the complaint, the plaintiff filed an affidavit, as required by section 5 of the act. This affidavit, after setting forth plaintiff's ownership of the land, and showing his source of title, together with other matters required to be stated in the affidavit, averred that the land was subject to a lien "for \$15,

000 with interest, secured by a deed of trust in favor of San Francisco Savings Union, a corporation." The San Francisco Savings Union and the Mercantile Trust Company of San Francisco (the trustee named in the deed of trust referred to in the affidavit) appeared, and, treating the complaint and the affidavit in conjunction as constituting a single pleading, demurred for want of facts sufficient to constitute a cause of action and on the ground that plaintiff was not a proper party plaintiff to the action. Their demurrer being overruled, the defendants answered, denying plaintiff's ownership in fee simple, and alleging that on May 12, 1905, Charles A. Warren, the then owner of the land, and plaintiff's predecessor in interest, had executed and delivered to the Mercantile Trust Company of San Francisco, as trustee, a deed of trust to secure the payment of a promissory note for \$15,000 made by the grantor to the San Francisco Savings Union. It is alleged that the note is unpaid and is still held and owned by said Savings Union, and that the Mercantile Trust Company has never conveyed said real property. The answer prays judgment declaring the Mercantile Trust Company to be the owner of the land subject to the terms of the deed of trust. This instrument, a copy of which is annexed to the answer, is in the usual form of a conveyance to a trustee to secure the payment of an indebtedness. The court found in favor of the allegations of the complaint and affidavit, and entered its judgment, declaring the plaintiff to be the owner in fee simple of the property; adjudging that no person other than plaintiff has any estate, right, title, or interest in, or any lien upon said property except that said Mercantile Trust Company of San Francisco holds a deed of trust as security for money loaned as in its answer set forth. It is further adjudged and decreed that all persons other than plaintiff be enjoined from asserting any claim, right, title, or interest in or to said property, adverse to the title determined in favor of plaintiff, "except that * * * Mercantile Trust Company of San Francisco has and holds a deed of trust on the lot * * * as set forth in its answer on file in this action to secure the money loaned as evidenced by the promissory note as set forth in its said answer herein." From this judgment the defendants San Francisco Savings Union and Mercantile Trust Company of San Francisco appeal.

The contention of the appellants is that by the execution of the deed of trust the title in fee vested in the trustee, Mercantile Trust Company of San Francisco, and that, so long as such title was held by the trustee, the plaintiff had no such estate or interest as would authorize it to maintain an action under the provisions of the act in question. In view of the fact that the court below, in declaring the title of plaintiff, expressly made such title subject to the deed of trust, it is

difficult to see how the appellants are in any wise prejudiced by the judgment complained of. They assert no interest in the land except that vested in them by the deed of trust, and the judgment does not purport to limit their right to protect that interest as fully as they could if there had been no judgment. But, assuming that the defendants were "parties aggrieved" by the judgment (Code Civ. Proc. § 938), and as such entitled to appeal from it, we think the act in question, reasonably construed, does authorize an action by one who has made a conveyance in trust, merely as security for a debt. Section 1 of the act provides that in certain cases "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him, in the actual and peaceable possession of any real property," may bring the action to establish his title and to determine all adverse claims to the property. It is argued by appellants that inasmuch as, by the provisions of Civ. Code, § 863, "every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust" and "the beneficiaries take no estate or interest in the property," the execution of the deed of trust to the Mercantile Trust Company vested the whole estate in such trustee, and there remained in the grantor and his successors no "estate or interest in the property," and necessarily no "estate of inheritance or for life." That instruments conveying property as security for a loan in trust to sell in the event of nonpayment, or to reconvey to the grantor upon payment of the debt, create valid express trusts, is thoroughly settled in this state. *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Balfour, etc., Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Staaacke v. Bell*, 125 Cal. 309, 57 Pac. 1012; *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319. And that such instruments do not create a mere lien or incumbrance, but vest in the trustee the legal title to the property, has been repeatedly held, and has been reasserted by this court in the very recent case of *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706.

It does not follow, however, that no estate can remain in the trustor. Under section 864 of the Civil Code, the author of a trust may prescribe to whom the property shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust. By the terms of section 865, his grantee or devisee acquires a legal estate in the property as against all persons except the trustees and those claiming under them. Section 866 provides that every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors. While, under the Code provisions, the beneficiary takes no estate, the creation of the trust may

vest an estate in the trustee, and still leave an estate in the trustor. Under an instrument like the one in question, the trustee takes a fee, such estate being necessary for the carrying out of the trust to sell if the debt should not be paid. But since, upon payment of the debt, the property will revert in the trustor or his successors, an interest in the property is left in such trustor. Such interest is an estate, and, as it may pass by devise or descent, is an estate of inheritance. "The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them." *McLeod v. Moran* (Cal.) 94 Pac. 604.

There are other considerations making it perfectly clear that the party executing an instrument of this character is embraced within the class of those to whom the Legislature intended to give the right to institute this action. Section 5 of the act requires the plaintiff to file with the complaint an affidavit, setting forth, among other things, "a statement of any and all subsisting mortgages, deeds of trust, and other liens" on the land. The phrase "deeds of trust" unquestionably has reference to deeds of trust given as security, like the one in the case at bar. While they do not, strictly speaking, constitute "liens" upon the property, the Legislature, by so designating them, and requiring a statement of them in the affidavit accompanying the complaint, manifested unmistakably its intention that the existence of such deeds of trust should not operate to deprive the trustor of the right to maintain the action. The right to bring the action is limited by section 1 of the act to any person who is by himself or his tenant, or other person, in the actual and peaceable possession of the property. That the trustor has such possession is clear. The deed of trust "conveys no right of possession and the trustor may remain in possession, and, until the execution of the trust may maintain an action to recover possession even when the trust deed is silent upon the subject of possession." *Sacramento Bank v. Alcorn*, supra. It follows that the respondent was a proper party plaintiff, and entitled to the relief granted. It may be added that this case presents no question as to the rights of beneficiaries or trustees under any instruments except deeds of trust given as security for indebtedness.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.

(153 Cal. 791)

STEMLER v. BASS (GARVER, Intervener).
(L. A. 2,060.)

(Supreme Court of California. July 2, 1908.)

1. BROKERS—WRITTEN AUTHORITY.

Under Civ. Code, § 1624, subd. 5, requiring a broker's contract of employment to sell real

estate to be in writing, a sale of real estate made by a broker is not binding on the principal unless the broker is acting under written authority.

2. SAME—SCOPE OF AUTHORITY—EVIDENCE—FINDING.

Evidence held to warrant a finding that a broker only had written authority to find a purchaser and consummate a sale by paying in cash to a bank selected by the principal the amount of money required by the principal's instructions to the bank, and accepting the deed awaiting delivery on compliance with such instructions, and that he had no authority to execute a contract of sale binding on his principal.

3. SAME.

The ordinary authority of a real estate agent deputed to sell land is simply to find a purchaser; he having no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 13.]

4. SAME—CONTRACT OF SALE—RATIFICATION.

Where it did not appear that the owner of land knew that his broker had executed any agreement for sale of the land in writing either on his own account or as agent of such owner, until the owner had by telegraph refused the offer and communicated the fact of refusal to both the broker and the bank, which telegrams superseded and were received before letters accepting the broker's offer, there was no ratification of the broker's unauthorized act in executing a contract of sale so as to bind the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 31-36.]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Belle G. Stemler against T. W. Bass and Nellie O. Garver, interveners. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Wm. F. McLaughlin and Earle & Creede, for appellant. John D. Pope and Wellborn & Wellborn, for respondent.

ANGELLOTTI, J. This is an action by the vendee to enforce specific performance of an alleged contract for the sale of a lot of land in Huntington Park, Los Angeles county. Defendant had judgment, and plaintiff appeals from such judgment and an order denying her motion for a new trial.

Plaintiff's claim is based on a written instrument executed on January 3, 1905, by one J. S. Hadden, purporting to act as the agent of defendant T. W. Bass, owner of the land, which is as follows: "Los Angeles, Cal., January 3, 1905. Received from Belle G. Stemler \$50.00 (fifty dollars) as deposit on purchase of property owned by T. W. Bass, (now of Broken Bow, Neb.) said property located and being lot 13, block 31, Huntington Park, Los Angeles county, Cal. The balance, \$800.00 (eight hundred dollars) to be paid on transfer of the said property, clear of all incumbrances, except mortgage of \$1,200.00, now held by one Katherine Kramer, which the said purchaser, Mrs. Belle G. Stemler, agrees to assume. The amounts above specified, namely \$800.00 and the \$50.00 deposit, consti-

tuting \$850.00 the entire equity of T. W. Bass, as per instruction of letter addressed to J. S. Hadden, dated December 28th, 1904, the said terms and amount being accepted by the purchaser. Signed by agent of T. W. Bass, J. S. Hadden." The trial court found that Bass never conferred authority on Hadden to execute any contract of sale of the land, that the only authority conferred on him was to find a purchaser for the same, that Hadden had no authority to sell the same except for cash, payable immediately in bank to the credit of Bass, and that Bass withdrew the authority conferred before Hadden had made any sale in accordance therewith. The principal question on this appeal is as to the sufficiency of the evidence to sustain these findings.

Unless the agreement made by Hadden with plaintiff was authorized in writing by Bass, it was, of course, not binding upon him (subdivision 5, section 1624, Civ. Code), unless subsequently ratified. Plaintiff seeks to show such authority in certain letters and written directions sent by Bass from the state of Nebraska, where he was residing. Bass had left California for Nebraska early in September, 1904. He had endeavored to sell this property before leaving, but had been unable to do so, and left the property in charge of Hadden, with directions to see what he could do about selling it. On the day he left, he told Hadden that, if he could get \$2,100 for the property, to sell it. There was a mortgage of \$1,200 thereon, which the purchaser was to pay or assume, and the balance of the purchase money was to be paid to the owner. The first written evidence of any authority was contained in a letter from Bass to Hadden, dated September 12, 1904, wherein he said: "How did you come out with the deal on the house? I wish you would push that sale through lively as I am in need of the money." On October 19, 1904, he wrote Hadden that he had decided not to sell at present, but desired him to get a good tenant from month to month, upon certain terms. On October 26th he wrote him again that he had decided to sell, and that for the next 60 or 90 days would take \$900 net for his equity in the property. November 22d, replying to a message from Hadden that he had an offer of \$2,050 for the place, he wrote to accept it, and let him know to whom the deed was to be made, and "I will send it to the Los Angeles National Bank, and the money can be paid there and take up the deed. Hope you will get everything through all O. K." On November 23d he wrote, stating that he had received a message to the effect that the deed should be made to Hadden, and stating: "I am sending the deed to Southern California Savings Bank and instructing them that upon the payment of \$850 to be forwarded to me and you accepting the mortgage for \$1,200 in favor of Mrs. Katherine Kramer and also the payment of \$14.24 to Mr. Burbank for the

insurance policy they shall then turn over to you the deed." On November 28th he inclosed the deed to Hadden made subject to the mortgage, the purchaser assuming the same, to such bank, with directions to deliver the same upon payment to it of \$850, and \$24.50 insurance, and to forward such money when so paid to him. On December 14th he wired Hadden to take up the deed, as he needed the money. On December 28th he wrote Hadden that he had paid up the insurance, and said: "Now, * * * I am in need of some money awfully bad, and if you can possibly find me a buyer that will pay \$850 and take up that deed, let them have it. * * * I will write the bank to accept \$850 and turn over the deed, and purchaser to accept the mortgage of course. I do hope you can dispose of it." On the same day he wrote to the bank: "I have paid up the insurance and also the interest to date, so upon the payment to you of \$850 you can then turn over to them the deed and send me a draft for the amount." On January 3, 1905, Hadden wired him: "Your place sold. Letter explaining. Advise bank about deed." On January 4th he wrote Hadden, acknowledging receipt of the message, and stating that he would await the letter before advising the bank further about the deed, and that he had an offer from another party but would give Hadden the preference, if the terms were as good as those of the subsequent offer. On January 6th he telegraphed Hadden, asking: "Have you deposit how much net to me wire answer." And received the following answer: "Eight fifty net fifty deposited guaranteed transfer on your communication." On January 7th he wrote Hadden, stating that he had advised the bank to deliver the deed upon the payment of \$850, and on the same day he wrote the bank to deliver the deed upon such payment being made. Before the receipt of either of these communications, he on January 9th telegraphed Hadden: "Cannot accept offer on property. Letter explaining on the way." And to the bank he telegraphed: "Return deed made to J. S. Hadden to me at once cancel all negotiations." The bank at once complied with this direction. On January 10th he wrote Hadden, explaining that he had sold the property to another party for \$1,035 net. The foregoing is all the correspondence that is material. The offer referred to in the letter of November 22d was apparently not plaintiff's offer; the evidence showing that her offer was not made until January 3d.

Upon these facts the trial court was amply warranted in concluding that Hadden was not authorized to make the contract of January 3, 1905, or any contract of sale on behalf of Bass, and that his only authority in the matter, in addition to finding a purchaser, was to consummate a purchase by paying in cash to the bank selected by Bass as his agent the amount of money required by the instructions

to such bank, and thereupon accepting the deed awaiting delivery upon compliance with such instructions. Until such consummation, in the absence of ratification or estoppel, Bass could be in no degree bound by any act of Hadden's. The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority. *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Delano v. Jacoby*, 96 Cal. 279, 131 Pac. 290, 31 Am. St. Rep. 201. Whether or not it was intended to confer such additional authority is to be determined from the language used regarded in the light of the surrounding circumstances. *Rutenberg v. Main*, 47 Cal. 213. In the case at bar, additional authority was, of course, conferred; but the limit of such additional authority was very clearly defined. The evidence showing the additional authority affirmatively showed the want of authority on Hadden's part to bind Bass by any agreement to sell. All that he could effectually do was to consummate a sale by the payment of the requisite amount in cash to the bank and the acceptance of the deed there deposited, and the writings relied on showed no attempt to confer any other authority. Such writings showed very clearly that what Bass wanted was the immediate payment of the whole purchase price in cash, that he was willing to part with his property or any interest therein only upon such payment, and that he was unwilling to cloud his title by any agreement for sale with some unknown purchaser, who might ultimately prove unwilling or unable to complete his contract, the existence of which agreement might deprive him of the opportunity to sell for cash to some other person. See *Duffy v. Hobson*, supra. The case at bar is very different in its facts from *Rutenberg v. Main*, supra, relied on by plaintiff, where it clearly appeared that it was intended by the owner to clothe the agent with authority to do generally whatever was necessary to make the proposed sale binding upon the principal.

There was no ratification of the agreement by Bass. It does not appear that he knew that Hadden had executed any agreement for sale in writing either on his own account or as the agent of Bass, until he had by telegraph refused the offer and communicated the fact of refusal to both Hadden and the bank. See *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53. His letters of date January 7, 1905, to Hadden and to the bank cannot be construed as purporting to ratify any agreement for sale made for him by Hadden, and they were superseded by the telegrams of January 9th, which were received by Hadden and the bank prior to the receipt of the letters, and at once acted upon by them. No principle of estoppel applies to the case.

Our conclusion on the matters already dis-

cussed renders it unnecessary to consider any other point made.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

154 Cal. 29

RUBIO CAÑON LAND & WATER ASS'N v. EVERETT. (L. A. 2,002.)

(Supreme Court of California. July 3, 1908.)

1. APPEAL AND ERROR—RIGHT TO PROSECUTE—INTEREST IN SUBJECT-MATTER—TRANSFER OF INTEREST.

Where, in a suit to establish plaintiff's right to maintain and use a pipe line through defendant's land, to restrain further interference therewith by defendant, and to recover damages for injury thereto, plaintiff obtained the injunction prayed and a judgment for \$100 damages, and defendant's motion for a new trial, from the denial of which, as well as from the judgment, defendant appealed, was directed to the part of the judgment awarding damages, as well as to the part establishing the easement, the fact that defendant parted with his interest in the land and relinquished his interest in the pipe line was no ground for dismissal of the appeal.

2. EASEMENTS—CREATION—PIPE LINE—RIGHT OF WAY—CONVEYANCE OF LAND—APPURTENANCES.

Plaintiff orally contracted with defendant's grantor for the purchase of certain land on which a pumping station was to be constructed and for a pipe line right of way over the remainder of the lot. Plaintiff constructed the pumping plant and pipe line, whereupon defendant's grantor executed to plaintiff a deed conveying the land on which the plant was located, together with the appurtenances thereunto belonging or in any wise appertaining. The deed did not otherwise describe the pipe line or right of way through the remainder of the land, which was subsequently conveyed to defendant by a deed excepting the tract previously conveyed to plaintiff, described by metes and bounds, but not reserving or mentioning the pipe line or right of way. *Held* that, as between plaintiff and defendant's grantor, plaintiff's deed was sufficient to convey the right of way for the pipe line across the land so conveyed to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 37.]

3. SAME—"APPARENT."

The word "apparent," as applied to an easement, as against a purchaser of the servient estate, does not necessarily mean "visible," but includes easements used by means of some artificial structure on the servient tenement, such as a pipe, sewer, or ditch, as distinguished from those using the servient easement in its natural state and at intervals, in the meantime leaving no visible sign of their existence, such as a way or right of fishery or pasture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 60.]

For other definitions, see Words and Phrases, vol. 1, p. 440.]

4. SAME—NOTICE—EVIDENCE.

Evidence *held* to sustain a finding that defendant, at the time he purchased a servient estate, had knowledge of facts sufficient to put him on inquiry as to the existence of plaintiff's right to maintain a water pipe line through property so purchased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 93.]

5. SAME--PROCEEDINGS TO ESTABLISH RIGHT--FINDINGS--NOTICE.

In a suit to establish an easement, a finding that defendant had knowledge of facts and circumstances sufficient to put a prudent man on inquiry as to the existence of the easement and right of way, and that by prosecuting such inquiry he might have learned of the existence thereof, sufficiently charged defendant with notice of the easement, and was not objectionable for failure to set forth particular facts and circumstances referred to.

6. SAME--CREATION--PAROL AGREEMENT--EVIDENCE.

Where plaintiff and defendant claimed title from a common source, and plaintiff claimed an easement over defendant's land for a pipe line, evidence of a parol agreement between plaintiff and the common grantor, granting such easement, was admissible to show that plaintiff held an equitable title thereto prior to a conveyance thereof as an appurtenance to the tract conveyed by such common grantor to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 90-92.]

7. EASEMENTS--DAMAGES--PUNITIVE DAMAGES--MALICIOUS INJURY.

Where, in a suit to establish an easement for a pipe line right of way, the complaint also claimed damages for defendant's alleged malicious injury to the pipe, and the evidence showed that defendant, pursuant to a willful intention so to do, inflicted unnecessary injury to the pipe when he removed a part of it, punitive damages were allowable.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Rubio Cañon Land & Water Association against Torrey Everett. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Roger S. Page and Sherman Page, for appellant. Lee & Shase and J. H. Scott, for respondent.

SHAW, J. Defendant was the owner of a tract of land in and through which, before he became such owner, plaintiff had laid an eight-inch pipe leading from the plaintiff's well and pumping plant, adjoining defendant's land, to plaintiff's reservoir, situated about a mile distant. The pipe was used by plaintiff to conduct water from its pump to said reservoir. Defendant, claiming that the pipe was maintained and used through his land without right, proceeded to tear up and remove 30 feet of the pipe and destroy 80 feet more by making holes therein. Thereupon plaintiff began this action to establish its right to maintain and use the line of pipe through defendant's land, to restrain further interference therewith by defendant, and to recover damages for the injury thereto. Judgment was given for the plaintiff, defendant's motion for a new trial was denied, and he appeals from the judgment and the order.

The respondent moves to dismiss the appeals on the ground that, since they were taken, the defendant has parted with his interest in the land and relinquished his interest in the pipe line. The plaintiff in its complaint demanded judgment for \$750 and

recovered thereon \$100 as damages. The motion for a new trial was directed to this part of the judgment as well as that relating to the pipe line. Under these circumstances, the defendant has the right, independent of the question of title, to appeal from the money judgment and from the order denying a new trial. *Solomon v. Reese*, 34 Cal. 33; *Dashiell v. Slingerland*, 60 Cal. 654. The appeals will therefore stand, regardless of the existence or nonexistence of further controversy as to the right of way. The motion is denied.

The land of plaintiff on which its well and pumping plant were situated consisted of one-half an acre which, together with defendant's land, comprised the whole of lot 14, block 8, of Altadena, which block originally belonged to one Andrew McNally. Plaintiff was engaged in supplying water to its stockholders for domestic use and irrigation. McNally was one of its largest stockholders. The plaintiff's water supply was insufficient, and in order to obtain more water it made an oral agreement with McNally to the effect that it would sink a well on the half acre in question, erect a pumping plant thereon, lay the pipe line in question, and operate the pump and pipe to carry water from the well to plaintiff's reservoir for the use of McNally and the other stockholders, and that thereupon McNally would convey to the plaintiff the said parcel of land and give the defendant the right of way in question over the remainder of lot 14 for the pipe line in controversy. In pursuance of this agreement, plaintiff constructed the well, pumping plant, and pipe line at an expense of more than \$12,000, and McNally thereupon executed to it a deed conveying the half acre, together with the "appurtenances thereunto belonging or in any wise appertaining." The deed did not otherwise describe the pipe line or right of way through the remainder of lot 14. This deed was dated April 24, 1903, and was duly recorded May 15, 1903. Defendant purchased of McNally the remainder of lot 14 on April 16, 1904, by deed of that date. This deed expressly excepted the half acre previously conveyed to the plaintiff, describing it by metes and bounds, but it did not expressly reserve or mention the pipe line or right of way therefor across the land conveyed to Everett. The court finds that Everett, at the time, had no actual knowledge of the existence of the right of way or of the pipe line, so far as it was constructed on his land, but that he did have constructive notice thereof by reason of the recorded deed from McNally to plaintiff of the half acre with the appurtenances belonging thereto, and also by reason of actual notice of circumstances sufficient to put him on inquiry concerning the said pipe line and right of way.

As between the plaintiff and McNally, the conveyance of the half acre unquestionably carried with it the right of way to maintain the pipe line. The pipe line was then in

existence across the remainder of lot 14 and was then in use by plaintiff as an appurtenance to the pumping plant, for the purpose of carrying water from the pump to the reservoir, and McNally had full knowledge of these facts. The half acre and the pipe line were in the possession of plaintiff under the previous parol agreement. As to the easement over the land conveyed to defendant, the half acre was the dominant tenement, and the remainder of the lot the servient tenement. If McNally, while he was the owner of the entire lot, had erected the pumping plant, laid the pipe, and put the same in operation, and had then conveyed the pumping plant to the plaintiff, the effect would be, under the rule of common law and of the Civil Code, to create an easement across the remainder of the land for the maintenance of the pipe line as an incident to the land conveyed. Civ. Code, § 1104; *Jones v. Sanders*, 138 Cal. 411, 71 Pac. 506; *Cave v. Crafts*, 53 Cal. 139; *Quinlan v. Noble*, 75 Cal. 352, 17 Pac. 69; *Dixon v. Schermeier*, 110 Cal. 585, 42 Pac. 1091; *Smith v. Corbit*, 116 Cal. 591, 48 Pac. 725. It may be that the fact that the pumping plant and pipe line were constructed by the plaintiff, and not by McNally, would prevent the conveyance from having this effect, or at least prevent the application of the common-law and code rule referred to; but under the principles of equity, and by force of other rules of law, the effect is the same. McNally had agreed in parol to convey the land and the right of way and had put plaintiff in possession in pursuance of the agreement. The consideration of the agreement, so far as McNally was concerned, was the expenditure of the money necessary to construct the well, pump, and pipe line, and the supplying of the water obtained to McNally and the other stockholders. Plaintiff had paid the full consideration agreed upon by putting the system in operation. It had a perfect equitable title to the land and to the easement appertaining thereto. The deed was but the execution of the parol agreement. It transferred the naked legal title and vested in plaintiff the entire estate, legal and equitable, in the land, and in the easement which was, as the property then stood, an incident thereto. Civ. Code, § 801. The transfer of the legal title to the principal thing transferred also the legal title to the easement as an incident thereto. Civ. Code, § 1084; *Pogue v. Collins*, 146 Cal. 435, 80 Pac. 623. This would be the case even if the deed had not expressly purported to convey the "appurtenances" with the land. *Cave v. Crafts*, 53 Cal. 140; *McShane v. Carter*, 80 Cal. 313, 22 Pac. 178; *Simmons v. Winters*, 21 Or. 44, 27 Pac. 7, 28 Am. St. Rep. 727; *Tucker v. Jones*, 8 Mont. 231, 19 Pac. 571; *Jones on Conveyancing*, § 1643; *Brewster on Conveyancing*, § 118.

It is contended by the respondent that, inasmuch as the deed from McNally to plaintiff passed the legal title in the pipe line and

right of way therefor to the grantee, it necessarily follows that its recordation constituted constructive notice to the defendant of the easement therefor over the land he subsequently bought, although the pipe was concealed by being buried two feet under the surface of the ground, and plaintiff had no actual knowledge thereof. It is contended that the rule is that subsequent purchasers of land take it subject to all servitudes then laid upon it for the support of easements of the class called "apparent" and which are attached to other land. The principle is well established, but the question whether or not an easement of the character of this pipe line is an apparent easement is not so clear. Many authorities declare that the word "apparent," as applied to an easement in this connection, does not necessarily mean visible, but refers to easements used by means of some artificial permanent structure on the servient tenement, such as a pipe, a sewer, or a ditch, as distinguished from those which use the servient tenement in its natural state, and at intervals, in the meantime leaving no visible sign of their existence, such as a way or a right of fishery or pasture. *Jones on Easements*, § 125, *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1049, *Pyer v. Carter*, 40 Eng. L. & Eq. 414, *Fetters v. Humphreys*, 18 N. J. Eq. 260, and *Kelly v. Dunning*, 43 N. J. Eq. 70, 10 Atl. 276, are cited in support of this proposition. It seems also to find some support from the decision in *Farmer v. Ukiah Water Co.*, 56 Cal. 14, holding that the record of a deed for a tract of land was constructive notice of the right to an easement consisting of a water supply delivered through an underground pipe across adjoining land, although the grantee of that land had no actual notice thereof.

We do not find it necessary to decide whether or not the record of the deed was constructive notice to the defendant, for we are of the opinion that the evidence is sufficient to sustain the finding of the court that the defendant had actual notice of facts and circumstances sufficient to put him on inquiry as to the pipe line and right of way, and this finding supports the judgment.

The defendant knew of the well and pumping plant and that it was a part of plaintiff's water system and was used to supply water to plaintiff's reservoir and pipes, by means whereof it distributed water to its stockholders in the neighborhood. He knew that the land he was buying was dependent upon this system for water to use thereon; that in order to obtain this water he must become a stockholder of plaintiff. He bought 50 shares of the stock for that purpose at the time of buying the land. The pipe line ran north from the pumphouse to Piedmont Drive, a distance of about half a mile in a straight line, passing through the remainder of the half acre and of lot 14 and a number of other lots intervening. It was located parallel to and about four feet east of a

stone-lined storm ditch, five feet wide and three feet deep, extending through all of said lots. Alameda street bounded lot 14 on the north. Across this street, and immediately over the line of pipe, there was a distinct depression in the earth, such as frequently appears where a trench for a pipe has been lightly refilled. Similar depressions some six inches deep showed in a straight line in defendant's lot over the pipe line, indicating its exact course. These were not such depressions as would be made by plowing. Some five or six feet north of the pumphouse there was a pipe protruding six inches above the ground and leading down to a cut-off valve in the pipe line in question. Six feet further north a 1½-inch pipe connected with the said pipe line, extending 18 inches above the ground and then turning by an elbow ran to the pump engine in the pumphouse. These pipes gave clear indications that they must be connected with an underground pipe leading from the pumphouse to the north. Before buying the lot, defendant went to the pumphouse and to the land around it to see what was there to be seen, and did see the pipes above mentioned. He went there because he wanted to know just how the plant was operated, and what it was operated for, and whether it would be so noisy as to be objectionable. It was not then in operation. He also walked all over lot 14 and along the storm drain and looked at the whole property. No evidence was given to show that he knew the direction of the plaintiff's reservoir from the pumphouse, but he testified that before buying he inquired of the people generally about the conditions relating to water and the sufficiency of the supply, and he did not deny knowledge of the position of the reservoir nor of the fact that the water from the well was pumped to the reservoir through a pipe. The force and effect of these circumstances, as proof that the defendant was put upon inquiry concerning the location of the pipe line, was a matter for the determination of the trial court. All that it is necessary for this court to decide is that an inference could reasonably be drawn therefrom that the defendant was thus put on inquiry, and we think that it is sufficient for that purpose. His avowal that he was not aware of it is not conclusive, for the trial court may not have credited him on that point.

The finding merely states that he had knowledge of facts and circumstances sufficient to put a prudent man on inquiry as to the existence of the easement and right of way, and that by prosecuting such inquiry he might have learned of the existence thereof. Complaint is made that this finding does not set forth the particular facts and circumstances referred to. We do not think that this was necessary. The finding of the fact that plaintiff was put on inquiry sufficiently charges him with notice of the easement.

The evidence of the parol agreement be-

tween McNally and plaintiff was admissible for the purpose of showing that plaintiff held the equitable title to the easement prior to McNally's conveyance thereof.

On the question whether or not the court intended to charge the defendant with punitive damages, the finding is somewhat ambiguous; but we do not think the ambiguity is material. The complaint averred a malicious injury, and the evidence was sufficient to show that defendant, in pursuance of a willful intention so to do, did inflict unnecessary injury to the pipe at the time he removed a part of it. We find no error in the record.

The judgment and order are affirmed.

SLOSS, J. I concur.

ANGELOTTI, J. (concurring). I do not believe that it should be held that the record of the deed from McNally to plaintiff was constructive notice to defendant of the right of plaintiff to an easement which was not visible, unless he had actual knowledge of the existence of the easement, or notice of the facts and circumstances sufficient to put him on inquiry. As I understand the opinion, however, the decision on this point is put entirely on the ground that the evidence is sufficient to sustain the finding of the trial court that the defendant had actual notice of facts and circumstances sufficient to put him on inquiry as to the pipe line and right of way. Although the evidence as shown by the printed record is, to my mind, not entirely satisfactory to this effect, I do not think it can be held that there was not enough therein to support the conclusion of the trial court.

I therefore concur.

8 Cal. App. 244

MARRON v. SAN DIEGO COUNTY.
(Civ. 477.)

(Court of Appeal, Second District, California.
May 13, 1908.)

COUNTIES — CLAIMS — DISALLOWANCE — ACTIONS.

Under the county government act of 1897, (St. 1897, p. 471, c. 277, § 42), providing for an allowance by the supervisors, and that if the claimant is unwilling to receive the amount allowed in full payment, claim may again be considered at the next regular session of the board, and section 43, providing that a claimant dissatisfied with the rejection of his claim, or with the amount allowed, may sue the county within six months after the final action of the board, where the board allows a portion of the claim presented and rejects the remainder, it is necessary that the claim be again presented at the next regular session, and a suit brought without such second presentation is premature, though the particular items rejected all relate to one class of items.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Silvestre Marron against the county of San Diego. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Wade McDonald, for appellant. U. S. Webb, Atty. Gen., L. R. Kirby, Dist. Atty., and H. S. Utley, Dep. Dist. Atty., for respondent.

TAGGART, J. This is an appeal from a judgment of the superior court of San Diego county, in an action brought for the purpose of determining the validity of certain fees, charged by the constable and justice of the peace of San Luis Rey township in that county, for the arrest of "brake-beam tourists" upon charges of "fraudulently evading the payment of railroad fare." The board of supervisors rejected all items of plaintiff's bill based upon arrests made upon such charges; and, the matter being submitted to the superior court upon an agreed statement of the case, judgment was for the defendant, and plaintiff appeals.

It appears from the complaint that plaintiff presented four causes of action, two for his own fees as constable, and two for the fees of the justice of the peace, which had been assigned to him. His own bills are alleged to have been: For January, 1907, official services rendered for defendant in serving process, transporting and feeding prisoners, etc., "aggregating in value" \$84.35; for February, for the same kind of services, "aggregating in value" \$74.70. The justice of the peace's official services for January are alleged to have aggregated \$81, and those for February \$66; and the prayer is for the aggregate of all these sums, to wit, \$306.05. It is alleged that, of the January bill of plaintiff, items amounting to \$10.25 were allowed, and \$74.10 were rejected; of his February bill \$47.85 were allowed, and \$26.85 rejected; that, of the bills of the justice of the peace, items aggregating \$15 were allowed, and \$66 were rejected, in the January bill, and \$24 allowed and \$42 rejected in the February bill. It is further alleged that all of the items rejected arose out of services rendered in cases in which persons were "charged with fraudulently evading the payment of railroad fare." It is stipulated that the claims against the county, upon which this action is based, were presented to the board of supervisors but once, at which time they were allowed in part, and rejected in part, as above stated, and that they "were never thereafter again presented to said board of supervisors for allowance." In the case of *Arbrios v. San Bernardino*, 110 Cal. 553, 42 Pac. 1080, it was held, in construing sections 43 and 44 of the county government act of 1893 (St. 1893, p. 364, c. 234), that when the board of supervisors allows a portion of the claim presented, and rejects the remainder, it is necessary that the claim be again presented at the next regular session of the board, and that the claimant indicate his unwillingness to accept the amount allowed, in order that he may maintain an action against the county, and that a suit brought without such second presentation is prema-

ture. Sections 42 and 43 of the county government act of 1897 (St. 1897, p. 471, c. 277), contain the same provision, and were presumably enacted by the Legislature with the construction given by the court in the *Arbrios* Case in mind. The distinction drawn in the opinion rendered by the Supreme Court in *San Diego v. Riverside*, 125 Cal. 495, 58 Pac. 81, between cases in which the entire claim was rejected on the first demand and claims such as the one under consideration in the *Arbrios* Case strengthens, rather than weakens, the latter case as an authority. The rule is again recognized in *Millard v. Kern County*, 147 Cal. 682, 82 Pac. 329, that if the claim be wholly rejected on the first presentation, it need not be presented the second time. The reason given for the rule laid down in the *Arbrios* Case, is inapplicable to, as well as unaffected by, the other two cases mentioned. On the authority of the *Arbrios* Case the judgment of the superior court, in favor of the defendant, should be sustained. That the particular items rejected all relate to one class of cases does not affect the rule. If a part of the claim be allowed, and a part rejected, the court will not inquire into the reason for the disallowance in applying the rule. Until there has been a second presentation there has been no such final action as the statute requires in order that the claimant may sue the county. This view renders it unnecessary to pass upon the validity of the items rejected by the board of supervisors.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 290

BORT v. QUADT. (Civ. 491.)

(Court of Appeal, First District, California.
May 27, 1908. Rehearing Denied by
Supreme Court July 24, 1908.)

1. PLEADING—DEMURRER—ADMISSIONS BY DEMURRER—ROPE AS APPLIANCE IN ITSELF.

A servant was injured from the collapse of staging resulting from a defective rope from which it was slung. Plaintiff alleged that the rope was an appliance used and necessary in the work. *Held*, that on demurrer the rope must be considered as an appliance in itself, so that the petition stated a cause of action, notwithstanding the staging was rigged by the servants themselves from material furnished by the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525-534.]

2. MASTER AND SERVANT—DUTY OF MASTER—SAFE APPLIANCES—APPLIANCES CONSTRUCTED BY SERVANT—MATERIAL FURNISHED AS APPLIANCE IN ITSELF.

It is the duty of the master to provide reasonably safe and suitable appliances and to keep them in a proper condition, and this duty cannot be delegated so as to shift the responsibility, and while the master is not liable for any neglect of the servant in constructing appliances from material furnished by the master, if a rope furnished for the rigging of staging is in itself an appliance and is unsafe, the master is not

released from liability, notwithstanding the servant assisted in rigging the staging.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

3. SAME—"APPLIANCE"—ROPE.

A rope furnished by a master for servants to use in rigging staging held not an appliance in itself, in view of the circumstances, notwithstanding a rope may be an appliance under some circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 455; vol. 8, p. 7578.]

4. SAME—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a judgment for injuries to a servant on the theory that defendant did not furnish sufficient material for the rigging of a safe staging on which to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 958-968.]

5. WORDS AND PHRASES—"FALL."

A "fall," as used in connection with a painter's staging to raise and lower it, consists of four ropes inserted in pulleys, which ropes are attached to a ladder and run from it to the building, where they are connected with a sling by a block and tackle.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. A. Bort against John Quadt. From a judgment for plaintiff and a denial of a new trial, defendant appeals. Affirmed.

G. H. Perry and Pippy & Bahrs, for appellant. Robert P. Troy, for respondent.

KERRIGAN, J. This is an action for personal injuries suffered by plaintiff, alleged to have been caused by the negligence of the defendant. The case was tried by a jury, which found for plaintiff, and judgment was accordingly entered. The defendant appeals from the judgment and from an order denying his motion for a new trial.

At the time of the accident the plaintiff was in the employ of the defendant as a journeyman painter, and was engaged with others in painting the Palace Hotel in San Francisco. On November 9, 1904, the second day of his employment, a staging on which he was suspended collapsed and fell to the sidewalk from a height of about 40 feet, whereby plaintiff sustained serious personal injuries, crippling him for life. The cause of the accident was the breaking of a defective or inadequate sling to which was attached the staging used in painting the hotel. The staging consisted of a ladder, with planks placed upon it, and three "falls." It was known as a "three-fall staging." A "fall" consists of four ropes inserted in pulleys, and these ropes are attached to a ladder, and run from it to the roof of the building, where they are connected with the "sling." The ladder, or platform part of the staging, is raised or lowered with these ropes. There was a "fall" at each end of a ladder, and a third "fall," known as the "middle fall," in the center of the ladder. At the top of each "fall" there was a block and tackle, and this was attached to a "sling" which hung down from the roof about a foot. It was the middle sling that broke.

Appellant interposed a general demurrer to the complaint, which was overruled, and appellant contends that in so ruling the court committed error. The part of the complaint aimed at by the general demurrer reads as follows: "That the said rope which broke as aforesaid was insecure, unsafe, and defective, and the said rope was one of the usual and necessary appliances used and necessary in the work plaintiff was employed to do by said defendant. That the said defendant well knew that said rope which broke as aforesaid was unsafe, insecure, and defective, but that said defendant failed, neglected, and refused to remove the same, and to supply a safe and secure rope in the place and stead thereof. That said injuries so sustained as aforesaid were not sustained through any fault of said plaintiff." Counsel for appellant say: That the component parts of a painter's scaffolding are not appliances furnished by the employer to the employes with which they are to do their work; that the only duty the appellant owed the workmen was to furnish them with adequate and sufficient materials from which to construct the necessary scaffolding. To maintain this view they cite a number of cases, in each of which the evidence on the trial clearly showed that the appliance was constructed by the servant himself, or by himself and fellow servants, from materials furnished by the employer. In such a case the rule is well settled that the master is not liable for any neglect in the preparation of the appliance. *Noyes v. Wood*, 102 Cal. 392, 36 Pac. 766; *Leishman v. Union Iron Works*, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. (N. S.) 500, 113 Am. St. Rep. 243; *Callan v. Bull*, 113 Cal. 603, 45 Pac. 1017. In the last case it is said: "The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or mill or a factory, and when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." The case at bar, however, does not come within the rule contended for by appellant and laid down in those cases, for it is alleged in the complaint that the rope which broke was itself an appliance, and regarding it as such—which, of course, we must do on demurrer—it was the duty of the master to see that it was a rea-

sonably safe and suitable appliance, and to keep it in a safe and proper condition; and, furthermore, this was a duty which he could not delegate so as to shift the responsibility to any agent or servant. *Wall v. Marshutz & Cantrell*, 138 Cal. 522, 71 Pac. 692. That a rope, under some circumstances, may be an appliance, see *Silveira v. Iverson*, 125 Cal. 266, 57 Pac. 996; *Id.*, 128 Cal. 187, 60 Pac. 687; *Manning v. App. Consolidated Mining Co.*, 149 Cal. 35, 84 Pac. 657; 20 Am. & Eng. Ency. of Law, p. 84. It follows that the complaint states a cause of action, and that the demurrer thereto was properly overruled.

We shall refrain from reviewing the evidence in this case. If we felt called upon to do so, unnecessary labor would be devolved upon the court, for the transcript was compiled in utter disregard of that part of section 661 of the Code of Civil Procedure which requires that the statement or bill of exceptions shall contain only so much of the evidence as may be necessary to explain the grounds of the appeal. It is sufficient to say that we lean to the view that under all the circumstances of this case the rope which broke was not an appliance, as contended by respondent, but that it was a part of a stock of materials from which the appliance (scaffolding) was to be constructed. Consequently, if sufficient materials were furnished by appellant out of which the employes could have constructed a safe scaffolding, the appellant performed his full duty; but there is sufficient evidence in the record to show that in this respect the appellant failed. The foreman, Peterson, who was employed after the scaffolding was built and adjusted, testified concerning it in part as follows: "I told him (appellant) that I would not go up on the staging and do my work; that the staging was rotten and so on, and that it would not hold anybody. He said, 'That staging is all right,' and I said it was not. I had a little fuss in the street with the defendant, and he said: 'Go up and strengthen it.' I took all of the rope I had to strengthen the two end falls, and I did not pay any attention to the middle fall, and there is where it happened. I tried to get down to the middle fall, but the rope was not long enough. The rope did not reach the middle fall. I tried to put the rope on the middle fall to put extra strength in it." On cross-examination he made it plain that he did not at this time strengthen the middle fall because he had no more rope. It is true that new rope was sent by appellant to the building the next day, which was several days before the accident; but the foreman was instructed not to use it on the scaffolding in question until, in the usual progress of the work, it reached the ground. In reference to these matters he testified on cross-examination as follows: "Q. He then asked you to strengthen it? A.

Yes, sir; he did, and I did the best I could with the ropes I had. Q. You could not fix the center sling? A. No, sir; the rope was too short to get there. Q. Did you tell the defendant when you went down that the rope was too short to fix the center sling? A. Yes, sir; I told him. Q. When you returned to the defendant after fixing the two side slings, what did you say to him about the center sling, if anything? A. I told him I had strengthened the two end falls, and there was not enough rope to go to the center. He said: 'It was all right any way, without strengthening. It is all right.' Q. What instructions did he give you in regard to the use of the new rope which was brought there? Where did he tell you to use the new rope? He told me to place it when the staging came down, and to keep on rigging ahead. Q. He told you to place the new rope on the next staging? A. For the next staging so soon as it came down, to have it ready. * * * Q. And he told you that day that the next day he would send out all the ropes you wanted? A. Yes, sir; after the staging was lowered down. Q. And were there not a great many ropes delivered to the job the next day? A. Yes, sir; they were not intended for the first staging, but for the next. Q. You spoke of the first staging when you told the defendant there were no more ropes there? A. Yes, sir. Q. And he told you that the next day there would be a whole lot of ropes delivered? A. Yes. Q. As a matter of fact there were a whole lot of ropes delivered the next day? A. Yes, sir; plenty. Q. Three or four days before the accident? A. Yes, sir. Q. Did you do anything or take any of those ropes to strengthen that middle fall? A. There is no way of strengthening the ropes except to lower the staging to the ground and strengthen it and rig it over. Q. You were the foreman of the job there? A. Yes, sir. Q. Why did you not lower down the staging then and strengthen that fall? A. The defendant told me: 'You are my foreman. I am the boss.' He said: 'You go by my advice.' And I did." As soon as the appellant arrived at the scene of the accident, and his foreman, Peterson, told him what had happened, the appellant said to him: "For Christ sake go and hide the rope. Go up, Jake, for Christ sake, just as soon as you can." It will be observed that the witness speaks of having failed to strengthen the middle "fall" because there was not enough rope on hand, while in fact it was not the "fall" but the "sling" that broke; but later on in his testimony he makes it somewhat plain that in saying "fall" he meant "sling."

We have carefully examined the alleged errors as to giving, refusing, and modifying instructions, and find no occasion for discussing them in detail. The instructions as a whole gave the jury a full and fair state-

ment of the law pertaining to every phase of the case.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

to a suit who becomes a party is the person who is served.

5. JUDGMENT—NAME OF DEFENDANT—MISNOMER—CONCLUSIVENESS.

A judgment is binding on the party served, though he may have been sued or served by a false or fictitious name, under the rule that a party regularly served with summons, though under a name not his own, must appear and plead the misnomer and defend the action on pain of being concluded by the judgment.

6. SAME—DIFFERENT NAME.

It must be shown by a party relying on a judgment that the person served is the same as the person against whom it is sought to enforce the judgment; the presumption being that different names designate different persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1819.]

7. SAME.

Plaintiff, M. S. Brum, was sued on a note as Manuel S. de Brum. Summons was regularly served on plaintiff, but he made no appearance and permitted judgment to be rendered against Manuel S. de Brum, though plaintiff had a complete defense thereto. *Held*, that such names would either be regarded as *prima facie* the names of different persons, or as *idem sonans*, and hence, in either event, plaintiff could not enjoin the enforcement of the judgment, since, in the latter event, he would be bound by it, and, in the former, any sale of plaintiff's property under the judgment would be void on its face and would not therefore be enjoined.

8. SAME.

Where plaintiff's neglect to appear and defend a summons and complaint duly served on him was not due to any imposition or fraud on the part of the adverse party, and there was no showing of mistake, surprise, or other equitable ground excusing his default, plaintiff cannot be relieved from the judgment rendered against him because he would have had a defense to the original suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 270.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Suit by M. S. Brum against E. C. Ivins and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Albert Nelson, for appellants. William Mallagh and R. V. Bouldin, for respondent.

SLOSS, J. This action was brought in the superior court of San Luis Obispo county to restrain the sheriff of said county and his deputies from levying a certain execution upon plaintiff's real estate.

On October 10, 1904, one Blumenthal commenced an action in the justice's court of the city and county of San Francisco against Manuel S. de Brum to recover \$60, with interest, alleged to be due on a promissory note made and delivered by Manuel S. de Brum to Dr. Meyers & Co., or order, and assigned to Blumenthal. The note, as set forth in the complaint, was by its terms payable at San Francisco. Summons was issued and was regularly served on M. S. Brum, the plaintiff in this action. He made no appearance in the suit in the justice's court, and judgment went in that court by default in favor of Blumenthal, and against the defendant nam-

154 Cal. 17

BRUM v. IVINS et al. (L. A. 2,022.)
(Supreme Court of California. July 3, 1908.)

1. JUSTICES OF THE PEACE—JURISDICTION—PERFORMANCE OF CONTRACT.

Where defendant, a resident of San Luis Obispo county, was alleged to have executed a note sued on payable in the city and county of San Francisco, a justice court in San Francisco had jurisdiction of the subject-matter of the action, under the express provisions of Code Civ. Proc. § 832, subd. 7.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 235.]

2. SAME—JURISDICTION OF PERSON.

Such justice acquired jurisdiction of defendant's person by the service of a summons on him.

3. JUDGMENT — CONCLUSIVENESS — PERSON SERVED.

A judgment in favor of plaintiff necessarily establishes his right to relief given against the person served.

4. PROCESS—SERVICE—IDENTITY OF PERSON.

While identity of names raises merely a presumption of identity of person, the only individual of the name used to designate a party

ed in the complaint. Thereupon an execution was duly issued to the sheriff of San Luis Obispo county (defendant herein) and placed in his hands, with instructions to levy on the real property of plaintiff in this action. The court found, following the allegations of the complaint, that plaintiff had never had any dealings with Dr. Meyers & Co., that he had never executed the promissory note sued on in the justice's court, and that he had never been indebted to Dr. Meyers & Co. It further found that plaintiff's full name is Manuel S. Brum, that he always signs "M. S. Brum," and has never signed his name to any instrument as "Manuel S. de Brum." The findings state that plaintiff did not appear in the action in the justice's court because he "had signed no promissory note in said case or made any contract with Dr. Meyers & Co." On these facts the court gave judgment restraining the defendants from levying execution against the plaintiff's property. The defendants appeal.

The respondent necessarily rests his claim to relief upon the fact that the complaint, summons, and judgment in the justice's court named the defendant there as "Manuel S. de Brum," while the plaintiff here, whose property is sought to be taken in satisfaction of that judgment, is named "Manuel S. Brum." If the action in the justice's court had proceeded against Manuel S. Brum, it could hardly be contended that a person bearing that name could, after being duly served with summons and permitting judgment to go against him by default, maintain a proceeding to enjoin the execution of the judgment upon the mere ground that he was not in fact liable on the obligation which formed the basis of the former judgment. The justice's court had jurisdiction of the subject-matter of the action (Code Civ. Proc. § 832), and by the service of summons on the defendant named would, in the case supposed, have secured jurisdiction of his person. "A judgment in favor of the plaintiff necessarily establishes his right to the relief given against the person served." Van Fleet on Coll. Att. § 367. While identity of names raises merely a presumption of identity of person, and there may be many persons bearing the name designated as that of the defendant in the proceeding, the only individual of that name who becomes a party to the suit is the one who is served. If he is not liable upon the cause of action set up, he has his opportunity to assert that defense when he is, by service brought into the action. Failing to do so, he cannot, after judgment has gone against him, resist its enforcement on the ground that he, although named in the proceedings and served, was not the party intended to be served. "The cases all agree on this point." Van Fleet on Coll. Att., supra.

Here the name of the person designated as defendant in the justice's court action differed somewhat from the name of this plaintiff. The weight of authority is to the effect that

a judgment is binding upon the party served, even though he may have been sued or served by a false or fictitious name; that a party regularly served with summons, although under a name not his own, must come in and set up the misnomer and whatever defense he may have, or else be held concluded by the judgment. 1 Freeman on Judgments (4th Ed.) § 50a; Van Fleet on Coll. Att. § 356; Foshier v. Narver, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874; Bloomfield R. R. Co. v. Burress, 82 Ind. 83; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Guinard v. Heysinger, 15 Ill. 288. It must be shown by the party relying on the judgment that the person served is the same as the person against whom it is sought to enforce the judgment. The presumption is that different names designate different persons. Thus, it has been held in this court that where the defendant had been sued and served by the name George N. Mott, and had defaulted, the judgment entered could not, on plaintiff's motion and without notice to defendant, be amended by altering the name "George" to "Gordon." The court said that there was no proof in the record that George and Gordon were the same person, and "prima facie two different names must be held to signify two different persons." McNally v. Mott, 3 Cal. 235. See, also, Sutter v. Cox, 6 Cal. 415; Houghton v. Tibbets, 126 Cal. 57, 58 Pac. 318. But if on proper proceedings it is shown that a person was served with process in an action brought against him, the judgment will bind him, although he may have been wrongly named. The cases last above cited involved substantial differences in names. There are cases of slight errors in spelling, which do not destroy the virtual identity of name (*idem sonans*). Such errors are disregarded entirely. For example, in Seaver v. Fitzgerald, 23 Cal. 85, it was held that a valid judgment against D. C. Seaver could be based on a publication of summons designating the defendant as D. C. Seavers. "The names," said the court, "are substantially the same."

This case must fall, so far as the variation of names is concerned, in the class of cases like McNally v. Mott, or in that represented by Seaver v. Fitzgerald; that is to say, the names Manuel S. Brum and Manuel S. de Brum must be regarded either as *prima facie* the names of different persons or as substantially the same. In either view the respondent was not entitled to the relief here sought and granted. If the name of the person against whom the judgment and execution ran is not the name of plaintiff, a purchaser under execution sale could not recover possession or establish title against plaintiff without allegation and proof that the plaintiff, although designated by a wrong name in the proceedings leading to the execution, was, in fact, the party who had been sued. If such showing could be made, the plaintiff would be bound by the judgment, and would

have no ground for relief against its enforcement. If it could not be, the execution would afford no authority for selling plaintiff's property. On the face of the proceedings, the sale of plaintiff's property would appear to have been made on an execution against another person. Such sale would be *prima facie* void. It would cast no cloud on plaintiff's title, and should not therefore be enjoined. *Rom. Cath. Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Russ, etc., Co. v. Crichton*, 117 Cal. 695, 49 Pac. 1043.

On the other hand, if there be no substantial difference between the names *Manuel S. Brum* and *Manuel S. de Brum*, we have the case, hereinabove supposed, of an action by a party regularly sued and served to enjoin the enforcement of a judgment rendered by a court having jurisdiction of the subject-matter and of the parties. A court of equity is asked to interfere on behalf of a judgment debtor who claims that he had a meritorious defense to the original action, but failed to set up that defense. His neglect to appear in the justice's court and deny the averments of the complaint which had been served upon him was not due to any imposition or fraud on the part of the adverse party, nor is there a showing of mistake, surprise, or other equitable ground excusing the failure to defend. Nothing is better settled than the rule that a defendant who, under such circumstances, fails to defend against an action at law, cannot have relief in equity against the judgment in the action, on grounds which would have been a defense to the original suit. 23 Cyc. 1006; *Phelps v. Peabody*, 7 Cal. 50; *Mastick v. Thorp*, 29 Cal. 444; *Agard v. Valencia*, 39 Cal. 292; *Ede v. Hazen*, 61 Cal. 360.

The record discloses no ground for the granting of relief against the execution of the judgment. Upon the facts found, judgment should have gone for the defendants.

The judgment is reversed, with directions to the trial court to enter judgment that plaintiff take nothing by the action, and that the defendants recover their costs.

We concur: SHAW, J.; ANGELLOTTI, J.

154 Cal. 22

HICKS v. POST. (L. A. 2,034.)

(Supreme Court of California. July 3, 1908.)

1. BROKERS — CONTRACTS — CONSTRUCTION — AGREEMENT OF AGENCY.

Plaintiff, the owner of land, entered into a contract with defendant and his partner, by the terms of which defendant and his partner were to sink a well on the land, install a pumping plant, and develop water upon the premises, they to pay all the expenses, and were to subdivide and sell the premises, in consideration of which they were to have the exclusive handling and sale thereof, and the net proceeds of sale of the land and crops raised thereon, after first paying plaintiff the first cost of the lands, were to be divided equally between plaintiff and defendant's firm. Defendant's firm was given the option to make such terms of sale as they might deem proper, subject to certain restric-

tions, and the contract provided that, if the property should not be subdivided and sold by defendant's firm at a sooner date, the contract should remain in force for two years, and for such further time as might be agreed upon at the end of that period. *Held*, that the contract was nothing more than an agreement of agency whereby defendant's firm, in consideration of money and services to be given by them, were given the exclusive right to sell the land for a compensation to be measured by the price realized, and they had no interest, legal or equitable, in the land, at least after the expiration of the time limited by the parties.

2. SAME—OPERATION—TIME AS OF THE ESSENCE OF THE CONTRACT.

Civ. Code, § 1492, providing that where delay in performance is capable of exact compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, etc., is not applicable to a contract under which a broker is given a certain time within which to make a sale; but the broker must perform within the time limited in his contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 68.]

3. SAME—CONTRACT OF EMPLOYMENT—EXTENSION—NECESSITY OF WRITING.

An oral agreement for extension of the contract was an agreement "authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission," and was of no effect because not in writing, as expressly required by Civ. Code, § 1624, subd. 6.

4. ESTOPPEL—MISREPRESENTATIONS.

The mere act of entering into an oral agreement for an extension of the contract, which agreement was required to be in writing, was not such a misrepresentation by plaintiff of a fact not equally within the knowledge of defendant as would estop plaintiff to deny that the contract was lawfully extended, under Code Civ. Proc. § 1962, subd. 3, providing that whenever a person has by his own act intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such act be permitted to falsify it.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Truman B. Hicks against M. E. Post to quiet title to land. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Kemp & Collier, for appellant. Hunsaker & Britt, for respondent.

SLOSS, J. Action to quiet title to a tract of 120 acres of land in Los Angeles county. The defendant answered, claiming ownership of an equitable interest in the land. His claim was based upon the provisions of a written agreement between plaintiff Hicks, on the one hand, and defendant Post and Otis L. Lockhart, doing business as Post & Lockhart on the other. This contract, dated the 3d day of March, 1903, recites that Hicks is the owner in fee simple of the land in controversy, having purchased the same from Post & Lockhart, and that he is desirous of having water developed upon the said property and the same subdivided and sold. By its terms Post & Lockhart agree to proceed at once to sink a well upon the

land and install a pumping plant thereon, and to develop water upon the said premises to the amount of 60 inches or more; they (Post & Lockhart) to pay all of the expense of developing the water and installing the pumping plant. They further agree to attend to all the details of subdividing and selling the said premises in such tracts as may be desired by purchasers, together with a sufficient amount of water for each tract sold, and also to attend to the harvesting of any crops which may be produced upon the premises. In consideration of these covenants, and of the payment by Post & Lockhart of the expenses incurred in the development of the water and installation of the pumping plant, Hicks agrees that Post & Lockhart shall have the exclusive handling, subdividing, and sale of the said premises. It is agreed that out of the net proceeds of sale of the said lands, and of any crops which may be raised upon the said premises during the continuance of the agreement, there shall be paid, first, to Hicks the sum of \$125 an acre (the same being the first cost of the said lands to the said Hicks), and thereafter the net proceeds arising from the sale of said lands, water, and crops shall be equally divided between the said Post & Lockhart, and the said Truman B. Hicks, one-half to each. Post & Lockhart are given the option to make such terms of sale as they shall deem proper, subject to certain restrictions mentioned in the agreement. The final clause of the contract reads as follows: "It is further understood and agreed between the parties hereto that if the said property shall not be subdivided, sold and disposed of by the said parties of the first part (Post & Lockhart) at a sooner date, this contract shall be and remain in full force and effect for two years from the date hereof, and for such further time as may be agreed upon at the end of the said two years." The answer alleges that on February 3, 1904, Lockhart transferred and assigned all his right and interest in the contract to Post, the defendant herein. It is alleged that pursuant to the contract Post entered upon the land and proceeded to sink a well, by means of which he developed 100 inches of water, which was more than the amount specified in the agreement, and that he installed a pumping plant as required; the amount of money expended by him for these purposes amounting to \$3,733.41. It is further alleged that the defendant Post has had the entire control and management of the property, has attended to all the details of seeding and harvesting the crops and marketing the same, and has expended for such purposes in excess of the amount received by him for the crops the sum of \$65.61. He has also, as is averred, spent a large amount of his time and labor in attending to said property. It is averred that prior to March 3, 1905, it was agreed between the plaintiff and the defendant that

the contract of March 3, 1903, should be extended indefinitely, and that the defendant should continue in the possession and exclusive handling and development of the said property, and that the same should thereafter be sold at such price as might be agreed upon between the said plaintiff and defendant, and for such sum as would reimburse the plaintiff for the purchase price of the property, and also reimburse the defendant for the amount of money expended by him in the improvement and development of the property; that pursuant to such extension and agreement the defendant remained in possession of the premises and expended a considerable amount of money in harvesting crops and disposing of the same, and in protecting the said property; that in pursuance of the said agreement defendant took to the said property a great number of prospective purchasers, in the endeavor to find a purchaser for the said property. All of these things are alleged to have been done by the defendant with the full knowledge, consent, and acquiescence of the plaintiff. On March 5, 1906, the plaintiff served upon the defendant a written notice that he, the said plaintiff, elected to declare the agreement of March 3, 1903, at an end, and refused to enter into any agreement for the further continuance thereof. Post refused to recognize Hicks' right to so terminate the agreement. The facts hereinbefore set forth, as alleged in the answer of the defendant Post, were found by the court to be true, with the exception of the allegations concerning the understanding and agreement of the parties that the contract of March 3d should be extended. In this regard the court found that the life or term of the said agreement of March 3, 1903, was not extended or modified as set forth in the answer, or at all. The court found, further, that the plaintiff is the owner in fee of the land, and that defendant has no interest, either legal or equitable, in said property. Judgment in favor of the plaintiff followed. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was commenced after the expiration of the two years specified in the original agreement. Leaving out of consideration, for the moment, any question of the extension of such contract, it is apparent that, at least after the expiration of the time limited by the parties, the defendant had no interest, legal or equitable, in the land. The contract was nothing more than an agreement of agency, by which the plaintiff, as owner of the land, gave to Post & Lockhart, in consideration of moneys to be expended and services to be performed by them, the exclusive right to sell the land for a compensation to be measured by the price realized. The right of Post & Lockhart to compensation and reimbursement was, as is aptly stated by respondent, "not to attach to the lands, but only to one-half of the net

proceeds arising from the sale in the event that a sale should be made during the life of the agreement." There is nothing to indicate that Post & Lockhart were to have any interest in the land. *Heyn v. Philips*, 37 Cal. 529; *Price v. Sturgis*, 44 Cal. 591; *Byers v. Locke*, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212. Nor is there anything in this contract to justify the conclusion that it was intended to create a partnership in the land between the plaintiff Hicks and Post & Lockhart. *Wheeler v. Farmer*, 38 Cal. 203; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147; *Title Insurance & Trust Co. v. Grider* (Cal.) 94 Pac. 601.

On the face of the findings the case is simply one of an agency to sell land, limited to a certain period of time. The agent, in the hope and belief that he will be able to sell the land at a profit within the time, agrees to and does make certain expenditures upon the land. If he is able to make the sales, he will be reimbursed for these expenditures out of the proceeds of the sales. If he fails to make the sales, he loses the expenditures which he has made. This is the element of chance which necessarily inheres in a contract of this character. Appellant's argument that time is not of the essence of a contract, unless it is expressly so declared in the contract (Civ. Code, § 1492), has no application to a contract under which a broker is given a certain time within which to make a sale. The broker must perform the duty assumed by him within the time limited in his contract. *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354. The defendant was under his agreement, entitled to nothing unless he made a sale during the life of the contract, and it is not claimed that he did this during the period originally fixed.

It is argued, however, that the court erred in excluding evidence offered by the defendant to show that the parties had agreed upon an extension of the time fixed in the contract. The only evidence offered in this regard was testimony that there had been an oral agreement between the plaintiff and defendant "that the said contract should be extended indefinitely, and that the defendant should continue in possession of and exclusive handling and development of the property, and that the same should thereafter be sold at such price as might be agreed upon between the said plaintiff and defendant, and for such sum as would reimburse the plaintiff for the amount of money which he had paid for the property, and also reimburse the defendant for the amount of money which had been expended by him in the improvement and development of the same." This evidence was properly excluded. If we have properly construed the writing of March 3, 1903, the agreement for extension was simply one "authorizing or employing

an agent or broker to purchase or sell real estate for compensation or a commission," and was, under our statute, required to be in writing. Civ. Code, § 1624, subd. 6.

There is no force in the argument that Hicks was estopped to deny that the contract continued in force for an indefinite period after the 3d day of March, 1905. The mere act of entering into an oral agreement in a matter concerning which the parties were, by law, required to contract in writing, cannot be regarded as a misrepresentation by Hicks of a fact not equally within the knowledge of Post. Code Civ. Proc. § 1962, subd. 3; *Boggs v. Merced Mining Co.*, 14 Cal. 278. But beyond this, it does not appear that Post was, as respects expenditures on the land, injured in any way by his reliance on the extension. The expenditures so made by him after March 3, 1905, did not equal his receipts from the crops after that date. The fact that, acting under an invalid agreement, he made efforts to find purchasers, cannot, of course, operate to prevent the other party from asserting the invalidity of the contract. To hold the contrary would be to abrogate the statute of frauds. *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *O'Toole v. Dolan*, 129 Cal. 488, 62 Pac. 92.

What we have said in construing the contract between the parties sufficiently answers the contention that plaintiff was bound to "do equity" by repaying to defendant the amounts expended by him.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(153 Cal. 757)

DAUPHINY v. BUHNE. (S. F. 3,540.)

(Supreme Court of California. June 25, 1908.)

1. LIBEL AND SLANDER—PRIVILEGED PUBLICATION—POLITICAL CANDIDATES.

Publication of a false criminal charge concerning a candidate for public office by a member of the community is not privileged, within Civ. Code, § 47, subd. 3, declaring privileged a publication made in a communication without malice to a person interested therein by one who is also interested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 146.]

2. SAME—QUESTION FOR COURT.

When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court whether or not it was privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 362.]

3. TRIAL—INSTRUCTIONS—EVIDENCE.

The facts and circumstances under which an alleged defamatory publication was made being undisputed, and showing it was not privileged, the court, if requested so to do, should instruct that it was not privileged; and, though not so requested, it is error to give an instruction on the theory that there is evidence on which it may be found that it was privileged.

4. LIBEL AND SLANDER—LIBEL PER SE.

An article, charging plaintiff with official corruption, with dishonestly agreeing to accept personal benefits as a consideration for his vote as member of a city council, is libelous on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 91-94.]

5. SAME—INSTRUCTIONS.

The article set out in the complaint being libelous on its face, it is error to refuse to so charge.

6. SAME—DAMAGES—AGGRAVATION—PLEA OF TRUTH.

Where defendant reiterates the alleged libelous charges in the answer, and offers no evidence of their truth, and the jury are satisfied that it is made with a knowledge of its falsity and maliciously and not in good faith, such plea of justification is an aggravation of the wrong, and may, as the jury should be instructed, be considered by them in assessing damages.

7. SAME—INSTRUCTIONS.

The court should not instruct in a libel suit that, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum, as the jury may under such circumstances award much more than the minimum as actual damages.

8. APPEAL AND ERROR—RECORD—POINTING OUT ERRORS.

Where the transcript, embodying a bill of exceptions containing all the evidence, which is lengthy, set out by question and answer, contains no index of where any particular evidence is to be found, and appellant's brief does not indicate where the questions objected to, and the rulings thereon, may be found, but merely sets forth a page of questions objections to which it is claimed were erroneously overruled, the court will not search the transcript to discover whether there was error.

Department 2. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by A. C. Dauphiny against A. H. Buhne. Judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

A. W. Hill, for appellant. Henry L. Ford, L. M. Burnell, and A. J. Monroe, for respondent.

LORIGAN, J. This is an action for libel. In the early part of 1901 plaintiff was a member of the firm of A. C. Dauphiny & Co., doing a general merchandise business in the city of Eureka, and both he and defendant were members of the common council of said city. At that time there was presented to the council petitions by various railroad companies for franchises to operate their roads across the city front of the city. Among these petitioning companies was the California & Northern Railroad Company. Diverse views were held by members of the council as to the terms and conditions upon which these several franchises should be granted, plaintiff opposing for a long time the granting of the franchise to the California & Northern Railroad Company, defendant favoring it. Ultimately this franchise was passed, plaintiff and defendant both voting in favor of it, and it developed from the evidence on the trial that it was concerning the action of plaintiff relative to the passage of the ordi-

nance granting this franchise that the article published by defendant of plaintiff had reference. Subsequently, and in the month of June, 1901, plaintiff and defendant were both candidates for re-election as councilmen from their respective wards in the city of Eureka. They were not opposing candidates, but each openly opposed the re-election of the other. It was during this period that the defendant caused to be published in the Daily Humboldt Standard, a daily newspaper published in the city of Eureka, an article entitled: "From Councilman Buhne of the First Ward," signed in the same way and containing the following: "Now, Mr. Dauphiny * * * did you have the city's interest at heart when, after fighting a certain franchise, you went to the company seeking it, or its representatives, and told them that if they would buy groceries from you, you would vote for the franchise? I know you did this and can prove it, and you voted for the franchise." Plaintiff thereupon brought this action for damages grounded upon the portion of the article just quoted, which was set forth in the complaint, accompanied by proper allegations that it was intended by defendant, and understood by the citizens who read the article, to charge that plaintiff had violated his official oath and been guilty of official corruption; that he had solicited personal benefits and had dishonestly accepted them for the purpose of influencing his official action as a member of the council of the city, and had corruptly bartered and legislated away the rights and privileges of said city, with the further allegation that said article so published was false and malicious. Defendant answered, admitting the publication, and as a first defense averred that it was true, and, as a second defense: "That at the time the defendant published the alleged defamatory article in the Daily Humboldt Standard, to wit, on June 15, 1901, the said plaintiff was the member of the city council from the Fourth Ward, and this defendant was the member of said city council from the First Ward of said city of Eureka. That at the said time, to wit, June 15, 1901, both plaintiff and defendant were candidates for the same offices, to wit, as members of the city council of the city of Eureka to be elected at the general election which was held in the said city of Eureka on or about the 16th of June, 1901. That defendant wrote and published said article, without malice, of and concerning the character and motives of a candidate for a public office, and for the promotion of public interests and public welfare. That this defendant and all other people, citizens and electors of said city of Eureka, were interested in the character and motives of all candidates for public offices and public trusts, which said candidates were seeking at the hands of said electors." The case was tried and a verdict rendered by the jury in favor of the defendant, and from the judgment entered thereon, and from an order denying

his motion for a new trial, plaintiff appeals.

It is insisted on this appeal that the evidence was insufficient to warrant the verdict against plaintiff and that a new trial should have been granted by the lower court on that ground; also, that the court erred in refusing instructions asked by appellant and in giving some requested by the respondent. As a new trial must be had for error as to instructions, it is unnecessary to embarrass future consideration of the case by discussing the sufficiency of the evidence. Different or other evidence may be presented upon the new trial which must be ordered.

It will be observed that two defenses were interposed by defendant: First, a justification on the ground that the charge as published was true; secondly, that the article published by him, under the circumstances alleged, constituted a privileged publication under section 47 of the Civil Code, which relieved him from responsibility to plaintiff. As the jury, while satisfied that the charge published was untrue, might yet have found it to be privileged under the instructions of the court and based their verdict upon that ground, it becomes important to consider the instructions as to the law on that subject. Section 47 of the Civil Code, relating to privileged publications, declares that "A privileged publication is one made * * * (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested, as to afford a reasonable ground for supposing the motive of the communication innocent, or who is requested by the party interested to give the information." The defense of privilege which the defendant pleaded and under the evidence introduced by him sought to sustain was made and offered with a view of bringing the publication within the operation of subdivision 3 of said section. As to the evidence, it was conceded that the plaintiff was a candidate for councilman when this publication was made, and the defendant testified in his own behalf that he entertained no malice against the plaintiff when he caused the charge to be published; that he published the article, as he said, with the intention of stating things concerning plaintiff which he believed to be true, and because he believed the public generally should know what kind of a man the plaintiff was. This was the only evidence upon which the claim of privilege was based. The theory of defendant, both under his pleading and this evidence, was that because the plaintiff was a candidate for public office he had a right, as a member of the community, to call the attention of the public to the character and motives of plaintiff as such candidate; that these were matters in which the public had a direct interest; that under these circumstances, as long as the publication was made without actual malice, and in a belief that the charges were true, it was a privileged publication under the subdivi-

sion of the section referred to, even though, in fact, the charge was false.

The trial court accepted this theory and claim of the defendant, and, upon the assumption that there was evidence which would support a finding by a jury that the publication was privileged, instructed them upon the law as to that subject. The court read to the jury that particular portion of the section of the Civil Code which we have quoted, and, having done so, immediately proceeded further to instruct as follows: "I therefore instruct you that, if you find from the evidence in this cause that the alleged publication was made by the defendant without malice upon a matter in which he was interested to a person or persons who was or were also interested therein or who being interested therein requested him to give such information, then I instruct you that such communication to such person or persons was and is a privileged communication. If you find such to be the fact, then such communication forms no basis for an action, and you will find a verdict for the defendant, unless you can also say that the defendant in making the publication was actuated by malicious motives independent of the mere publication of the article in question." It was error to give this instruction, because there was no evidence in the case at all warranting it. All the evidence relied on by the defendant in support of his claim that the publication was privileged had no tendency to support it. There was no evidence under which this instruction was applicable. It is not the law that a person may assail the character of a candidate for office by charging him with criminal misconduct, and then escape liability on the ground that the charge was made with good intentions and for justifiable ends without malice, and under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication. While the privilege of electors to comment and criticise the acts and conduct of candidates for public places is very large, this privilege must be confined to statements of the truth. There is no privilege of publication under the Code or general law which will exempt one from responsibility for falsehood. The only justification one can make who publishes criminal accusations against a candidate is, when he is called to account, to prove the truth of the accusation. Libel is no more justifiable when published about a candidate for public office than if published of him on any other occasion. His reputation and character are as much entitled to protection against false accusation when he is a candidate for office as at any other time. It is true that, when a person becomes a candidate for a public office, his talents and qualifications for the office to which he aspires may be freely commented on and criticised by any member of the community by publication or otherwise. His faults or his vices, in so far as they may affect his official character,

may be freely discussed. He does not, however, by becoming a candidate, surrender his private character as a subject for false accusation. That character is only put in issue as far as his fitness or qualification for the office he seeks may be affected by it. The public have an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated. Hence publication of the truth, with an honest intention of giving information to the public of a candidate, furnishes no ground for complaint. But it is one thing to publish the truth and quite another to publish falsehoods. The publication of the truth is justifiable, but the publication of a falsehood finds no justification whatever under the law. While facts may be published, falsehoods may not, and he who would justify a charge of specific acts of misconduct against a candidate for office must do so by proof of the truth of the charge or he does not justify at all. The law does not permit the character of those seeking position to be destroyed by libelous charges under any guise of privileged publication. One can justify the publication of a libel against a candidate for office upon privilege, only by proof that the accusation is true. This is the rule unqualifiedly laid down by this court in *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216, where the subject will be found fully discussed.

It may be said, too, while considering this instruction, that, had the plaintiff requested it, it would have been the duty of the court to have instructed the jury that the publication made by the defendant, under the circumstances disclosed by the evidence, was not privileged. When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not. In the case at bar the facts and circumstances under which the alleged libelous publication was made were not disputed. They showed that the publication was not privileged, and, had the court been requested, it should have so instructed the jury. *Carpenter v. Ashley*, 148 Cal. 422, 83 Pac. 444. The fact, however, that no such instruction was asked did not make it any the less error to give the jury an instruction on the theory that there was evidence upon which they might find the publication was privileged when in fact there was none.

It is also insisted by appellant that the court erred in refusing to instruct the jury, as requested by him, that the article set forth in the complaint was libelous on its face. This point is well taken, as the court should have given that instruction. The article charged the plaintiff with official corruption, with dishonestly agreeing to accept personal benefits as a consideration to influence his official acts upon the matter which was before the legislative body of the city of Eureka

of which he was a member. A charge against a public official importing want of integrity or corruption in the discharge of his official duties is actionable of itself. *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Jarman v. Rea*, supra.

The court should have likewise given another instruction asked by plaintiff, but which it refused. This instruction was to the effect that where a defendant reiterates the alleged libelous charges in his answer and offers no evidence to prove their truth, and the jury are satisfied that it is made with a knowledge of its falsity and maliciously and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff and may be considered by the jury in assessing damages. This instruction was correct and should have been given. *Chamberlin v. Vance*, 51 Cal. 75; *Westerfield v. Scripps*, 119 Cal. 611, 51 Pac. 958.

It is further insisted by appellant that one of the instructions given at the request of respondent was erroneous. In that instruction, the court told the jury that "the public are interested in knowing the character of candidates for office; and, while no man can willfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum if the fault itself is not serious, and there should be no reasonable responsibility where there is no malice." This instruction was undoubtedly taken from language used by the court in *Baily v. Kalamazoo Publishing Company*, 40 Mich. 251, 257, where the court was discussing the right to criticise the conduct of a candidate for office and the responsibility therefor. At least, we find the language used there, although inaccurately copied in the instruction as to the latter part of it. In that case the words used are "there should be no unreasonable responsibility where there is not actual malice," instead of "no reasonable responsibility where there is no malice" as the instruction has it. It is always injudicious to take the language of a court in discussing a proposition of law as a correct instruction to be given to a jury. General language is often there used which would be inappropriate as an instruction, and this instruction is an illustration of it. The particularly objectionable part of the instruction is found in the use of the language "it must reduce the damages to a minimum." It is not the province of a trial court to say to a jury: "If an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum." This does not at all follow. Minimum as applied to damages means the least possible amount that may be awarded by a jury, but under the circumstances such as the court referred to in its instruction the jury might award much more than the minimum as actual damages. This is too clear for comment. Of course, as to the rest of the instruction which was incor-

rectly copied, it is hardly worth discussing it, on account of the emasculated condition in which it was given. There could be, however, no necessity or propriety in giving it if it had been correctly copied. What the responsibility should be is a question purely for the jury, to be determined by them under instructions explicitly declaring the rule under which it should be ascertained. There is responsibility for substantive damages—damages for loss of reputation and so forth—even where there is no actual malice in the mind of the accuser when he makes the defamatory charge. There is no necessity on a new trial for giving this instruction at all, even if modified by omitting the objectionable features we have pointed out. As it stood, it only had application to the matter of mitigation of damages, and the rule in that respect, as laid down in other instructions, seems to be full enough, or, at least, is not challenged by appellant as being incorrect in law.

Some alleged errors in rulings upon the admissibility of evidence are claimed to have been committed by the court. The transcript embodies a bill of exceptions containing all the evidence set out by question and answer, is quite lengthy, but the transcript itself does not contain any index of where the testimony of any witness may be found. Neither in the briefs of counsel for appellant is it indicated where, or in what part of the bill, the questions objected to, and the rulings of the court upon them, may be discovered. He contents himself with setting forth in a page or so in his brief a lot of questions which he claims the court erred in overruling his objections to. We are not even enlightened on the subject as to whether the questions were answered or not. It is the duty of counsel to point out specifically where alleged errors, upon which they rely, may be found in the transcript, and if counsel do not see fit to do so, it will be assumed that they have not deemed them of sufficient merit or importance to undertake the task. In any event, under such circumstances, this court will not assume the burden of doing it.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.

(154 Cal. 1)

ALDERSON et al. v. HOUSTON.
(L. A. 2,030.)

(Supreme Court of California. July 1, 1908.)

1. CONTRACTS — CONSTRUCTION — STATUTORY PROVISIONS—LANGUAGE.

Under the express provisions of Civ. Code, § 1644, the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 732-740.]

2. BROKERS — COMPENSATION — TRANSACTION NOT COMPLETED—DEFAULT OF PRINCIPAL—REMOVAL OF INCUMBRANCES FROM PROPERTY —“TAX.”

Where a contract with brokers for the sale of lots required defendant to furnish a certificate of title, showing the property clear of incumbrances, except “* * * taxes assessed, but not due and payable,” defendant was bound to clear the property from all street assessments; the word “tax” being ordinarily used to refer only to taxes assessed for state, county, or city purposes, and not to designate street assessments for public improvements.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886, 7813.]

3. SAME—ESTOPPEL OF PRINCIPAL.

Defendant gave plaintiffs the right to the exclusive sale of certain lots for the period of 18 months, free of all incumbrances, except taxes assessed, but not due and payable. Street assessments became due after the contract was made, and it was optional with defendant to pay them, or by nonpayment to suffer the issuance of 10-year bonds therefor, which were not due and payable except in annual installments. *Held*, that having failed to pay the assessments, defendant was estopped to set up his inability to discharge the liens for the bonds subsequently issued, as an excuse for nonperformance of the contract on his part.

4. SAME—PERFORMANCE BY BROKER PREVENTED BY DEFAULT OF PRINCIPAL—REMEDIES.

A contract giving plaintiffs the exclusive right, for a specified time, to sell a number of lots owned by defendant at a separate price each, and providing that an advance commission of 10 per cent. on the selling price should be paid plaintiffs, and that a commission of \$8,000, less such amounts as were paid as advance commissions, should be paid when all the lots were sold, was an entire one; and the act of defendant, in disabling himself from complying with the terms of the contract requiring certificates of clear title to be given, by suffering the accrual of bond liens for street assessments, thereby preventing plaintiffs from performing their part of the agreement, amounted to a wrongful discharge of plaintiffs as agents, and they were not required to continue making sales and demanding of defendant certificates showing clear title, but were entitled to sue immediately on the breach, and recover the entire damages therefrom.

5. SAME.

Where defendant gave plaintiffs the exclusive right, for 18 months, to sell a number of lots, on commission, agreeing to give with each lot a certificate of clear title, but thereafter allowed street improvement assessment liens to accrue against the lots, and refused to discharge them, and plaintiffs, by reason thereof, lost the sale of several lots for which they had secured purchasers, the subsequent offer of defendant to procure certificates of clear title, accompanied by a condition that he was not to be bound to clear the title, but would do so or not at his pleasure, did not remove the effect of the repudiation of the contract.

6. DAMAGES—PROSPECTIVE LOSSES—LOSS OF PROFITS — COMMISSIONS OF BROKERS — BREACH OF CONTRACT BY PRINCIPAL.

Civ. Code, § 3300, provides that, for breach of an obligation arising from contract, the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. Defendant gave plaintiffs the exclusive right to sell lots at a separate price each, agreeing to pay an advance commission on the selling price, and a further commission, when all the lots were sold, of \$8,000, less the advance commissions, but breached his agreement to furnish a certificate of clear title,

thereby preventing plaintiffs from selling some of the lots. *Held* that, the evidence showing that plaintiff could have sold all the lots but for such breach, they were entitled to recover the agreed commission, less the amounts paid thereon and the amount which they would have had to expend in the future performance of the contract but for such breach.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by G. E. Alderson and another against H. R. Houston. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiffs appeal. Reversed.

Chas. L. Batcheller and Thos. C. Ridgway, for appellants. Russ Avery and Samuel H. French, for respondent.

SHAW, J. The plaintiffs appeal from a judgment, and from an order denying their motion for a new trial.

The complaint states a cause of action for the breach of a contract on the part of defendant, as owner of 43 lots in the city of Los Angeles, empowering the plaintiffs, as real estate brokers, to sell the said lots. The contract is dated May 17, 1904. It declares that the defendant is the owner of 43 lots, describing them, and gives to plaintiffs the right to the exclusive sale thereof for the period of 18 months from its date. It contained the following provision: "All sales are to be made with delivery of certificates of title for each lot as sold or passes title under the terms of this agreement, drawn by the Title Insurance & Trust Co. of Los Angeles, and shall show clear of incumbrances, except building restriction, and such taxes that may be assessed but are not due and payable." It further provided that an advance commission of 10 per cent. on the selling price should be paid to plaintiffs, and that "a commission of \$8,000, less such amounts as are paid in cash as advance commission, being the said 10 per cent., and such discounts as shall have been allowed from list prices to said Alderson shall be paid in cash when all the said lots are sold." The discount mentioned referred to certain discounts, to be allowed on sales of certain lots upon which plaintiffs were to build houses. It was agreed that they should erect on the lots 6 houses within 12 months, and 4 within 15 months, from the date of the contract. Time was made of the essence of the agreement, and it was agreed that any failure of the parties thereto to comply with the terms thereof should forfeit the contract upon 30 days' written notice. The sales of the respective lots were to be made at prices stated in a schedule attached to the contract. It is alleged that the plaintiffs proceeded to place the lots on the market for sale, advertise them in the newspapers, place signboards advertising that the same were for sale by plaintiffs, and in all the usual ways, and in various ways, endeavored to procure purchasers, built houses on several of the lots in pursuance of the terms of the agreement, and made sales of a number of

the lots at the prices agreed upon, for which they received advance commissions and discounts amounting to \$2,320. It is further alleged that certain street assessments, for the improving and opening of streets abutting on the lots, became a lien upon a number of the lots; that the plaintiffs procured purchasers for some of these lots ready, able, and willing to buy the same, and demanded of defendant that he procure a certificate of title showing the same to be free from incumbrances; that thereupon the defendant refused to remove the liens of said assessments from said lots, and refused to furnish the certificates of title, as demanded, and denied his obligation, under the terms of the contract, to clear any lots of the lien of said assessments, whereupon said sales so made by the plaintiffs were prevented and defeated, and the plaintiffs were prevented from performing their part of the contract. It is claimed that, by reason of the conduct of the defendant in preventing the performance of the contract by plaintiffs, the plaintiffs are entitled to recover the damages arising from the breach of the contract, and that this consists of the \$8,000 agreed to be paid as commissions upon the sale of all the lots, less the sums received in advance, as the contract provides, which balance amounts to \$5,680.

The court found that the plaintiffs placed the lots on the market, and advertised them, and made the effort to sell the same as alleged in the complaint, and that they procured purchasers for 12 of the lots not incumbered by assessment liens, for which certificates of title were furnished, and deeds made, to the satisfaction of the purchasers, and upon which the \$2,320 advance commissions and discounts were received by the plaintiffs. The dispute arises concerning lots 13, 16, 54, 55, and 56. As to lots 54 and 55, the court finds that the plaintiffs found purchasers therefor, and that defendant hindered and prevented the sales thereof, but that after February 23, 1905, he did not refuse to clear the title of said lots of the assessment lien, or refuse to furnish the certificate of title provided in the contract, nor insist that the purchasers should pay the assessment, or accept title to the lots subject thereto. As to lot 56, the finding is to the same effect, except that it is found that the defendant did not hinder or prevent the sale thereof. As to lots 13 and 16, the court finds that the plaintiffs found purchasers therefor, but that the defendant did not refuse to furnish clear certificates, nor hinder or prevent the sales. The plaintiffs found purchasers for lots 54 and 55 at the agreed price of \$1,100 each. Under the terms of the contract there was a discount of 25 per cent. upon the price of lot 55, to which the plaintiffs would have been entitled, as part of the commission, if they had made the sale. They would also have been entitled to \$110, as 10 per cent. advance commission on the sale of lot 54, if such sale had been accomplished, making a total of \$385 on the two lots.

The plaintiffs claim that the judgment in

favor of the defendant is not supported by the findings, and that many of the findings are not supported by the evidence. The evidence shows that at the time the contract was made the assessment liens on lots 54, 55, and 56 had not accrued, and that they did not accrue until September 16, 1904. Sales of lots 54, 55, and 56 were made about October 7, 1904. Houston made deeds ready for delivery for lots 54 and 56, conveying title subject to the assessment liens. He was requested, on October 20, 1904, to discharge the liens and furnish clear certificates of title, whereupon he refused to furnish the same, or to make a deed, except upon the condition that the purchasers should pay or assume the liens, stating that the contract did not require him to give title to any of the lots free or clear of assessment liens. The court found that his contention in this respect was untenable, and in this we think the court was correct. The part of the contract above quoted required him to furnish a certificate of title showing the property clear of incumbrances, except building restrictions, and taxes assessed, but not due and payable. While in the broad sense of the term the word "tax" may be construed to include special assessments made to pay for improvements upon streets, or for the opening thereof, yet such is not the ordinary and usual meaning of the word. In construing contracts the words thereof are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. Civ. Code, § 1644. In the ordinary course of business, particularly among real estate dealers, it is well known that the word "taxes" is used to refer to ordinary taxes assessed upon property for state, county, or city purposes, and not to designate street assessments for public improvements. There is nothing to indicate that it was here used in other than its ordinary meaning. By the contract, therefore, the defendant was bound to furnish a certificate of title for each lot, showing that the same was free from all liens, except such state, county, and city taxes as were assessed, but not due or payable. He was, consequently, bound to clear the property from all street assessments, and to furnish certificates accordingly. In this connection, another contention of defendant may be considered. The proceeding for improving the street in question was made under the general street improvement law and the so-called "Bond Act." See Gen. Laws (Pony Ed.) 1906, pp. 1279, 1330; St. 1885, p. 147, c. 153, and amendment thereto; Bond Act, St. 1893, p. 33, c. 21; St. 1899, p. 40, c. 42. At the trial Houston claimed that 10-year bonds had been issued on these assessments, which were not due and payable except in annual installments, and hence that they came within the exception in the contract as taxes "not due and payable." The assessment became a lien on September 16, 1904, the date of issuing and recording the warrant. Section 10, Street Improvement Act, supra. Bonds could

not, in any event, be issued therefor until the expiration of 30 days thereafter, and after the recording of the contractor's return to the warrant. Section 4, Bond Act, supra. In the intervening time the entire assessment on each lot was due and payable. Section 10, supra. It was therefore optional with Houston either to pay the assessments, or by non-payment to suffer the issuance of 10-year bonds therefor. He had, by his contract with plaintiffs, agreed to sell these lots free from such liens, at any time within 18 months from the date of the contract. His conduct, in thus voluntarily permitting them to become incumbered by liens for these bonds which could not be discharged for 10 years, was an act by which he disabled himself from executing his contract according to its terms. The assessments having become due and payable after his contract was made, and he having then had an opportunity to discharge the liens, he would be estopped to set up his inability to discharge the liens for the bonds subsequently issued, as an excuse for nonperformance of the contract on his part.

After his refusal of October 20th to pay the liens, or furnish clear certificates therefor, a correspondence on the subject ensued between plaintiffs and defendant. The plaintiffs steadily insisted that Houston was bound to furnish clear certificates and remove the liens, declared that the sales made would fall through if their demands were not promptly met, and urged immediate action. They also stated that it was useless to try to sell the lots at the schedule prices with the assessment liens upon them, and that, in order to enable them to carry out their contract, they must have the question settled. The defendant steadily persisted in his refusal and in his denial of any obligation to pay the liens or furnish certificates clear of such liens. During this correspondence, and because of the delay in clearing the title, the buyer of lot 54 withdrew his offer, and claimed and obtained a return of his deposit. A certificate of title was ordered for lot 55, but further proceedings upon that sale were delayed by the plaintiffs, because of the existing controversy concerning the assessment liens, they having informed the buyer that the sale was to be made free of incumbrance. The buyer, after some delay, refused to wait longer for the title to be cleared, and withdrew his deposit and offer. Houston was not informed of this sale, nor specifically requested to clear the title thereto. A formal demand for a clear deed and certificate for lot 56 was made on January 20, 1905, and was definitely refused by the defendant on January 24, 1905. On February 23, 1905, the defendant served on plaintiffs a written notice, stating that he had executed and deposited in escrow a deed of lot 56, clear of liens, and that he would thereafter, until he should give written notice to the contrary, execute deeds, and procure certificates of title clear of incumbrance, for all lots sold by the plaintiffs under the con-

tract, but that he contended, and would continue to contend, until he gave written notice otherwise, that he was not bound by the contract to give deeds or procure certificates free from the lien of street assessments, and that he reserved all his rights under the contract; that he did this in order to remove any excuse claimed by plaintiffs for not performing the contract on their part, and to protect himself in case his construction of the contract was finally determined to be wrong, and not as a compromise, or with any concession that his construction of the contract was not correct. The deed referred to in this notice did not on its face purport to convey a clear title, but declared that it was made "subject to all taxes and assessments levied or assessed against the property after the 17th day of May, 1904," which made it subject to the street bond thereon, amounting to \$483.40. He had, however, deposited with the deed his check to the city treasurer for the amount of the bond, with instructions to the escrow holder to deliver the check to the city treasurer when the deed was taken up. The holder of the bond had agreed to accept full payment in that way, and cancel the bond, but plaintiffs were not informed of that fact until the trial of the cause. The plaintiffs did not accept the propositions made in the notice of February 23d, but replied thereto on March 2, 1905, saying that it came too late, that they had been prevented from making sales by his delay and refusal to conform to the contract, and that unless he would give a reasonable extension of time for the performance of the contract by them, and would agree thereafter to pay or remove all street assessment liens as the lots were sold, they would insist on their rights and damages for his breach of the contract. To this Houston replied, on March 4th and 15th, in writing, reaffirming all that he said in his notice on February 23d, and stating that, while no legal or moral reason existed for so doing, yet he would and did extend the time limit of the contract 4 additional months, but that he would not agree to abide by the contract, except as stated in said notice. This offer to extend the time was not accepted on the terms proposed, and on May 8, 1905, it was withdrawn. The plaintiffs did not take up the deed for lot 56 in pursuance of the offer of February 23d, and about the 1st of June, 1905, they began the present action.

Although the contract in question provides for the sale of 43 lots, at a separate price for each lot, yet in view of its provisions with respect to the payment of the \$8,000 commissions, it must be considered as an entire contract. The total price of all the lots, according to the schedule prices, was \$47,275. The \$8,000 commissions provided for was evidently not calculated upon any percentage of the prices fixed. By the terms of the contract, if plaintiffs failed to make a sale of all the lots, they would receive nothing, excepting these advance commissions and discounts,

which would not amount to \$8,000. It is similar, in this respect, to the contract considered in *Cox v. McLaughlin*, 44 Cal. 18. There a contractor agreed to grade and construct a section of a railroad at a fixed sum for the entire work, to be paid, from time to time, in installments as the work progressed, and it was held that the contract was entire, and that the provision for payments, from time to time as the work progressed, did not make it severable. In the present case the plaintiffs are not entitled to anything, except the advance commissions and discounts, until the entire contract is performed, and there is no scale furnished by the contract whereby the whole amount they are entitled to for each lot can be apportioned. See, also, the following authorities: *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Potter v. Potter*, 43 Or. 154, 72 Pac. 704; *Horseman v. Horseman*, 43 Or. 94, 72 Pac. 698; 2 *Parsons on Contracts*, 519; 3 *Page on Contracts*, §§ 1484, 1487, 1493. The contract made plaintiffs agents of defendant to sell all the lots for the agreed commission, at the agreed price, upon the terms fixed thereby, and within the time limited. The conduct of the defendant in repudiating his own obligation to perform, in refusing to perform a material part of the contract, and in disabling himself from performance by suffering the accrual of bond liens, which could not be removed, except with the consent of the bondholder, prevented the plaintiffs from performing their part of the contract as its terms provided. It amounted to a wrongful discharge of plaintiffs as agents. It was a breach of a material part of an entire contract. "The first breach by the defendant was a breach of the whole, and discharged the plaintiffs from performance of any conditions on his part." *Haskell v. McHenry*, 4 Cal. 411. "Plaintiffs were entitled to sue upon the breach immediately, and recover the entire damage resulting from it, without waiting for the time for full performance to elapse." *Hale v. Trout*, 35 Cal. 242. They were not required to go on making sales and demanding certificates showing clear title. *Id.* The law is well and succinctly stated in *Clark & Skyles on Agency* (section 365, p. 826) as follows: "The agent has the election of two remedies by which he may obtain the redress for the wrongful discharge: (1) He may treat the contract as rescinded, and sue at once, on a quantum meruit, for the service actually rendered by him prior to the revocation and notice thereof; or (2) he may treat the contract of employment as continuing, though broken by the principal, and sue on the breach, for damages. In the latter case he may either sue for damages at once upon the breach of the contract, or wait until the expiration of the time of service fixed by the contract, and then sue for damages." Page 828: "If he elects to treat the contract as continuing, and sues at once for the breach, he is entitled to recover the amount of compensation,

if any, earned by him prior to the breach, and remaining unpaid, and, in addition to this, the probable damages sustained by him by reason of the breach. Such damages are prima facie the whole amount of unearned compensation which he would have earned if allowed to carry out the contract; but the principal may reduce such amount of damage, by showing affirmatively, the burden of proof being on him, that the agent will probably find similar employment during the remainder of the term fixed by the contract." Page 830: "When an agent has notice of his wrongful discharge, it is not necessary that he should tender his service, or keep himself in readiness to perform. * * * All that is necessary is that he was ready and willing to continue in such employment at the time of the discharge."

It is claimed, on behalf of the defendant, that the conduct of the defendant, although contrary to the terms of the contract, did not constitute a sufficient prevention of performance by plaintiffs to justify them in declaring the contract terminated, and suing to recover the entire compensation allowed therein. We think this claim cannot be sustained. The question was elaborately discussed in *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33. After quoting from the decision in *Palm v. O. & M. R. Co.*, 18 Ill. 217, the following passage: "I have examined all the authorities referred to by counsel, and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work, by the positive affirmative act of the other party, or where the other party has neglected to do some act, without which the plaintiff could not, in the nature of things, go on with his contract"—the court proceeds to discuss the question, and in the course of the discussion says: "Stress is laid by counsel upon the words 'prevented from going on.' * * * The same language—I. e., that the party suing must be 'prevented' from performance—has been used in numerous cases; but, wherever the attention of the court has been directly called to the sense in which the word has been used, it has been held, not to mean that there must be physical prevention, but that any acts, conduct, or declarations of the party evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance." After some further discussion the opinion proceeds: "Without further quotation from cases it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other par-

ty, and it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an *effectual* renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. (Italics ours.) As said by Bowen, L. J., in *Johnston v. Milling Co.*, 16 Q. B. Div. 460: 'Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * *

If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases." The court cites and discusses the following cases supporting the proposition: *Hochster v. De Latour*, 20 L. & Eq. 157; *Frost v. Knight* (L. R.) 7 Exch. 111; *Freeth v. Burr* (L. R.) 9 C. P. 208; *Mersey S. & I. Co. v. Naylor*, 9 Q. B. Div. 648; *Roper v. Johnston* (L. R.) 8 C. P. 167; *Ex parte Stapleton* (L. R.) 10 Ch. Div. 586; *Planche v. Colburn*, 8 Bing. 14; *Danube & B. S. R. Co. v. Xenos*, 13 C. B. (N. S.) 825; *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Hosmer v. Wilson*, 7 Mich. 304, 74 Am. Dec. 716; *Derby v. Johnson*, 21 Vt. 21; *Hinckley v. Pittsburgh S. Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Haines v. Tucker*, 50 N. H. 307; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180. The same principle is stated in *De Prosse v. Royal Eagle Co.*, 135 Cal. 411, 67 Pac. 502, where the court says, referring to a repudiation by the defendant of a part of an entire contract: "A repudiation of a part of it was, as to plaintiffs, a repudiation of it all; that is, plaintiffs had the right to consider the breach of this covenant a breach of the entire contract"—quoting with approval the passage from *Haskell v. McHenry*, supra.

The defendant claims that the case falls within the rule stated in *Cox v. McLaughlin*, 54 Cal. 608, and *Cox v. McLaughlin*, 76 Cal.

60, 18 Pac. 100, 9 Am. St. Rep. 164, where it was held that where a contract was entire, and the consideration for the work to be done by plaintiff was to be paid in installments as the work progressed, the mere failure or refusal of the defendant to pay an installment when it became due did not constitute such a prevention of performance as to authorize the plaintiff to sue for the entire contract price without performing all the work, but that it was a sufficient breach to warrant the plaintiff in treating the contract as rescinded, refusing to go on with the work and suing upon a quantum meruit for the value of the work already done. But, as is pointed out in *Porter v. Arrowhead R. Co.*, 100 Cal. 500, 35 Pac. 146, those cases were so decided for the reason and upon the ground that the payment of an installment upon the contract price was not a condition precedent to the doing of the work, and that a breach cannot be a "prevention" of performance by the other party, unless it is a breach of a condition precedent; that is, of something which the defendant must do before the plaintiff can perform. In the case at bar we find that the condition broken by Houston, the part of the contract which he repudiated, was a condition precedent to the performance by plaintiffs. The defendant was to furnish certificates showing clear titles to the satisfaction of buyers. The plaintiffs could not complete the sale of any lot upon the contract terms until this was done. It is not for the defendant to say that purchasers might have been found who were willing to take the lots, and pay or assume the liens in addition to the contract prices, if the plaintiffs had continued to make efforts to that end. The plaintiffs owed him no duty to find such buyers. They had a right to stand upon the contract. The refusal of the defendant to clear the lots of the liens effectually prevented the plaintiffs from completing the making of the sales above mentioned, and also from the performance of their part of the contract.

It is further claimed that, by the offer contained in the notice of February 23, 1905, and the extension of time offered on March 4th, Houston receded from his refusal and from his repudiation of the contract, and removed all excuse for a lack of full performance by plaintiffs. The claim is not tenable. In the first place, the time of performance was limited by the contract to 18 months from its date. During more than 4 months of that time, Houston had repudiated his obligation, and had refused to perform the same, and this delay had, as the evidence shows, prevented the sales of the four lots numbered 13, 16, 54, and 55. As to lots 54 and 55, the court so finds. As to the other two, the evidence shows that plaintiffs had found purchasers ready, able, and willing to buy at the fixed prices, if the title were cleared, but that, because of Houston's repudiation and refusal, they could give no assurance that the title would be cleared, and that, after wait-

ing a long time, during which the hope was held out to them that Houston would ultimately yield his claim, and give a clear title, the buyers became weary, and refused to go on with the purchases. The subsequent offer of Houston did not restore to plaintiffs these buyers, nor destroy the effect of his previous refusal to be bound. In the second place, Houston's offer of February 23d was not a retraction of his previous refusal to be bound. On the contrary, he thereby repeated and reaffirmed his intention not to be bound, and declared that he would thereafter perform the contract or not as he should choose. If plaintiffs had accepted this as a settlement of the dispute, they could no longer give prospective buyers a positive promise of a clear title, or make a positive sale at the fixed prices, but would be compelled to say that both the title and prices were dependent upon the pleasure of Houston, and were not fixed by the contract. The proposition of Houston was a clear repudiation of his obligation. The offered extension of time did not remove the objection. It was accompanied by a condition that Houston had no right to impose, namely, that he was not to be bound to clear the title, but would do so or not at his pleasure. The plaintiffs were not required to accept the offer of extension with that condition annexed. The performance on their part involved the expenditure of money in advertising, and of time and effort to find buyers, and it would be unjust to require them to do this in reliance upon the mere volition of Houston, instead of upon his obligation, to which they had a right. In *Lake Shore, etc., Co. v. Richards*, supra, there was a similar dispute as to the construction of a contract, and a refusal to perform as to a part only. With respect to this the court there said (page 99 of 152 Ill., page 783 of 38 N. E. [30 L. R. A. 33]): "Under the construction of the contract upon which it had acted, and was proposing to continue to act, it was under no obligation to deliver any cars to be transferred by plaintiff's firm, thus absolutely repudiating its contract liability to do so. True, it had not altogether ceased to deliver some cars to be thus transferred, but they were not delivered because of any contract liability to do it, but at their convenience and option." It was held that this did not remove the effect of the repudiation of the obligation.

As the case must be reversed for a new trial, it is proper to discuss the question of the measure of damages. The rule applicable to such breach of contract is stated generally in section 3300 of the Civil Code, whereby the damages allowed are said to be "the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." There are a few cases, involving the future performance of a broken contract, wherein it has been held that the possibility that the plain-

tiff would have been able to perform if he had not been prevented was, from the nature of the undertaking, so remote and speculative that the contract price for full performance could not be allowed as damages. Contracts of agency to sell goods in unlimited quantities on commission have been held to be in this class. *Union R. Co. v. Barton*, 77 Ala. 148; *Brigham v. Carlisle*, 78 Ala. 248, 56 Am. Rep. 28; *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11. These, however, are exceptions. The general rule is thus stated in 1 *Sutherland on Damages* (section 121): "The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur. The jury may proceed upon reasonable probabilities, and accept, as sufficiently proved, those results which, under like circumstances, generally come to pass. It is not, however, to be hence inferred that prospective damages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events. It is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration." As was stated in *Danforth v. Tenn., etc., Co.*, 93 Ala. 614, 11 South. 60: "If profits formed a constituent element of the contract, their loss the natural and proximate result of the breach, and such as was reasonably in the contemplation of the contracting parties, and the amount can be estimated with reasonable certainty, they are recoverable."

There was uncontradicted evidence in the case at bar showing that it was extremely probable that plaintiffs could and would have sold all the lots within the time limited in the contract if the defendant had been willing to clear the title. It was amply sufficient to support a finding to that effect. The court below made no finding on the point, being evidently of the opinion that no finding was required, inasmuch as it concluded that there had been no prevention of performance. The question whether or not the contract could have been performed was a question of fact, to be determined from the evidence, in case the court had concluded that the defendant was liable.

In mitigation of damages the defendant would have been entitled to deduct from the contract price the amount which the plaintiffs would have had to expend in the future performance of the contract, and which they were excused from expending by reason of the defendant's breach and their election to treat the contract as terminated. 1 *Sutherland on Damages*, § 120, p. 340; *U. S. v. Speed*, 75 U. S. 84, 19 L. Ed. 449; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 62, 42 Am. Dec. 38; *McMaster v. State*, 108 N. Y. 556, 15 N. E. 417. The defendant did not introduce any evidence in mitigation of damages.

We are of the opinion that the court erred

in its conclusions of law, first, that the defendant did not prevent the performance by plaintiffs of the contract; and, second, that plaintiffs were not entitled to the agreed commission less the amounts previously paid thereon, and that the motion for new trial should have been granted.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(153 Cal. 796)

BENTLEY v. HURLBURT.

HURLBURT v. BENTLEY.

(L. A. 2,074.)

(Supreme Court of California. July 2, 1908.
Rehearing Denied July 30, 1908.)

1. MUNICIPAL CORPORATIONS—SELLING LOTS—FILING AND RECORDING PLATS.

St. 1893, p. 96, c. 80, as amended by St. 1901, p. 288, c. 124, provides: That when land is laid out in lots for sale the proprietor thereof shall cause a plat of it to be made, and shall acknowledge it; that it shall then be presented to the body having control of streets, which shall indorse thereon what streets offered by it are accepted; that when so indorsed it shall be recorded in the office of the county recorder; that the plat shall not exceed a certain size, and shall be drawn in all details clearly and legibly, and if not so drawn may be refused; that when it is presented to be recorded the recorder shall paste it in a book of maps, and it shall then be deemed recorded; and that one selling or offering to sell a lot "before the plat is made out, acknowledged, filed," as herein provided, shall be guilty of a misdemeanor. Held that, even if a sale of a lot before compliance with the statute would make the contract void, there was a substantial compliance with the statute, where the proprietor made out and acknowledged the plat, and, after taking it to the city engineer and receiving it back from him after he had referred it to the city council, handed it and the recording fee to the recorder, and the recorder did not refuse it, but requested him to take it to the county surveyor, and he did this, and such surveyor sent it to the city surveyor, with a note requiring some corrections, and, after receiving it back with the corrections, delivered it to the recorder for recording; the sale being made after the proprietor had delivered it to the recorder, but before it was returned by the county surveyor; and a "filing" by the proprietor being all that is required of him before making a sale.

2. VENDOR AND PURCHASER—ACTION FOR INSTALLMENTS OF PRICE—DEFENSES—TITLE.

Whether plaintiff, in an action at law by a vendor to recover installments of payments on the contract of sale, not including the final installment, not yet due, has parted with his title to the land, is immaterial; he having performed all the conditions of the contract to be performed by him. Whether he is able to comply with his agreement will for the first time become important when the final installment shall fall due.

3. NEW TRIAL—DENIAL OF MOTION—WAIVER OF EXCESS.

Notwithstanding the judgment is excessive, it is proper to deny a new trial; plaintiff having already filed a waiver of the excess.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 324-329.]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Two actions; one by W. George J. S. Bentley against Burt G. Hurlburt, the other by

said Hurlburt against said Bentley. There was judgment for Bentley, new trial was denied, and Hurlburt appeals. Affirmed.

O. B. Carter, for appellant. Taner, Taft & Odell, for respondent.

SLOSS, J. The two above-entitled actions were, by order of court, consolidated and tried together. Bentley v. Hurlburt is an action to recover installments claimed to be due on 25 contracts for the sale by Bentley to Hurlburt of lots of land in the city of Santa Monica, Los Angeles county. The complaint is in 25 counts or causes of action. The first alleges that on June 19, 1905, the plaintiff sold to defendant lot 4 in block 4 of the Fountain Glen tract, and the defendant agreed to pay therefor the sum of \$350, as follows: Ten dollars at the date of the contract, \$10 on the 19th day of July, 1905, and \$10 on the 19th day of each month thereafter until the whole was paid, with interest on deferred payments. It is alleged that the defendant paid the installments for June, July, August, and September, 1905, but had failed and refused to pay any further amounts of principal or interest. The plaintiff alleges performance of all conditions of the contract to be performed by him to the time of commencing the action. Each of the other counts is in the same form, except that different lots of the same tract and different amounts of purchase price are set forth. The complaint was filed on February 24, 1906, and prayed judgment for \$1,532.25, together with such further sums as might accrue under said contracts before entry of judgment. The answer denies that plaintiff sold to defendant any of the lots, denies that any contract was ever entered into between the parties for the sale of any of such lots, and denies that defendant paid to plaintiff any sums of money, pursuant to the terms of any contract for such sale. The answer also contains a counterclaim, in the form of a common count for money had and received by plaintiff to the defendant's use, in the amount of \$1,090. The action of Hurlburt v. Bentley was in two counts, one setting forth the same cause of action as that contained in the counterclaim just mentioned, and the other a similar claim for \$180, alleged to have been had and received by plaintiff to the use of Mrs. R. E. Kempton; said claim having been assigned to Hurlburt. Bentley's answer to this complaint consisted of denials of the material allegations, and a counterclaim for the sums involved in the first action. There was a further counterclaim for \$510, alleged to be due from Mrs. R. E. Kempton to Bentley on contracts similar to those set up in the action of Bentley v. Hurlburt. The findings of the court were in favor of Bentley, and he recovered judgment for \$2,648.10. From the judgment and an order denying a motion for new trial, Hurlburt appeals.

It is not disputed that the parties did, in fact, sign and deliver writings purporting to

bind them to the terms of the contracts set up in the original complaint. Nor is there any question (except in a particular to be mentioned) regarding the amount paid on these contracts or the amounts due thereon at the time the judgment was entered. The appellant's position is that the contracts were totally void, and that, as a consequence, Bentley cannot enforce them, while, on the contrary, the amounts paid on such void contracts by the proposed vendee may be recovered by him. It is this right to recover payments already made that is asserted in the counterclaim in the first action and the complaint in the second.

The claim of invalidity is based on the provisions of an act entitled "An act requiring the recording of maps of cities, towns, additions to cities or towns, or subdivisions of lands into small lots or tracts for the purposes of sale, and providing a penalty for the selling or offering for sale any lots or tracts in cities, towns, additions to cities, towns, subdivisions, or additions thereto, before such maps are filed and recorded," approved March 9, 1893. St. 1893, p. 96, c. 80. The act reads as follows:

"Section 1. Whenever any city, town, or subdivision of land into lots, or any addition to any city, town, or such subdivision, shall be laid out into lots for the purposes of sale, the proprietor or proprietors thereof shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing: First—all the parcels of ground within such city, town, addition, or subdivision, reserved for public purposes, by their boundaries, courses, and extent, whether they be intended for avenues, streets, lanes, alleys, courts, commons, or other public uses; and second—all lots intended for sale, either by number or letter, and their precise length and width.

"Sec. 2. Such map or plat shall be acknowledged by the proprietor, or if any incorporated company, by the chief officer thereof, before some officer authorized by law to take the acknowledgment of conveyances of real estate.

"Sec. 3. The map or plat so made, acknowledged, and certified, shall be filed in the office of the county recorder of the county in which the city, town, addition, or subdivision is situated.

"Sec. 4. Every person who sells, or offers for sale, any lot within any city, town, subdivision, or addition, before the map or plat thereof is made out, acknowledged, filed, as herein provided, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, and not more than five hundred dollars, or by imprisonment in the county jail not to exceed six months, or both such fine and imprisonment."

In 1901 section 3 of the act was amended to read as follows: "Sec. 3. The map or plat so made, acknowledged, and certified

shall be presented to the governing body having control of the streets, roads, alleys, and highways in the territory shown on the map or plat, and said governing body shall indorse thereon which streets, roads, alleys, and highways, offered by said map or plat, they accept on behalf of the public, and thereupon such streets, roads, alleys, and highways, only as have been thus accepted, shall be and become dedicated to public use. When so indorsed, and not before, said map or plat shall be recorded in the office of the county recorder of the county in which the city, town, addition, or subdivision is situated, in a book kept for that purpose. The map or plat shall be no more than thirty-six inches by thirty-six inches in size, and shall be drawn in all details clearly and legibly, and if not so drawn may be refused by the county recorder. When such map or plat is presented to be recorded the county recorder shall paste the same securely in a book of maps, and it shall then be deemed to have been recorded under the provisions of this act." St. 1901, p. 288, c. 124.

The contention of the appellant is that the sale of the lots in question was made in advance of the filing or recording of a map or plat thereof, and that, as such sale was an act to which the law affixed a penalty, it was prohibited and void, and could not be the basis of an action to recover money agreed to be paid under the contract of sale. That the imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and that no recovery can be had on a contract made in violation of statutory prohibition, is doubtless the general rule. Civ. Code, § 1667; *Berka v. Woodward*, 125 Cal. 119, 127, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, and cases cited. The rule is, however, not without exceptions. In *Harris v. Runnels*, 12 How. (U. S.) 79, 13 L. Ed. 901, the Supreme Court of the United States said: "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so." While the statute here under consideration has not been construed by this court, statutes substantially similar have been brought for interpretation before the courts of other states. In a majority of the cases it has been held that a contract of sale made in violation of such a statute was not void, and that the vendor could recover the purchase price in an action on the contract. *Strong v. Darling*, 9 Ohio, 201; *Bemis v. Becker*, 1 Kan. 226; *Pangborn v. Westlake*, 36 Iowa, 546. The contrary was decided in *Downing v. Ringer*, 7 Mo. 585.

It will not be necessary for us to choose between these opposing views, for the reason that we are satisfied that the court below

was justified by the evidence in concluding that Bentley had substantially complied with the statute. The facts, as testified to by respondent's witnesses, were these: A map of the Fountain Glen tract, in which the lots sold were situated, was acknowledged by Bentley on the 27th or the 29th of May, 1905. He took the map to the city engineer, who, after referring it to the city council, returned it to Bentley on June 6th. On June 7th or 8th Bentley went to the office of the county recorder and handed the map and 50 cents to the recorder. The latter looked at the map and told Bentley to take it to the county surveyor's office and leave the 50 cents. Bentley did so. The county surveyor sent the map to the city surveyor of Santa Monica, with a note requiring some corrections. These were made, and the map returned to the county surveyor, who, on July 3, 1905, delivered it to the recorder to be recorded. The sale of the lots in question was made on June 19th, after Bentley had tendered the map, with the fee for recording, to the recorder, but before the map, as corrected, had been returned to the recorder's office. As above stated, we think that these facts showed a compliance, on Bentley's part, with the provisions of the law. Section 3 of the act, as originally enacted, required merely that the map be "filed" in the recorder's office. Under the amended section 3 it must be "recorded," and it is provided that it shall be deemed to be recorded when it has been, by the recorder, pasted securely in book of maps. Section 4 of the act, the section imposing the penalty, does not use the word "recorded." It defines as a misdemeanor the selling or offering for sale of lots "before the map or plat thereof is made out, acknowledged, filed." Under the original act the proprietor of the land had unquestionably done all that was required as a prerequisite to selling lots when he had tendered a proper map, together with the legal fee, to the recorder for filing. The amendment to section 3, requiring a certain method of recording, did not enlarge the terms of section 4 which made it a misdemeanor to sell, or offer for sale, before the map was "filed." The new section 3 refers to two acts—the presentation of the map for recording, and the pasting in a book. The former, which is to be performed by the party who seeks to have the map recorded, may well be called a "filing." The latter, which is the act of the recorder, is by the act itself defined as a recording. We think the reasonable construction of the act, as amended, is that it prohibits the sale or offering for sale of certain classes of lots before a map, made, acknowledged, certified, and indorsed as specified in the law, shall have been presented to the recorder to be recorded. The "proprietor" of the land has then done all that the law imposes upon him, and a delay on the part of the recorder in performing the ministerial duty of pasting the map in a book will not affect the right of the owner to make

a sale, or render such sale criminal. Here the owner, Bentley, had so presented the map to be recorded. The recorder did not refuse it, as, under section 3, he was authorized to do if the map was not drawn "clearly and legibly," or was not of the required size. What he did was to request Bentley to take the map to the county surveyor. The law did not authorize him to make an approval by the county surveyor a condition precedent to the receiving of the map. If it was "not more than 36 inches by 36 inches in size" and was "drawn in all details clearly and legibly," it was the recorder's duty to receive and record it. Bentley, in taking the map to the surveyor, did not withdraw it, and the subsequent recording must be regarded as having been made pursuant to the original presentation of the map on June 7th or 8th. The sale of the lots on June 19th was therefore proper, and the statute affords to Hurlburt no ground for refusing to pay the amounts which he agreed to pay, or for the return of installments paid under the contract.

It is argued by appellant that there can be no recovery on the contract for the reason that there was evidence that Bentley had parted with his title to the land. This evidence was immaterial. The action is one at law to recover money agreed to be paid by defendant. The plaintiff alleges, and there is no denial, that he has performed all the conditions of the contract to be performed by him. Hurlburt was not entitled to a conveyance until payment of the entire purchase price. When the final installment shall fall due, it will for the first time become important to ascertain whether the vendor is able to comply with his agreement to convey a good title.

The judgment, as entered, included \$460.95, the amount due on contracts between Bentley and Mrs. Kempton. It is conceded that this sum could not be recovered in an action against Hurlburt. In the order denying appellant's motion for a new trial it is recited that the judgment is excessive in the sum of \$460.95 and that Bentley has filed a written waiver of said amount. The denial of the motion follows these recitals. This, it is claimed, did not obviate the error in the original judgment. It has, however, long been settled in this state that on a motion for new trial the court may, if the judgment be excessive, make a conditional order denying the motion if the prevailing party will consent to remit the excess and granting it in the absence of such consent. *Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Gillespie v. Jones*, 47 Cal. 259; *Clanton v. Coward*, 67 Cal. 373, 7 Pac. 787; *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315. If, upon such conditional order being made, the consent to the reduction be filed, the usual practice has been to enter an absolute order denying the motion. This is, in effect, what happened in the present case. The fact that the

plaintiff's consent to remit preceded the making of any order on the motion for new trial made it unnecessary for the court to make an order conditional in form, giving the plaintiff a certain time within which to file his consent to the reduction. The consent having already been filed, the court could properly act upon such consent and deny the motion at once.

The transcript contains copies of certain affidavits which are claimed by appellant to show newly discovered evidence, on which a new trial should have been granted. These affidavits are not, however, authenticated by being incorporated in a bill of exceptions (rule 29 of this court [78 Pac. xii]) or otherwise, and they cannot therefore be considered on this appeal. *Melde v. Reynolds*, 120 Cal. 234; *Esert v. Glock*, 137 Cal. 533.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

153 Cal. 735

McCOWEN et al. v. PEW et al. (S. F. 4,670.)

(Supreme Court of California. June 22, 1908.
Rehearing Denied July 22, 1908.)

1. PLEADING—CONSTRUCTION.

Plaintiffs sued to cancel an option to purchase land, and defendants filed a cross-complaint for specific performance of the agreement to convey. Plaintiffs claimed that the contract was void as against public policy. *Held* that, in determining whether the cross-complaint shows the contract to be void, the other pleadings must be considered, although the point of invalidity was based on the allegations of the cross-complaint alone.

2. CONTRACTS—VALIDITY—PUBLIC POLICY—ANNULMENT OF CONTRACT.

Though an agreement involved in a suit is fair between the parties, whenever or wherever it appears in the cause that the consideration and inducement for the agreement were contrary to public policy, the court must annul the agreement, though no objection to its enforcement be raised by either party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 681–722.]

3. RAILROADS—CONSTRUCTION—CONTRACTS—VALIDITY.

Defendants, to secure freight for a railroad to be built by them, took options upon timber lands in the locality through which the line might be built and such freight received, and the owners of the lands, to induce the building of the road over a particular one of four contemplated routes, gave the options at prices representing the full value of the land. *Held*, that the contract was not void as against public policy.

4. SAME.

Plaintiffs sued to cancel an option to purchase timber lands. By cross-complaint defendants asked specific performance of the contract, alleging that the option was taken to obtain freight for a railroad to be built by them, and that it was given at a price representing the full value of the land, to induce the building of the road over a particular one of four contemplated routes. *Held*, on objection that the cross-complaint did not state a cause of action or defense based on a claim that the contract was void as against public policy, that it must be presumed, in the absence of allegations in

the cross-complaint to the contrary, that defendants intended to form a railroad corporation, and that the options were for the benefit of the corporation, and that any inducements operating upon the granting of such options must be taken to have been extended to the contemplated railroad itself.

5. SAME—CONTRACTS FOR LOCATION OF STATIONS, ETC.

An agreement by a railroad company with an individual precluding itself from locating stations, etc., on its road at any other than particular localities, etc., is void, as violating the company's duty to the public to locate and maintain its stations, etc., where the public necessities demand their establishment.

6. SAME.

An agreement of an individual or officer or agent of a railroad company, under an assumption of influence with the company, for a consideration, to secure from the company the location of stations, etc., in a particular locality, or to secure the building of its road by a particular route, is void, as constituting a species of bribery.

7. SAME.

A railway company, in the absence of a law requiring it to select a particular route, having discretion to select the route, may, for a consideration moving to itself and as an inducement thereto, determine as between contesting localities in favor of one as against the others.

8. CONTRACTS—VALIDITY—PUBLIC POLICY.

A contract should not be declared against public policy, unless it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 498-511.]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George McCowen and another against J. W. Pew and others. From a judgment for plaintiffs and from an order denying a new trial, defendant Pew appeals. Reversed and remanded for new trial.

Jesse W. Lilienthal and J. E. Pemberton, for appellant. McNab & Hirsch and D. M. Delmas, for respondents.

LORIGAN, J. This case was here before (McCowen v. Pew, 147 Cal. 299, 81 Pac. 958), and was remanded for a new trial because an incorrect rule of law was applied by the trial court for the measurement of damages.

The action was brought in the superior court of Mendocino county. The complaint alleged that plaintiffs were the owners of about 1,160 acres of land in said county, and on October 16, 1899, entered into an agreement with the defendant J. W. Pew (which agreement is set forth in the complaint), whereby an option was given to the latter to dispose of said property to others, or to purchase said property himself, within one year from the date of the option, at the price of \$15 per acre; that said Pew had not exercised his right under the option within the year given, but still asserted and claimed some rights thereunder. The prayer was for a decree adjudging the agreement to be void and as of no validity and quieting the title of plaintiffs to the property.

The defendant Pew filed an answer; also,

an amended cross-complaint, which was answered by plaintiff. In the amended cross-complaint he alleged the making of the agreement, as set forth in the complaint, granting to him an exclusive option for 12 months to acquire said property from plaintiffs, and then proceeds to further allege: "(4) That in the making of said agreement this defendant was not acting in his own interest and behalf, but for others associated with him, who were to construct the railroad herein-after mentioned, and as to the interest of said persons, although made and taken solely in the name of this defendant, as party of the second part. (5) That at the time said agreement and contract was made, this defendant, and the persons so associated with him, were contemplating and preparing for the building of a railroad from some point on the line of the railway of the San Francisco & North Pacific Railway Company into some portion of Mendocino county, in which timber and wood could be procured in large quantities. That at said time four different locations (or routes) for said proposed railroad were under consideration by them, and it had been determined by them to so build said railroad at some one of the said contemplated locations only, but it had not been decided at which one. That one of the said contemplated locations for said proposed railroad was from Ukiah, northerly to Willits in said county. That the building of said railroad at last-mentioned location would greatly increase the value of the lands hereinbefore described by making the timber thereon accessible to a market, but the building thereof at any one of the other proposed and contemplated locations would not increase the value of these lands. That the selection of a route or location depended largely upon securing options upon timber lands along the line of the proposed railway. That all these facts were well known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs, and causing them to enter into said contract or agreement, was the encouragement and inducement of the building of said railroad from Ukiah to Willits in preference over said other routes. (6) That thereupon and thereafter this defendant, and the persons so associated with him, secured the selection of said route and location for said railroad from Ukiah to Willits in preference to said other routes and locations, and said railroad was thereupon surveyed and laid out and is now in process of construction and being rapidly built and pushed toward completion, and will be built from Ukiah to Willits within a short time; and that the consideration and inducement causing preference to be given to said location thereof was the option given said contract hereinbefore set forth, giving this defendant the privilege of purchasing said land, and similar options in similar contracts regarding other lands adjacent thereto and in that portion of the county, and said options were all taken and

said contracts all entered into solely for the purpose of securing freight for said railroad, and the added valuation that would be given to said lands by the construction of the railroad in excess of the price set in said contracts respectively." Then follows allegations in the amended cross-complaint addressed to the subject of damages with which we are not concerned on this appeal, followed by a prayer for a specific performance of the agreement to convey.

The pleadings thus stood when the cause came on again for trial, after being remanded, as heretofore stated, and the trial court directed that the issues raised by the cross-complaint and answer be first tried. When the cross-complainant proceeded to put in his evidence in support thereof, counsel for plaintiffs objected to the introduction of any evidence in support of it on the ground that the cross-complaint did not state facts sufficient to constitute a cause of action or defense to the action of plaintiffs. The court sustained the objection, dismissed the cross-complaint, and entered judgment in favor of plaintiffs quieting their title as prayed for in their complaint. From this judgment and an order denying their motion for a new trial the cross-complainant Pew appeals, and the only question necessary for consideration is the refusal of the trial court to permit the introduction of any evidence by appellant in support of his cross-complaint.

While the particular ground upon which the trial court based its ruling in that respect is not disclosed by the general objection of respondents interposed upon the offer of appellant on the trial, or from the ruling of the court upon it, it, however, appears from the exhaustive discussion in the briefs on both sides here that the special point made was that from the allegations of the cross-complaint it appeared that the contract sought under that pleading to be specifically enforced was contrary to public policy and void, and hence specific performance of it could not be decreed. The allegations of the cross-complaint upon which this contention was based are those which we have heretofore specially quoted, and particularly those alleging that at the time the agreement granting an option was entered into several routes from some point on the line of the San Francisco & North Pacific Railroad Company into some portion of Mendocino county were in view, including one from Ukiah to Willits; that the inducements and consideration moving from plaintiffs and causing them to enter into said agreement granting an option to cross-complainant was the encouragement and inducement of the building of the said railroad between the last-mentioned points in preference over said other routes; that, having procured the option from plaintiffs, defendant and his associates secured the selection of the route of the railroad from Ukiah to Willits in preference to other locations; and that the consideration and in-

ducement causing preference to be given to said location was the option given in said contract heretofore set forth granting the appellant the privilege of purchasing said land, together with similar options and similar contracts regarding other lands adjacent thereto and in that portion of the county of Mendocino.

To agreements made under such circumstances and upon such considerations and inducements as these allegations show the agreement relative to this option to have been made, it is insisted by respondents that the rule must be applied: That railroad companies are quasi public corporations, in the location of whose lines the public has an interest; that it is the paramount duty of such companies to establish their lines with routes through localities where the wants and necessities of the public shall be best subserved; that the policy of the law is that such companies shall be left to a free and unlimited exercise of their discretion in locating such lines in the interest of public necessities and conveniences; that contracts between a landowner and a company for the establishment of the line of road to subserve and promote the private and pecuniary advantages of those entering into them are in contravention of such policy and void, because the tendency of all such contracts is to sacrifice the public interest to the selfish private advantage of the contracting parties. We make no question about the rule as contended for by respondents, but we are satisfied, taking the allegations of the cross-complaint with the other pleadings in the case, which must be considered for that purpose (although it was on the allegations of the cross-complaint alone that the point of invalidity was based), that it does not appear therefrom that in the granting of the option any restriction or limitation was imposed thereby on Pew and his associates, who contemplated building the railroad, as to the selection of a route, or that the agreement was entered into for the private advantages of the contracting parties, or in disregard of the public interests. As far as the contracting parties are concerned, while not particularly material to a consideration of the proposition involved, it may be said that it was alleged in the cross-complaint that the price of \$15 an acre for the land in question "was reasonably fair and just," and this is admitted in the answer to the cross-complaint to be true. As to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that they were made by the cross-complainant as a foundation for a claim for special damages for the cutting of the timber during the life of the option, and for no other purpose (*McCowen v. Pew*, supra), while the answer to the cross-complaint denies that any such consideration entered at all. But while we mention these matters it must, of course, be conceded that the validity of the contract is

not to be determined from their consideration. Even if, as between the parties, this contract was fair, and the allegations of the cross-complaint appeared to have been made for a purpose aside from raising any question as to the validity of the consideration for it, yet, for whatever purpose said allegations were made, if it appears therefrom that the consideration and inducement for the agreement were such as are contrary to public morality and public policy, it is the duty of the court to annul the contract for that reason "whenever and wherever it might appear in the cause," even though no objection to its enforcement on that ground was raised by either party to it. *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Oscanyan v. Arms Co.*, 103 U. S. 267, 26 L. Ed. 539.

Now to a consideration of the allegations of the cross-complaint, to determine whether in the making of the agreement for the option any rule of public policy was infringed: Preliminary to a consideration of these allegations, it is to be observed, however, that the agreement itself granting the option (the terms of which we have not heretofore particularly referred to) provides for an option in favor of respondent Pew to purchase the 1,160 acres of timber land at \$15 an acre, and recites that the owners (McCowens) "desired to dispose of same and to have the assistance of said party of the second part (Pew) in so doing without cost to the parties of the first part," and declares the consideration for the option to be "for value received, * * * and to induce said party of the second part to undertake the disposition of said land." On the part of Pew, he stipulated "to use his best endeavors to dispose of said property, either by acquiring same or selling same to others," without cost to the McCowens. These are the only provisions of the contract of option itself. There is nothing therein relative to any conditions or stipulations or restrictions as to any route for a contemplated railroad, nor any mention made of a railroad at all. Neither when we come to an examination of the allegations of the cross-complaint do we find anything from which it appears that any agreement was made that in consideration of the granting of the option the selection of any particular route was provided for. As we understand and construe these allegations, it appears therefrom: That Pew and his associates contemplated constructing a railroad through some portion of Mendocino county; that various routes were in contemplation, but no particular one had been decided on when the option in question was obtained; that, with a knowledge that said road was to be built on some route, the option was given by the McCowens as an inducement and encouragement towards the building of the railroad over a route from Ukiah to Willits; that defendant Pew and his associates subsequently secured

the selection of said railroad route between these points in preference to other routes and locations; that the option so given, together with similar options and similar contracts regarding other lands adjacent thereto, was the consideration and inducement causing preference to the building of the route between Ukiah and Willits, and the said options were all taken, and said contract entered into, solely for the purpose of securing freight for said railroad and the added valuation which would be given to said lands in excess of the price stated in said contract by the construction of said road.

It will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, nor, in fact, as far as said allegations are concerned, does it appear therefrom that they undertook to do anything. Neither is it alleged that the route which was selected was materially, or at all, injurious to the public interests, or that any other route would have better subserved any public want or necessity. All that appears is: That Pew and his associates, for the purpose of securing freight for the railroad they contemplated building, took options upon timber lands in the locality through which the line of said road might be built and such freight received; that certain owners of land, as an inducement to the building of the railroad over one of the four contemplated routes, gave an option upon their lands at a price specified in the option representing the full value of the land; and that the only advantage to be secured to the builders of the road (as full value for the land was to be paid) was the obtaining of freight to be carried. A contract made under these circumstances and upon the consideration and inducement disclosed by the cross-complaint is, we are satisfied, when tested by the decisions, in violation of no rule of public policy. In the absence of anything to the contrary in the allegations of the cross-complaint, it must be taken that Pew and his associates were persons contemplating the formation of a railroad corporation, and that the options obtained by Pew were for the benefit of such corporation, and that any inducements operating upon the granting of such options must be taken to have been extended to the contemplated railroad itself.

Contracts or agreements between railroad companies and individuals, or between individuals and officers of the company, where one of the particular parties has contracted to secure certain advantages from railroad corporations as to the location of routes of road between designated points, and for the establishment of depots and stations in certain localities, have in numerous cases been before the courts for determination as to their validity. These agreements that we have referred to resolve themselves into three classes, and the rules to be extracted from

the decisions dealing with them are, first, that in all cases where a railroad company agrees with an individual to preclude itself from establishing or locating depots or stations on its road at any other than certain localities, or within certain prescribed limits, such agreements are void. Contracts of this kind are plainly in violation of a clear duty owed by the railroad company to the public, as public agents, to locate their depots and stations where the public wants and necessities demand their establishment, and to change them and provide others as future public necessities may require. Any attempted limitations or restrictions on the part of the railroad company as to the exercise of such public duty is subversive of the public interests and void. *Williamson v. Railroad*, 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206; *Railroad Company v. Mathers*, 104 Ill. 257; *Railroad Company v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *McClure v. Railroad Company*, 9 Kan. 373. The second class relates to agreements where some individual or officer or agent of the railroad company, under an assumption of influence with that corporation, has agreed for a consideration to secure from the corporation the location of stations or depots in a particular locality, or to secure the building of its road by a particular route. Such contracts are uniformly held to be void. They constitute a species of bribery of the officers of the company and are necessarily corrupt in their tendencies as influencing the officers of the corporation for mercenary considerations and for their private emolument to forego the duties they owe to public interests to locate such public conveniences where public necessities require that they should be established. Some of the cases declaring the invalidity of this class of agreements are: *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Bester v. Wathen*, 60 Ill. 138; *Holladay v. Patterson*, 5 Or. 177; and others to which we shall later more particularly refer. The last class of cases are those involving contracts such as the one under consideration here, where the consideration is to move directly from the individual to the railroad company as an inducement to the construction of its lines between certain points or analogous cases involving contracts providing for the establishment of depots or stations at particular points on the railroad, but where there is no provision or stipulation in the agreement that the route selected or depot or station to be established is to be located or established to the exclusion of other routes and locations.

It is to be observed that there is no law which requires a railroad corporation to select any particular route for the construction of a contemplated road. It is to be assumed that the corporation will build through that particular territory where the public necessities require its construction and where its material benefit will be best advanced; but there is no law which requires it to do so. In this state any three persons may incorpo-

rate to construct a railroad and may select such route as they choose to build over, notwithstanding a different route might be more to the public interest. In the absence of any law requiring a particular route to be selected, it is necessarily left to the judgment of the corporation to do the selecting, and vested with such discretion, in making a selection between different routes, we do not understand the rule to be that the company, for a consideration moving directly to itself and as an inducement thereto, may not determine as between contesting localities in favor of one locality as against the others, or that such an agreement is per se illegal and void. Necessarily, the position of respondents is that the agreement in question here is per se void. This is what they do claim, and could not claim otherwise, because there is nothing in the allegations of the cross-complaint that the route selected was not the most advantageous to public interests. They insist, however, that it was not necessary for it to so appear; that any contract whereby a railroad is induced to make a particular selection in consideration thereof is of itself invalid. If this position were correct, it would naturally and logically follow that every contract whereby property was to be conveyed or money contributed by another as an inducement to the building of a railroad over a particular route, whether it appeared that the public interest would be affected or not, would be void, and it would further follow that no authorities could be found sustaining such a contract. To the contrary, however, the great weight of authority and the prevailing doctrine is that such agreements of themselves are not void; that they do not contravene any rule of public policy and are enforceable.

Now, as to the authorities sustaining such contracts and the cases upon which respondents rely for their invalidity, and first as to the authorities supporting this contract: In *Greenhood on Public Policy*, pp. 321, 322, it is said: "The manner in which the majority of the railroads of the country have been built is, in all probability, familiar to every one. Men in subscribing to railroads do so out of self-interest. The conditions imposed are made with reference to the enhancement of the value of their own property, or to their personal convenience. * * * It cannot be said that a subscription to a railroad corporation, conditioned on the location of its route in a particular section or direction, has any tendency to influence the corporation to disregard the public convenience, for it goes to a place to obtain traffic, and no public policy requires it to select the dearest route it may find. If it does prejudice the public, it is a matter of easy proof, and, if such proof can be furnished, any contract of subscription will fall; but, in the absence of such proof, prima facie any subscription to a railroad corporation conditional upon its building its line in a particular route or through a particular town or country is val-

ld. The contrary view has been sustained by a small but respectable minority. The majority hold that, having fulfilled the condition, the corporations have the right to insist upon the agreement." In *Piper v. Choctaw Northern Townsite & Improvement Co.*, 16 Okl. 436, 85 Pac. 965, it is said: "This case squarely presents the proposition as to whether or not a railroad company, for the purpose of aiding in the construction of its line of road, may accept and enforce an obligation payable to it, conditioned upon the construction of its line of road to a given point within a given time, and the establishment and maintenance of a depot there. There are many respectable authorities which affirm this proposition, and in the judgment of this court it is nearer in consonance with sound reasoning in this case to hold that, under the facts presented, the contract is not void, and therefore is enforceable. If the law were otherwise, it would be equivalent to a declaration that a community desiring the advantages of a line of railway, where chartered privileges permit its construction, would be, under the law, prevented and prohibited from inducing such construction by aiding the same. A railroad company is only a quasi public corporation, and as such it must not only take into consideration the public welfare, but the private welfare of its stockholders as well, in the location and construction of its line of road. A donation to its assets which enables it to build a contemplated line immediately, and a consideration in part of its immediate construction, or which enables it to build its line upon a route that it might not otherwise be able to build, could not be held to be void upon the ground of public policy, and in this respect it must be held to be the privilege of a railroad company, in determining its duty towards the public and its shareholders, to determine what line and between what points its line shall be constructed." In *Baltimore, etc., R. Co. v. Ralston*, 41 Ohio St. 587, the court declares on this same point: "That public policy forbids the enforcement of contracts to induce the location of railroad lines at particular places in disregard of the rights of stockholders and the public is very true. Contracts for location, providing private emolument for the officials who sanction them, are, of course, void, and, even if the stipulated location turn out to be the best that could have been made, and entail no detriment to stockholders or the public, yet such contracts are held in well-considered cases, and, we think, correctly, to be against public policy as a dangerous exercise of official power for private gain. In the case at bar these objectionable features are not present. The stipulated compensation was for the company alone, and it may well be that it was a matter of indifference to the stockholders and public whether the route was through Defiance or not. The propriety of the location in respect to particular points

when the charter is silent is of necessity left to the managing officers of the company, and we fail to see any illegality or immorality in their stipulating for the benefit of the company in awarding the advantages of location as between contesting localities. The general doctrine that such an agreement is not void per se as against public policy is laid down in the leading case of *Cumberland Valley R. R. Co. v. Baab*, 9 Watts (Pa.) 458, 36 Am. Dec. 132, and has been frequently recognized in analogous cases in our Supreme Court, notably in the decisions sustaining contracts to take stock conditioned on a particular location." In 23 Am. & Eng. Ency. of Law, p. 688, the same general doctrine is announced that "contracts for the location of railroad lines at particular places are not void per se as against public policy, but they are illegal where calculated to prejudice the interest of the public or of the shareholders of the road, or where they provide for private emoluments to the officers of the road who are entrusted with the duty of choosing its location." These citations sufficiently declare the prevailing doctrine which finds support in numerous authorities, among others: *Cumberland R. Co. v. Baab*, 9 Watts (Pa.) 458, 36 Am. Dec. 132; *McClure v. Missouri River, etc., R. Co.*, 9 Kan. 373; *Workman v. Campbell*, 46 Mo. 305; *Telford v. Chicago, etc., R. Co.*, 172 Ill. 559, 50 N. E. 105; *Louisville, etc., Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; *Racine Bank v. Ayres*, 12 Wis. 512; *Berryman v. Cincinnati Southern R. R. Co.*, 77 Ky. 755; *Texas & St. Louis R. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Harris v. Roberts*, 12 Neb. 631, 12 N. W. 89; *First Nat. Bank of Cedar Rapids v. Hendrie*, 49 Iowa, 402, 31 Am. Rep. 153; *Supervisors v. Wisconsin Cent. R. Co.*, 121 Mass. 460; *Lyman v. Sub. R. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; 3 Elliott on R. R. (3d Ed.) §§ 121-386; *Missouri Pac. R. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97. Some of these authorities cited relate to the validity of contracts providing for the transfer of property, or the contribution of money, to railroads as a consideration or inducement to the building of their line of road over certain routes or between designated points. Others relate to similar contracts inducing the establishment of depots or stations in particular localities. In principle there can be no distinction between such contracts as to the objects sought, whether they pertain to lines of road or the location of depots or stations. The proposition in all these cases decided is that, in the absence of any agreement that the route selected, or the stations located, shall be to the exclusion of other routes or stations, they are not contrary to public policy, and that the rule applies equally to both classes of contracts.

Now, to examine the authorities cited by counsel for respondents in support of their contention as to the invalidity of the contract—and we shall refer only to those from

which they have quoted excerpts in their briefs: We make no question as to the correctness of the principles announced in almost all those cases; but, in our judgment, the facts in each case to which they were applied were radically different from those in the case at bar. Recurring to these cases: In *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404, the evidence disclosed that certain officers of the Northern Pacific Railroad Company, in consideration that they should receive a portion of the proceeds of plaintiff's land, agreed to so locate the line of said road that it would run through a certain section of land, and further agreed to locate a depot within the section; that the company had contemplated building its line by another route, but by reason of the inducement above stated the officers having in charge the location of the line and depots determined to change the route and locate both the line and depot upon said land. In the next case relied on (*Bestor v. Wathen*, 60 Ill. 138), the railroad company made a contract with a certain construction company to build its road. While building, the construction company, the president of the railroad company, one of its directors, and its construction agent entered into a contract with the owner of 160 acres of land, situated where the road then in process of construction was expected to cross the Illinois Central Railroad, by the terms of which the owners agreed to sell the first-named parties an interest in the land. The only consideration was that the so-called purchasers should "aid, assist, and help in building the road upon said land." The court refused to enforce either of these contracts. In both these cases the contracts were between an individual and certain officers of the railroad company who were taking advantage of their position as agents of the railroad company to contract for their individual benefit. It is apparent from the opinions in both these cases that the railroad company had nothing to do with these contracts and had no interest in them; that they were made for the private and personal benefit of certain officers of the company in the one case, and certain officers and the contracting company in the other. They were without the knowledge of the company and in violation of the duties of the contracting parties to them. It is obvious that the court did not there have under consideration contracts made with the railroad company itself or for its benefit, but those made by certain of its agents and officers with outsiders, looking to the personal advantages of said officials alone. Such contracts were clearly a fraud upon the corporation and its stockholders whom the officers and agents represented. These contracts fell within the second class of cases, to which we have heretofore referred, and which are universally condemned as fraudulent upon the rights of the corporation and void.

In *Woodstock Iron Co. v. Extension Co.*,

129 U. S. 643, 32 L. Ed. 819, a railroad company contracted with another company of like nature to construct a railroad by the nearest and cheapest route from Atlanta to Columbus for a consideration of \$20,000 a mile. One of the directors of the extension company and also a director in the railroad company negotiated on behalf of the extension company a contract with an iron company to deflect the road at a certain point lengthening it about five miles, for which the iron company agreed to give a right of way through its property and convey certain tracts of land and pay certain sums of money. The railroad company had no knowledge of the contract, and the court held the contract void as immoral in its conception and corrupting in its tendency; that it was nothing less than a bribe offered to the employé to disregard his contract with his employer. Of course, such a contract would be indefensible, but the contract at bar is in no manner similar to it. *Fuller v. Dame*, 18 Pick (Mass.) 472, is also cited as supporting the contention of respondents; but there the company, however, had no knowledge of the contract or any interest in it. Its existence was not even known to it or its officers. All that was held in that case was that a contract made by a stockholder of a company with a property owner to use his influence with the company for the establishment of a depot in a particular locality was a fraud upon the other stockholders and upon the company and void as against public policy. It will be observed that this case also falls within the second class of cases we have heretofore mentioned.

A case also relied on is *Enid Right of Way & Township Co. v. Lile*, 15 Okl. 382, 82 Pac. 811. This case, if its apparent force was not destroyed by the language used in a subsequent decision by the same court, tends more than any other cited by respondents, to sustain their contention. In the *Enid Right of Way Case* the affirmation of the judgment was by an equally divided court. An exhaustive dissenting opinion was filed, in which an analysis of all the cases supporting the prevailing opinion was made, and they were differentiated from the case under consideration by the court, and the conclusion reached by the judges dissenting upon a review of all the authorities bearing on the question, that the weight of authority was in favor of the validity of the contract there in question, but which the prevailing opinion discountenanced as contrary to public policy. In that case the action was upon a promissory note given by defendant Lile to the plaintiff, which was stipulated to be paid when the Denver, Enid & Gulf Railroad was completed to a point where the location of a depot on certain land was to be made. The note was held void as contrary to public policy. It is unnecessary to discuss the grounds upon which the court reached this conclusion, because, while the apparent effect of this decision is in favor of the position of

respondents, this same court in a subsequent decision appears to have limited its application to contracts between third parties looking to the exercise by them of influence with the railroad company to do something which was against public policy, because, in *Piper v. Choctaw Northern Township & Imp. Co.*, supra, which we have heretofore quoted from, it is expressly held, in conformity to the prevailing doctrine, that a subscription moving directly to the railroad company to encourage the building of its railroad at a particular place contravened no rule of public policy and was enforceable. In that opinion the *Enid Case*, as also *McGuffin v. Coyle*, 16 Okl. 648, 85 Pac. 954, 6 L. R. A. (N. S.) 524, decided by the same court (Oklahoma), and relied on also by respondents, are specially referred to and held not to militate against the general rule.

We have referred, we think, to all the cases quoted from by respondents in support of their position, and are satisfied that none of them have any application in support of the point they make. While all these cases reviewed had relation to contracts concerning the establishment of depots or stations, the principle to be applied in determining their validity is no different from that which is to be applied with reference to contracts regarding the construction of a road between given points. This, of course, is conceded by counsel in citing them. It will be observed further, that in all the cases reviewed the contracts in question were declared invalid because agents or officers of the companies had taken advantage of their position to further their private interests and secure personal emoluments to the disadvantage of the companies they represented. The contracts were not declared invalid because they related to the location of depots or stations (speaking now of the special matters involved in the contracts in those cases) at particular localities, but because the persons who made them had been guilty of fraud and corrupt conduct toward their principals (the corporations). None of the cases involved a contract between an individual and the company itself, or those contemplating the construction of the road, providing for the payment of money or property as an inducement to its construction over a particular route, the making of which, under the prevailing doctrine as we have shown, countervails no rule of public policy.

The error of the trial court was in holding, as it necessarily did, that per se this contract was void as against such policy. A contract should not be declared in contravention of public policy unless it is apparent that it contravenes some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety. Nothing of this character appears from the allegations of the cross-complaint. Contracts for the conveyance of property, or the payment of money, in consideration of the building of

a railroad within a given time and between certain points, as our court (*Spire v. Urbahn*, 124 Cal. 110, 56 Pac. 794) says, have become familiar as stimulants to the construction of such railroads and other public works. It is familiar history that the great railroads of the West have been largely aided in their construction by contributions and donations made in inducement to the selection of certain routes. States, counties, and cities have granted subsidies to them to that end, and the national government in the building of the first trans-continental railroads donated vast tracts of land as inducements to the building of such roads over the continent and between particular points. Our statute (Civ. Code, § 465) provides for the acquirement by a railroad company of grants and donations of real and other property which may be made to aid and encourage the construction, maintenance, and accommodation of such railroad. We refer to these matters as indicating the public policy which supports contracts which are made in inducement to the building of railroads, and that no contract which simply provides for the transfer of property or the payment of money, or confers upon the company the right to acquire either as an inducement to build its road between certain points, should for that reason alone be held in contravention of any public policy.

The most that has been held by any of the cases—and those supporting the prevailing doctrine appear to so hold—is that it may be interposed as a defense to the enforcement of such contracts that they were made in disregard of public convenience and in violation of the clear wants and necessities of the people. Of course, in the present case no such showing is made. The trial court based its conclusion that the contract for the option was invalid from the allegations of the cross-complaint, which does not pretend to disclose anywhere that any public convenience or necessity was subverted by the contract. The court held, as a matter of law, that a contract giving an option to purchase certain lands as an inducement to the building of a line of railroad between certain points was void upon its face, or void per se. The courts, however, as we have seen, declare expressly to the contrary, and that such a contract, in the absence of any showing that public interest has suffered in its making, is valid and enforceable. The trial court was therefore in error in refusing to permit the offer of evidence on the part of appellant in support of the allegations of his cross-complaint, and in dismissing his action praying for specific performance of the contract.

In disposing of this appeal we have not overlooked the objection of respondents that the appeal from the order denying appellant's motion for new trial cannot be considered because his notice of intention to move for a new trial was not served in time. We have

examined the record and find no merit in the point.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.

153 Cal. 781

UNITED STATES OIL & LAND CO. v.
BELL et al. (L. A. 2,048.)

(Supreme Court of California. July 1, 1908.)

1. DEEDS—CAPACITY OF GRANTOR—UNDUE INFLUENCE—EVIDENCE.

In a suit to quiet title to an undivided half interest in certain land, evidence held to warrant the court's finding that a conveyance by defendants to plaintiff's grantors was based on a sufficient consideration, and was not procured by undue influence or by taking advantage of the necessities and distress of the feme grantor, and her alleged weakness of mind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 635, 641.]

2. ATTORNEY AND CLIENT—DEALINGS—BURDEN OF PROOF.

In all dealings between attorney and client the highest degree of fairness and good faith is required of the attorney, and, if the transaction presents even a suggestion of unfair dealing, the burden of proof is on the attorney to show the honesty and good faith thereof, and that it was entered into by the client freely and voluntarily.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 248.]

3. HOMESTEAD—TENANCY IN COMMON.

Land held by tenancy in common or joint tenancy cannot be selected or claimed as homestead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 121, 122.]

4. TRIAL—CUMULATIVE EVIDENCE—EXCLUSION.

Where, on an issue as to mental capacity of a feme grantor, she had testified that she was very much incensed at the provisions of the deed, that she had walked the floor the whole night before signing, and neither undressed nor went to bed, and subsequently testified that she was half insane when her attorney waited for her signature to the deed; and that the matter had kept her awake all night—questions calling for her feelings after she had read the deed over and her condition during the night, and whether she slept the night prior to the execution of the deed, were properly excluded as already covered by the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 131, 132.]

5. APPEAL AND ERROR—RULINGS ON EVIDENCE—NECESSITY OF EXCEPTION.

The sustaining of an objection to a question cannot be reviewed on appeal, where the record fails to show any exception to the ruling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1503-1515.]

6. QUIETING TITLE—MATERIALITY.

Where, in a suit to quiet title to a moiety of certain land, the main issue was as to the validity of a deed by defendants to plaintiff's grantors covering such portion of the land, whether certain attorneys had brought actions against the feme defendant and recovered judgments against her since her execution of such deed was immaterial.

7. WITNESSES—EXAMINATION—LEADING QUESTIONS.

That certain questions were leading is not material, where it appears from the answers given that the form of the questions did not affect them.

8. SAME—NONRESPONSIVE ANSWERS.

Where a witness was asked to state as nearly as possible what R. said when he came to witness' house on a certain morning, the answer that witness' wife was in a terrible state, and had not gone to bed all night, was properly stricken as nonresponsive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 861-863.]

9. TRIAL—MOTION TO STRIKE EVIDENCE.

Where a motion to strike out evidence is made on several grounds stated in the conjunctive, it need not be denied where only a part of the grounds are well taken.

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the United States Oil & Land Company against Kate M. Bell and another to quiet title to certain land. Judgment for plaintiff, and, from an order denying defendants' motion for a new trial, they appeal. Affirmed.

B. F. Thomas, for appellants. Richards & Carrier and James L. Crittenden, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from an order denying their motion for a new trial. On June 12, 1897, defendant Kate M. Bell was the owner of a tract of land in Santa Barbara county, containing about 10,000 acres, under a deed from her husband, defendant John S. Bell, which had not been recorded. On that day she and her husband by deed of conveyance, which was duly recorded June 18, 1897, granted, sold, and conveyed to James L. Crittenden and Sidney M. Van Wyck, Jr., an undivided one-half thereof. This deed also purported to convey an undivided one-half of another tract, containing some 4,000 acres, in which concededly defendants had no interest, and which is in no way here involved. Thereafter, on October 30, 1897, Mrs. Bell made and acknowledged her declaration of homestead as to a portion of said 10,000-acre tract, containing 75 acres, more or less, and such declaration was duly recorded November 1, 1897. On March 7, 1899, said Van Wyck conveyed his interest under the deed aforesaid to James L. Crittenden, and on September 18, 1902, said Crittenden and his wife conveyed said undivided one-half of said 10,000-acre tract to plaintiff. This action was brought by plaintiff on October 31, 1902, to obtain a decree adjudging that defendants have no interest in any part of said 10,000-acre tract other than that Mrs. Bell has an undivided one-half interest therein as tenant in common with plaintiff, that plaintiff is the owner in fee of an undivided one-half as tenant in common with Mrs. Bell, and that the declaration of homestead is null and void. On July 14, 1903, the defendants

answered, and on the same day Mrs. Bell filed a cross-complaint, the object of which was to obtain a judgment declaring the deed of June 12, 1897, rescinded and annulled on the ground that there was not any adequate or sufficient consideration therefor, and that the same was executed and procured by and through undue influence of the grantees, by an unfair advantage of Mrs. Bell's weakness of mind, taken by the grantees, and by an oppressive and unfair advantage of her necessities and distress taken by said grantees. Plaintiff answered the cross-complaint. The findings of the trial court were full and complete in favor of plaintiff upon the question of the validity of the deed of June 12, 1897. It was found that the deed was made "for a valuable, adequate and sufficient consideration"; that they "did freely and voluntarily make, execute and deliver" the same; "that there was no concealment or misstatement or misrepresentation whatever or of any kind upon the part of said Jarrett T. Richards in any of his transactions * * * in the matter of the said deed"; that said deed "was not made, executed, or delivered under or by reason of or as the result of any undue influence or of any oppressive or unfair advantage taken of the mental distress, or financial embarrassment or necessitous condition of the defendants or either of them by said James L. Crittenden, or by said Sidney M. Van Wyck, Jr., or by said Jarrett T. Richards or by Charles F. Carrier or by any one on behalf of them or either of them"; "that neither of said defendants was ever or at any time subject to any undue influence exercised by any of said parties, but that said defendants with full knowledge and notice of all the facts acted freely and voluntarily." If these findings have sufficient support in the evidence, they dispose of the case, and render immaterial other findings in favor of plaintiff upon other matters urged in support of the judgment.

Examination of the record discloses ample support for these findings. The trial court found in accord with the great weight of evidence that in May and June, 1897, and for some time prior and subsequent thereto, the 10,000-acre tract was of the value of not exceeding \$100,000. It was and for several years had been almost hopelessly involved in litigation, claims being asserted against it to the extent of about \$110,000 by the executors of the estate of Thomas Bell and the San Francisco Savings Union. The Bell estate claims aggregating some \$50,000 had been pending in the courts for several years being involved in the action of Bell v. Staacke, which was commenced in 1893. The property was in the hands of a receiver, and was yielding no income to defendants. The attorneys for the defendants herein apparently felt that there was practically no hope for success in that case, and that the claims against the property would absorb it all. Under these circumstances, it was suggested by Mr. Richards,

one of such attorneys, that another attorney might be found who might be able to carry the case to a successful issue. Mr. James L. Crittenden, then of the firm of Crittenden & Van Wyck, was spoken of in this connection, and Mr. Richards went to San Francisco in May, 1897, to consult with him, armed with a power of attorney executed by Mr. and Mrs. Bell, authorizing him to employ an attorney or attorneys and to grant as a contingent fee to the person so employed any interest in the subject of the suit and the real property affected thereby as to him might seem best. Mr. Crittenden finally agreed with Mr. Richards that his firm would take the case for one-half of the property, Mr. and Mrs. Bell to pay all costs and expenses. He expressed a desire to have Mr. Richards remain in the case to act with his partner, Mr. Carrier, as local attorneys, and said that he would allow him one-third of his fee therefor. He also insisted that an absolute conveyance of the undivided half of the property should be made at once. On May 22, 1897, Richards wrote to Mr. Bell at Santa Barbara, stating that Mr. Crittenden would agree "to fight the thing through for half what can be recovered," and that he had voluntarily agreed to give Richards one-third of his half, but that \$250 must be advanced by the Bells for personal expenses and costs of Mr. Crittenden in attending the trial. Mrs. Bell read this letter on its receipt. On May 25th Mr. Richards received a telegram from Mr. Bell, of which Mrs. Bell had knowledge, directing him to "close arrangement," and informing him the money was ready. Thereupon the contract of employment was executed by Mr. Richards for Mr. and Mrs. Bell, and by Messrs. Crittenden and Van Wyck, the Bells agreeing therein to forthwith execute and deliver a good and sufficient deed of conveyance of an undivided half of said property. On his return to Santa Barbara from San Francisco, Mr. Richards gave a copy of the agreement to Mr. Bell. Mrs. Bell testified that she never saw the agreement until long after, but there never was any claim on her part that she did not fully understand and intend that Messrs. Crittenden and Van Wyck were to have half of the property for their fee, and that Mr. Richards was interested with Messrs. Crittenden and Van Wyck to the extent already stated. Her claim was that she did not understand that the conveyance was to be made prior to the termination of the litigation, or that the attorneys were to receive one-half of the rents and profits of the land received by her pending the litigation, which, of course, would necessarily be the case if they received a deed at once. As we have seen, however, at this time the property was in the hands of a receiver, and there was apparently no likelihood of her ever receiving any of the rents and profits. Early in June, 1897, Mr. Crittenden went to Santa Barbara to engage in the trial of the action. He insisted that the

deed should at once be made in accord with the agreement, and Mr. Richards on the evening of June 11th left the deed at the Bells' house for examination by her, Mr. Bell having already seen it and being entirely satisfied. On the morning of June 12th he called at the house, and saw Mrs. Bell. She undoubtedly for some reason was strongly averse to executing it, and had been worrying a great deal over the matter during the night. The trial court was fully warranted by the evidence in concluding that her only objection was to thus absolutely putting the property in the control of parties who were strangers, before they had rendered the services they had undertaken to perform. He was further fully warranted in concluding that in the interview between her and Mr. Richards the latter was not guilty of the slightest bad faith, or of any misrepresentation or undue influence whatever, but that he honestly and fully explained the situation to her, and that Mrs. Bell, while deploring the circumstances that made it necessary, executed the deed freely and voluntarily and with full understanding of the situation. Considering the value and situation of the property, there was nothing unreasonable or unfair in the amount of compensation demanded, or in requiring a deed to be made at that time. Up to this time neither Mr. Crittenden nor Mr. Van Wyck had ever seen Mrs. Bell or personally communicated with her. The deed was duly delivered, and Mr. Crittenden proceeded with the performance of the service he had agreed to render. There was never any intimation to him that the arrangement that had been made was not entirely satisfactory to Mrs. Bell, nor has there ever been any complaint that the services of the attorney were not in every respect satisfactory. With the consent of Mrs. Bell, Mr. Van Wyck retired from the case, and Mr. Crittenden continued his services in the litigation in which this land was involved until the end of the year 1903, relying upon his deed, as he had a right to rely, in view of the acceptance of his services by Mrs. Bell and her failure in any way to claim the invalidity of such deed. While he was not ultimately successful in releasing the land from the claims asserted against it, he was successful in prolonging the litigation to such an extent that, when those claims could no longer be resisted, the land, as the record indicates, had become much more valuable on account of the discovery of petroleum therein, an advantage accruing not only to him as the owner of an undivided half, but also to his client as the owner of the other half.

We cannot understand how, in the face of substantial evidence of this character, it could be conceived that this court would hold the findings of the trial court to be without sufficient support. It may be assumed that the rule as to transactions between a client and his attorney is fully as rigorous as is claimed by counsel for appellant—that in all

dealings with his client the highest degree of fairness and good faith is required of the attorney, and the courts view all such transactions with suspicion and examine them with the utmost scrutiny, and, if they present even a suggestion of unfair dealing, the burden of proof is on the attorney to show the honesty and good faith of the transaction and that it was entered into by his client freely and voluntarily. The trial court was amply warranted in concluding that the honesty and good faith of the transaction had been shown, and that it had been entered into by the Bells freely and voluntarily.

There is nothing in the evidence requiring a conclusion that Mr. Crittenden was estopped to urge the invalidity of the homestead declaration. The deed from the Bells to Messrs. Crittenden and Van Wyck being valid, the land was thenceforth held by the Bells and their grantees by tenancy in common, and it is settled in this state that, under the law as it has existed for many years, land held by tenancy in common or joint tenancy cannot be selected or claimed as a homestead. See *Schoonover v. Birnbaum*, 143 Cal. 548, 83 Pac. 999, and cases there cited.

Certain errors of law in the admission and rejection of testimony are urged. Objections were sustained to certain questions asked Mrs. Bell, such as "What were your feelings after you had read the deed over that night, and your condition during the night?" "What was your mental condition that night?" "Did you sleep that night after you read over that deed?" "Had you slept any the night previous?" all referring to the night prior to the execution of the deed on June 12, 1897. But the witness had already testified that she was very much incensed at the provisions of the deed, and the result was that she walked the floor the whole night and neither undressed nor went to bed, and subsequently testified that she was half insane when Mr. Richards waited for her signature to the deed, and that the matter had kept her awake all that night. This sufficiently covered the subject-matter of such questions. The record fails to show any exception to the ruling of the trial court in sustaining an objection to the question asked Mrs. Bell as to any change in her financial condition between the time of executing the deed and the filing of her cross-complaint, and this ruling therefore is not open to review. We are unable to perceive the materiality of the question asked Mrs. Bell as to whether Messrs. Richards & Carrier had brought actions against her and recovered judgments against her since June 12, 1897.

Certain questions asked Mr. Richards on his cross-examination by plaintiff's counsel, and objected to by defendants, were, we think, within the scope of a proper cross-examination. Besides, the matter elicited thereby was unimportant, and could not have prejudiced defendants.

Other questions asked Mr. Richards on

cross-examination by plaintiff's counsel were not strictly within the scope of proper cross-examination. Admittedly plaintiff's counsel would have been entitled to ask these questions, except for the claim that some of them were open to the objection of being leading, if he had been examining the witness as his own on direct examination. He did subsequently make the witness his own as to all these matters, with full opportunity to opposing counsel to cross-examine. So far as the objection that some of these questions were leading is concerned, it is apparent from the answers given by the witness that the form of the questions in no degree affected the answers.

The court did not err in striking out, on the ground that it was not responsive to the question, testimony given by Mr. Bell to the effect that Mrs. Bell "was in a terrible state, and had not gone to bed all night." The question was: "State as nearly as possible what Mr. Richards said when he came to your house that morning." Learned counsel is in error in his claim that, where a motion is made to strike out evidence on several grounds stated in the conjunctive, the motion must be denied, unless all the objections are well-based.

The order denying a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

8 Cal. App. 275

GREVE v. ECHO OIL CO. (Civ. 363.)
(Court of Appeal, First District, California.
May 26, 1908. Rehearing Denied by Supreme Court July 24, 1908.)

1. EVIDENCE — PAROL EVIDENCE — VARYING TERMS OF CONTRACT—ADMISSIBILITY.

The rule that parol evidence is inadmissible to vary the terms of a written contract has no application where both parties to the action are not parties to the contract, or in privity with them, and where a controversy is between a party to a written contract and one who is neither a party to it, nor a privity to one who is, parol evidence contradicting the contract is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1966–1968.]

2. SAME.

In an action on an assigned claim, parol evidence is admissible to correct a mistake in the written assignment, and the assignee may show by parol that by "J. H. G." the assignor meant "H. J. G.," the correct name of the assignee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1906.]

3. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—EARNINGS.

A wife's earnings may be her separate property by agreement with her husband, or because of her living separate from him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 459–464.]

4. ASSIGNMENTS — ACTION BY ASSIGNEE — WIFE'S CLAIM FOR SERVICES—COMPLAINT—CONSTRUCTION.

Where, in an action by the assignee of a claim for a wife's services, the complaint alleged that defendant became indebted to the

wife on account of services, and that she transferred her claim to plaintiff, etc., a finding in accordance with the allegation of the complaint must be construed to mean that defendant became indebted to the wife in her separate right, and that the assignment by her was not void on the ground that the claim was community property and assignable only by the husband.

5. EVIDENCE—OPINION OF WITNESS.

Where, in an action on an assigned claim for services, it appeared that the written assignment was made to "J. H. G.," instead of "H. J. G.," the correct name of the assignee, the testimony of one present at the time of the execution of the assignment, that the assignor intended to execute an assignment to the assignee, was objectionable as the opinion of the witness.

6. TRIAL—RECEPTION OF EVIDENCE—STRIKING OUT—GROUNDS—HEARSAY EVIDENCE.

Where it developed on the cross-examination of a witness that his answer on direct examination was based on the statement of a third person to the witness, the answer must be stricken as hearsay.

7. SAME—FINDINGS—CONSTRUCTION.

In an action against a corporation, which denies the allegations of the complaint and sets up a counterclaim alleging an indebtedness due to it from plaintiff, a finding that the allegations in the answer, except wherein it purports to answer one cause of action alleged in the complaint, are untrue, negatives the existence of any indebtedness from plaintiff to defendant.

8. CORPORATIONS—DEEDS—EXECUTION.

A deed of a corporation, signed by its president and secretary, and bearing the corporate seal, is prima facie evidence that the deed was duly authorized by the board of directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1729.]

9. ACKNOWLEDGMENT—AUTHORITY TO TAKE—DISQUALIFICATION OF OFFICER.

An acknowledgment taken before a grantee or one standing in the position of a beneficiary under a conveyance, or other written instrument, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 106, 107.]

10. SAME.

An acknowledgment by grantors, taken before a grantor, is not void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 105.]

11. SAME.

An acknowledgment by stockholders of a mining corporation of a consent to a deed executed by the officers thereof, taken before another stockholder, is not void, since the latter takes no beneficial interest under the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 109.]

12. EVIDENCE — DOCUMENTARY EVIDENCE — RECORDS OF CONVEYANCES.

Act April 23, 1880 (Laws 1880, p. 131, c. 118), as amended by Act March 9, 1897 (Laws 1897, p. 96, c. 92), prohibits the directors of a mining corporation from selling any part of the mining ground unless a sale is ratified by holders of two-thirds of the stock. A deed was executed by a mining corporation, through its officers, attested by the corporate seal, and properly acknowledged. The stockholders all formally consented by a separate instrument. The secretary signed and acknowledged the certificate required by the act. *Held*, that the deed was executed in accordance with the act and was entitled to be recorded, and the record thereof was entitled to be read in evidence with the same force and effect as the original deed, as authorized by Code Civ. Proc. § 1851.

13. MINES AND MINERALS—MINING CORPORATIONS—POWERS—PURCHASE OF REAL ESTATE.

Under Act April 23, 1880 (Laws 1880, p. 131, c. 118), as amended by Act March 9, 1897 (Laws 1897, p. 96, c. 92), prohibiting directors of a mining corporation from purchasing "any additional mining ground" unless the act is ratified by holders of two-thirds of the stock, etc., the ratification of the stockholders of the mining corporation purchasing real estate is only required for the acquisition of additional mining ground, and to raise the question of the validity of a purchase, it must be shown that the land purchased was additional mining ground.

14. APPEAL AND ERROR—DISPOSITION OF CASE ON APPEAL—REMITTITUR.

Where, in an action involving separate items, the court erred in the admission of evidence in support of one item, the court on appeal will permit plaintiff to file a remittitur in the trial court entering partial satisfaction of the judgment to the amount of such item, and affirm the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4462-4476.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by H. J. Greve against the Echo Oil Company. From a judgment for plaintiff, and from a denial of a new trial, defendant appeals. Conditionally affirmed.

Stanton L. Carter, for appellant. Everts & Ewing, for respondent.

HALL, J. This is an appeal from a judgment against defendant, and from the order of the court denying defendant's motion for a new trial. The amended complaint, upon which the action was tried, contained five counts. The first and second counts set forth causes of action accruing directly to plaintiff, and no attack is made by appellant as to the sufficiency of the evidence to sustain these causes of action. The findings of the court as to the third cause of action were in favor of defendant. The fourth count sets up a cause of action accruing originally to W. J. Kinney for the sum of \$243, for services rendered to defendant by said W. J. Kinney, and in the third paragraph of said count it is alleged that said W. J. Kinney, before the commencement of the action, did sell, transfer, and assign his said claim to the said H. J. Greve, and the said H. J. Greve is now the lawful owner and holder thereof, and the whole of said sum of \$243 remains unpaid. The fifth count sets up a cause of action accruing originally to A. M. Kinney for the sum of \$90 for services rendered to defendant, and in the third paragraph of said count is a similar allegation as to the assignment and transfer and nonpayment thereof. The appeal comes to this court upon the judgment roll and a statement of the case. This statement sets forth that plaintiff introduced sufficient evidence to sustain all the allegations of the first and second causes of action, and all the allegations of paragraphs 1 and 2 of the fourth and fifth causes of action (which paragraphs set forth the causes of

action as they accrued to plaintiff's assignors), and then proceeds to set forth the evidence relating to the allegations of paragraph 3 of the fourth cause of action, as to the assignments to plaintiff. The court made findings in accordance with the allegations of the third paragraph of counts 4 and 5.

In discussing the evidence relating to these findings, appellant's counsel has wandered far from the points raised by the specifications of insufficiency of evidence. He has discussed the insufficiency of the evidence to sustain the findings that the assignments were made prior to the commencement of the action, and that they were made for a valuable consideration, and the like. An examination of the specifications disclosed that the only point relating to the assignments there presented is that the assignments were not made to H. J. Greve, but were made to J. H. Greve. To make this clear, we insert the first specification relating to the finding as to the assignment of the claim set forth in the fourth cause of action, which is a type of all the specifications as to the assignments. It is as follows: "The evidence is insufficient to support, justify, or sustain that portion of the findings numbered 3, 'that previous to the filing of the complaint and the commencement of said action, W. J. Kinney assigned, for valuable considerations, and transferred the said claim to H. J. Greve, the plaintiff herein, and the said H. J. Greve is now the true and lawful owner and holder thereof,' in that the evidence does not show that said W. J. Kinney assigned or transferred the claim referred to to the plaintiff, H. J. Greve, or that the plaintiff, H. J. Greve, is, or ever was, the owner, or holder, thereof; but, on the contrary the evidence shows conclusively that said Kinney, by a written assignment, prior to the commencement of the action, for a valuable consideration, assigned and transferred said claim for \$243, being the claim referred to in the fourth cause of action of plaintiff's amended complaint, unto one J. H. Greve, and that J. H. Greve is, and at the time of the commencement of this action was, and ever since has been, the true and lawful owner thereof." It needs but a reading of the above specification to see that the only attack made on the finding is that the proof showed an assignment to J. H. Greve, instead of an assignment to H. J. Greve, the plaintiff. The specification as to the evidence of the assignment of the claim set forth in the fifth count is in all respects like the one above set forth. Therefore the only point we can consider with regard to the assignments is: Was the evidence sufficient to prove assignments to H. J. Greve of the claims sued upon as assigned claims?

The record discloses that the plaintiff introduced in evidence, without objection, two written assignments, one signed by W. J.

Kinney, for the claim set forth in the fourth count, and one signed by A. M. Kinney for the claim set forth in the fifth count. Both assignments are in terms to J. H. Greve, and not to H. J. Greve. Plaintiff's name was shown to be Henry John Greve. The court permitted plaintiff to prove by parol testimony, over the objection and exception of defendant, that said assignments were in fact delivered to plaintiff, H. J. Greve, and that by said assignments the assignors intended to assign said claims to H. J. Greve, the plaintiff. W. J. Kinney, one of the assignors, who is the husband of A. M. Kinney, the other assignor, testified that so far as he knew there was no such person as J. H. Greve. From the evidence thus introduced it is clear that the assignors intended to assign the claims sued on to plaintiff, and that by mistake in writing the assignment his initials were transposed. The real point of appellant's contention is that the oral evidence was incompetent, and that the court erred in admitting it. In this connection appellant urges that the action of the court in this regard was in violation of the rule that parol testimony is inadmissible to vary or contradict the terms of a written contract. This rule, however, has no application where both parties to the action are not parties to the contract or in privity with them. "Where the controversy is between a party to a written contract and one who is neither a party to it nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence." 11 Am. & Eng. Ency. of Law, 550; *Hussman v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 Cal. 53; *McMaster v. Pres.*, etc., *Ins. Co. of N. Am.*, 55 N. Y. 222, 14 Am. Rep. 239; *Furbush v. Goodwin*, 25 N. H. 425; *Badger v. Jones*, 12 Pick. (Mass.) 371; *Krider v. Lafferty*, 1 Whar. R. 314; *Edgerly v. Emerson*, 23 N. H. 564, 55 Am. Dec. 207; *Sprague v. Hosmer*, 82 N. Y. 470; *People v. Bragle*, 88 N. Y. 585, 42 Am. Rep. 269. So, also, in *Owen v. Meade*, 104 Cal. 179, 27 Pac. 923, where an assignment omitted to name any assignee it was held no error to admit parol evidence to show that such omission was unintentional, and that the assignor in fact agreed to assign the claim sued on to the plaintiff. In the case at bar, although plaintiff claimed to be the assignee under the assignments put in evidence, defendant was not a party thereto, nor in privity with a party thereto, and, under the rule above quoted and abundantly sustained by the above cited cases, either plaintiff or defendant had the right by parol evidence to explain or correct a mistake in the written assignments. The court therefore did not err in allowing plaintiff to prove by parol evidence that by "J. H. Greve" the assignors meant "H. J. Greve." The evidence thus

introduced was quite sufficient to sustain the findings relating to the assignments of the claims sued on in the only particular in which they are attacked in the specifications.

Appellant in his brief has also raised the point that the assignment by A. M. Kinney was void because she is the wife of W. J. Kinney, and the claim by her assigned must be considered to be community property, and therefore only assignable by the husband. In addition to the fact that any such point is excluded from consideration by the narrow scope of the specifications above pointed out, the contention is also completely answered by the settled statement of the case, which recites that sufficient evidence was introduced to sustain the allegations of paragraph 2 of the fifth cause of action. The allegations of said paragraph 2 are that defendant became indebted to A. M. Kinney on account of work and services, etc. The court found in accordance with this allegation, which must be construed as meaning that defendant became indebted to A. M. Kinney in her separate right. A wife's earnings may be her separate property by agreement with her husband, or because of her living separate and apart from him. Her right to assign the claim sued on in the fifth count is thus conclusively established by the findings as to the allegations of paragraph 2, which the statement recites are sustained by the evidence.

In discussing the action of the court in allowing proof by parol to vary or explain the written assignments, we were dealing only with the general line of proof that the court allowed in this regard. We now come to a particular ruling which was erroneous, not because it varied a written contract by parol evidence, but because it violated other rules pertaining to evidence. The claim sued on in the fifth count, for \$90, was the claim of A. M. Kinney, and was alleged to have been assigned by her to plaintiff. A. M. Kinney was not a witness on the trial of the action, but her husband, W. J. Kinney, was. After the assignment made by A. M. Kinney had been read in evidence, and it had been shown by W. J. Kinney that A. M. Kinney was his wife, and that he was present when she executed the writing, he (W. J. Kinney) was asked by plaintiff: "To whom did she intend to execute that assignment?" This was objected to as irrelevant, incompetent, and not the best evidence. The objection was overruled, and the witness answered: "H. J. Greve." The objection should have been sustained. The evidence sought called for the opinion of the witness upon a vital point in the fifth cause of action, which was for the court to determine from the facts and circumstances surrounding and attendant upon her execution of the instrument. If she had herself been a witness at the trial, she might properly have been asked her intentions; but to ask a bystander what she intended is sim-

ply to ask for his opinion. The witness was permitted to give his opinion upon a vital fact which should have been determined by the court unaided by opinions of witnesses.

The witness was thereupon asked by counsel for defendant upon cross-examination: "How do you know she intended to assign it to H. J. Greve? Did she tell you so?" And answered: "Yes, sir." Defendant thereupon moved to strike out the answer of the witness to the question as to whom A. M. Kinney intended to execute the assignment, upon the ground that it was hearsay. This motion the court denied, and again committed error. This motion was directed to the evidence that the witness had given on his direct examination, and not, as counsel for respondent seems to think, to his answer made to defendant's counsel. By his answer to the question put by defendant's counsel it was developed that his answer on direct examination that A. M. Kinney intended to assign to H. J. Greve was based on the statement of A. M. Kinney to the witness, and was therefore hearsay, and should have been stricken out.

Besides denying the allegations of the several counts in plaintiff's complaint, defendant pleaded as a part of its answer a counterclaim as an offset to the indebtedness set up in the complaint. In the counterclaim it is alleged, in substance, that plaintiff, at the time of the commencement of the action, was indebted to defendant in an amount exceeding the aggregate amount of all the claims sued on for the balance due and unpaid upon his subscription to 24,000 shares of the capital stock of the corporation, defendant, and upon which subscription there now remains unpaid and owing from plaintiff to defendant a sum greatly exceeding the aggregate amount of all the claims sued on. Defendant in its counterclaim did not ask for any affirmative relief, nor is the amount claimed to be owing on account of the subscription for stock given. It is simply alleged that the amount of the indebtedness exceeds the amount of the claims sued on. The court did not make findings in detail on the issues presented by the counterclaim, but contented itself with the general finding "that all the allegations in the answer filed to said amended complaint, save and except wherein said answer purports to and does answer the third cause of action set forth in plaintiff's amended complaint, are untrue." While this manner of making findings has been held sufficient, it is not to be commended, for it often leaves the reviewing court in the dark upon what particular theory of the facts the court decided the case. The finding in this case, however, negatives the existence of any indebtedness on the part of plaintiff to defendant, and is sustained, either if the evidence shows that plaintiff never subscribed for any stock of defendant, or that if he did subscribe for such stock it has been wholly paid for. The evidence in the record does show that plaintiff subscribed for 24,000 shares of the capi-

tal stock of defendant at the par value of \$1 per share; but we think that the evidence sustains the proposition that such stock was wholly paid for by the transfer by the "Trophy Oil Company," with the consent of all its stockholders, of 160 acres of land to defendant in consideration of 54,000 shares of stock of defendant corporation, of which the 24,000 shares subscribed for by plaintiff were a part. The 54,000 shares for which the land was sold to defendant were not issued to the Trophy Oil Company, but were divided among the stockholders of the Trophy Oil Company. All the stockholders of the Trophy Oil Company approved and consented to the deed in writing, which bears date October 13, 1900, and the land appears to have been taken and ever since held by the defendant corporation. It does not concern the defendant corporation as to how the 54,000 shares of stock given as consideration for the land were disposed of. The books of the defendant corporation do not show how the land was paid for, but witnesses testified that the consideration for the transfer of the land was 54,000 shares of stock in the defendant company, of which the 24,000 shares subscribed for by plaintiff were a part.

Upon the trial of the issues raised by the counterclaim, the court admitted in evidence the record of a deed, purporting to be executed by the Trophy Oil Company to the Echo Oil Company, conveying to the latter company 160 acres of land. It was and is objected that the deed was void and inadmissible, because it was not shown to have been authorized by the board of directors, and was not ratified by the holders of two-thirds of the stock of the corporation, as required by "an act for the further protection of stockholders in mining companies," adopted April 23, 1880 (Laws 1880, p. 131, c. 118), and amended March 9, 1897 (Laws 1897, p. 96, c. 92). The deed is signed by the president and secretary of the corporation, and has the corporate seal attached. This is prima facie evidence that the deed of a corporation is duly authorized by the board of directors. *Ang. & Ames on Corp.* § 224; *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300, 28 Pac. 1049; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Southern Cal. Colony Ass'n v. Bustamente*, 52 Cal. 192; *Crescent City Wharf & Lighter Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426; *Andres v. Fry*, 113 Cal. 124, 45 Pac. 534. There is attached to the deed a writing signed by nine stockholders, whereby they ratify, confirm, and consent to the deed, and to this is attached the certificate of the secretary, attested by the seal of the corporation, to the effect that the said stockholders are the owners of all the stock of the company. The written ratification and the certificate of the secretary fully comply with the statute in all respects, provided they were properly acknowledged. In this regard it is urged that the acknowledgments of the secretary and all the stockholders save one were

void because taken before one of the parties to the instrument. It does appear that the acknowledgments of the secretary and of eight stockholders were taken before J. R. Baird, as a notary, who is one of the signing stockholders. It certainly is the law that an acknowledgment taken before a grantee, or one standing in the position of a beneficiary under a conveyance or other written instrument, is void, and does not entitle an instrument so acknowledged to be recorded. *Lee v. Murphy*, 119 Cal. 365, 51 Pac. 549, 955; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Murray v. Tulare Irrigation Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586. In support of this doctrine many cases might be cited from other jurisdictions. In some of them the rule is stated broadly that an acknowledgment may not be taken before a party to the instrument; but an examination of the cases discloses that in every case where an acknowledgment has been held void, because taken before a party to the instrument, the officer taking such acknowledgment was either a grantee or agent of the grantee in the instrument, or took some benefit under the instrument. We have been unable to find, after diligent search, involving the examination of many cases, a single case where it has been held that an acknowledgment by grantors taken before a grantor is void. No reason occurs to us why such an acknowledgment should be held void, and the reason assigned in the cases for holding an acknowledgment taken before a grantee void does not exist in such case. In *Murray v. Tulare Irrigation Company*, supra, it was held that an acknowledgment taken before one of several grantees, where each grantee took a separate interest in the land conveyed, was good as to all the grantees save the one taking the acknowledgment. In the case at bar, the consenting stockholder who took the acknowledgment of the other stockholders held but one-ninth of the stock. The consent of the other eight stockholders was sufficient to validate the conveyance without his joining therein at all. He took no beneficial interest under the conveyance, and therefore his act does not transgress the rule laid down in the adjudicated cases. The deed itself having been executed by the corporation, through the proper officers, attested by the corporate seal, and by them properly acknowledged, and all stockholders having in writing consented to the deed, and, as we have seen, properly acknowledged the execution of such consent, and the secretary having signed and also acknowledged the certificate required by the act above referred to, the deed was entitled to be recorded, and the record thereof was entitled to be read in evidence with the same force and effect as the original deed. Code Civ. Proc. § 1851. The court therefore did not err in admitting in evidence the record of the deed. In thus deciding, we have not overlooked the contention of appellant that the conveyance was void because the ratifica-

tion thereof by the stockholders of Echo Oil Company (the grantee) is not acknowledged before any officer. This contention is completely answered by the case of *Granite Gold Mining Company v. Maginness et al.*, 118 Cal. 136, 50 Pac. 269. The ratification of the stockholders of the grantee company is only required for the acquisition of additional mining ground, and in order that defendant might raise the point it must appear that the land conveyed was additional mining ground. No such showing was made.

Appellant in his brief discusses many other points, none of which appear to us to be of sufficient importance to require special notice.

The error which we have pointed out concerning the admission of the evidence of W. J. Kinney could only affect the trial as to the assigned claim of A. M. Kinney, which was for \$90 only. If respondent should prefer to waive his claim to that extent, rather than suffer a retrial, we think that justice and the interest of the parties require that he should be allowed to do so.

It is therefore ordered that if respondent shall within 10 days after the filing of the remittitur in the trial court enter partial satisfaction of the judgment to the amount of \$90, as of the date of the entry of the judgment, the order and judgment shall stand affirmed; otherwise the order and judgment are reversed. Plaintiff recovers its costs of appeal.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. Unrep. 343

RICHMOND et al. v. HOUSER, Judge, et al.
(Civ. 531.)

(Court of Appeal, Second District, California.
May 29, 1908.)

1. CERTIORARI—RETURN—SUFFICIENCY.

Where no objection is urged to the sufficiency of a return on an application for certiorari to review the proceedings of the superior court, and all parties treat the same as a correct transcript, the Court of Appeal will so regard it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 143.]

2. SAME—EXISTENCE OF REMEDY BY APPEAL.

Certiorari lies to review an order of the superior court remanding an action in forcible detainer theretofore certified to the superior court by a justice of the peace, and such order is not reviewable only on appeal, since it is an improper divestiture of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 5, 6.]

3. SAME—PARTIES.

On certiorari to review an order of the superior court, it is necessary that it should be a party, and, in its absence, the writ being directed to the judge of such court, its order cannot be annulled.

Application by Emma Agnes Richmond and others for a writ of certiorari, directed to Frederick W. Houser, as judge of the superior court in and for Los Angeles county, and

others. Application denied, without prejudice.

Wm. T. Blakely, for petitioners. Tipton & Cailor, for respondents.

ALLEN, P. J. This is an application for a writ of certiorari to review the proceedings of the superior court of Los Angeles county remanding an action in forcible detainer theretofore certified to such court by a justice of the peace. The writ is not directed to the court, but to Frederick W. Houser, judge of said court. There is no return by the clerk of the superior court, and the transcript certified to this court is certified to by the justice of the peace; but therein is contained a certificate of the clerk of the superior court, showing the action and proceedings of the superior court. No objection is urged as to the sufficiency of this return, and all parties treat the same as a correct transcript, and we will so regard it.

The return shows that the action of the justice in certifying the case to the superior court was proper, and the order of remand unwarranted. It is insisted by respondents that such order is erroneous, and reviewable only on appeal. We are of the contrary opinion. The superior court had jurisdiction to hear and determine the case before it upon its merits, and the order of remand was an improper divestiture of its right of jurisdiction. "Where such is the case, the writ of certiorari is a proper proceeding to annul the order." Hall v. Superior Court, 71 Cal. 550, 12 Pac. 672; Levy v. Superior Court, 66 Cal. 292, 5 Pac. 353. This writ of certiorari, however, being sought to review the action of an inferior tribunal, it is necessary that such tribunal should be a party, that an effective review be had. This court cannot, in the absence of a proper party, make an order annulling the order of remand.

The application is therefore denied, without prejudice.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 305

DAVIES et al. v. ANGELO et al. (Civ. 311.)
(Court of Appeal, Third District, California.
May 28, 1908. Rehearing Denied July
27, 1908.)

1. APPEAL AND ERROR—FINDINGS—EVIDENCE—SUFFICIENCY—REVIEW.

An appellate court, in reviewing the sufficiency of the evidence to support the findings, is not concerned with the preponderance of the evidence, or the substantial character of the showing made by the defeated party; but the inquiry is whether the record contains any evidence tending to support the findings, giving full credit to the testimony of the successful party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

2. WATERS AND WATER COURSES—APPROPRIATION—ACQUISITION OF WATER RIGHTS—EVIDENCE—SUFFICIENCY.

Evidence in an action for deprivation of water for irrigation held to justify a finding

that one, under a claim of right, for more than the statutory period used for purposes of irrigation 25 inches of the water of a stream, authorizing a judgment that he had acquired the right to the use of such water.

3. TRIAL—FINDINGS—ISSUES.

It is the duty of the court to find on all material issues, regardless of any request of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 916.]

4. WATERS AND WATER COURSES—IRRIGATION—ACTION TO PROTECT RIGHTS IN WATER—FINDING.

A finding that one is the owner of 25 inches of the water of a stream, and that he has used the same under a claim of right for more than the statutory period, "and that such use and appropriation is prior" to any rights of another therein, negatives any claim of right of the latter in or to such water, and passes on the issue of the prior right of the latter.

Appeal from Superior Court, Siskiyou County; J. S. Beuse, Judge.

Action by Lewis Davies and others against Joseph Angelo and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

James F. Farragher, for appellants. Taylor & Tebbe and Gillis & Tapscott, for respondents.

BURNETT, J. The principal contention of appellants relates to the sufficiency of the evidence to support the findings of the lower court. Those to which the specification of insufficiency is addressed are substantially as follows: (1) That the use of the waters of McAdams creek by defendants has never been adverse to the rights of plaintiffs for a sufficient period of time to give them an adverse right thereto; (2) that during the time (20 years) plaintiffs and their predecessors owned and cultivated the so-called Davies ranch, they owned and used 25 inches, measured under a 4-inch pressure, of the waters of McAdams creek and its tributaries (except Clear creek) for irrigating said lands, and that such use and appropriation are prior to any rights of defendants herein; (3) that such use of said waters was made each year from April 1st to October 1st, and that it was necessary for the cultivation of said lands; (4) that in the year 1904 defendants wrongfully and unlawfully diverted all of the waters from said creek and deprived plaintiffs thereof; (5) that during the period of time covered by the diversion by defendants there was sufficient water flowing in McAdams creek to have reached plaintiffs' ditches; (6) that the acts of defendants caused plaintiffs damage in the sum of \$200, and that the continuance of the diversion by defendants of the water would cause great and irreparable damage and injury to plaintiffs.

We are not concerned, of course, with the question of the preponderance of the evidence, or as to the substantial character of the showing made by the defendants; but the single inquiry is, does the record contain

any evidence tending to support said findings? This question must be answered in the affirmative. Without segregating and considering it under its appropriate and corresponding findings, we make the following quotations from the testimony of the witnesses: Lewis Davies said: "I have been familiar with the Davies ranch, on McAdams creek, since 1871. Every year through the irrigating season we have used the water and have raised a crop, excepting, perhaps, in 1881 or 1882, when we had a lawsuit with the miners for this same water. Without irrigating water the garden and fruit crops would dry up and would not mature. The water we used for irrigating was from McAdams creek and a drain known as the 'Oak Grove drain.' We had two irrigating ditches from the creek for irrigation of garden, orchard, alfalfa, and hay. In the spring, when the water was plenty, we used 100 and more; but when the water gets low in the creek we use what the miners have used above us, and that varies from 20 to 30 inches. We would use all the water flowing in McAdams creek above Clear creek. Last year there was a very large crop of apples on the trees, and if we had had water we would have had good apples. Defendants put a dam across the creek and deprived us of the water, however, and the fruit dried up. I think there was plenty of water there to have saved our fruit, if defendants had not interfered. I estimate the damage to our fruit and garden at \$350. I went to defendants, and told them to use the water to irrigate their garden and turn the water down, so I could save my garden and fruit; but they said, 'If the water is ours, we will use it all the time.' I took the dam out, and they put it back immediately, and we did not have any water afterwards. No one above us during the irrigating season in prior years has diverted any of the waters of McAdams creek, or taken them away from us, except during our lawsuit with the miners in 1881, and possibly in 1882." Mr. Davidson testified: "I have been acquainted with McAdams creek more or less for 50 years last past. I know the Lewis Davies place. I think Davies bought this in the '70's. Up to 1900 I was by the Lewis Davies place every year, and I can say they used surface waters of McAdams creek every year for irrigating. I know the old former Ed Mathewson place, now occupied by defendants. There has been a garden there quite a while. It was not there for some time after the Davies ranch." Mr. Wayne testified: "I lived on McAdams creek from 1871 to 1874. I know what is called the 'Davies ranch.' During the time I was there they used water from McAdams creek to irrigate it. While I was there the miners had me to go up and down the creek and keep the water in it. After the water got down so that it was used by the last mine, the first ranch to use it was the Lewis Davies ranch."

There is other testimony of a similar char-

acter, and it is not denied that the irrigating season extends from April 1st to October 1st. Giving full credit, as we must, to the testimony of plaintiffs, we reach the conclusion that plaintiffs, under a claim of right for more than the statutory period of time, for purposes of irrigation, used the waters flowing in said McAdams creek; that said claim of right included at least 25 inches, as found by the court below, although there were periods of drought when the supply was less; that defendants, by the construction of a dam, deprived plaintiffs of the use of water to which they were entitled, and thereby damaged the latter to the extent of \$200, and that the continuance of said obstruction would work irreparable injury to plaintiffs. The findings, supported, as they are, by the evidence, justify the judgment, and render immaterial the allegation of defendants as to prior appropriation of said water, upon which there is no specific finding.

In this connection appellants cite *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318, and *Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851. In the former the well-settled doctrine is announced that "it is the duty of the court to find upon all the material issues, regardless of any request of the parties," and in the latter it is held that in an action to abate and enjoin a nuisance caused by the construction and maintenance by defendants of a bulkhead, embankment, and ditch, where the court found that the ditch caused the injury complained of, but that the defendants did not construct the ditch, and rendered judgment for the defendants, the omission to find upon the material issue presented by the pleadings as to whether defendants maintained the ditch is ground for reversal. But those cases are not in point here, for the reason that the court found that plaintiffs are and have been the owners of 25 inches of the water, and have used the same under claim of right for more than the statutory period, "and such use and appropriation is prior to any rights of defendants herein."

The prior right to the waters, and the extent of such right, were thereby determined, and the findings of the court necessarily negative any claim or right of defendants in or to any of said waters. The material issues were all passed upon, and we see no reason for interfering with the conclusion of the trial court.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 317

WARING v. WILCOX et al. (Civ. 478.)

Court of Appeal, Second District, California.
May 29, 1908. Rehearing Denied by
Supreme Court July 27, 1908.)

1. INSURANCE—LIFE POLICY—BENEFICIARY.

The intention of insured as to who should be the beneficiary, being ascertained, must be

given effect, where it does not contravene public policy or any statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1461.]

2. SAME—RIGHT TO CHANGE BENEFICIARY.

Where the right to change the beneficiary is reserved in the policy, the beneficiary has no vested interest, and another may be substituted at the instance of insured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1469.]

3. SAME.

Where a policy in favor of the mother of insured reserved the right to him to change the beneficiary, the fact that he falsely represented to his mother that he had married one with whom he was living in illicit relations and desired to make her the beneficiary, as she was his wife, and that the mother believed him, is of no consequence in determining the rights of the substituted beneficiary.

4. SAME.

Fraud practiced by insured on the insurer in securing a change of beneficiary, in that he falsely represented that he had married one with whom he was living in illicit relations and desired to make her the beneficiary, as she was his wife, is of no consequence in determining the rights of the substituted beneficiary as against the beneficiary first named.

5. SAME.

A change in the beneficiary of a policy, induced or procured by a promise of the substituted beneficiary of a continuance of illicit relations, is not thereby rendered void; the gift not requiring any consideration to support it.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Carrie M. Waring, known as Carrie M. Wilcox, and Inez C. Wilcox and another having instituted separate actions against the Pacific Mutual Life Insurance Company on a life policy, the actions were thereafter consolidated, the amount of the policy deposited in court, and by appropriate pleadings the rights of the parties set out and litigated in such consolidated action. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed and remanded.

F. W. Allender, Clara A. Allender, and Warren L. Williams, for appellant. Murphy & Schmidt, for respondents.

ALLEN, P. J. Appeal by plaintiff from a judgment of the superior court of Los Angeles county and from an order denying a new trial. It is made to appear by the record that each of the parties plaintiff and defendant originally instituted actions against the Pacific Mutual Life Insurance Company, successor to the Conservative Life Insurance Company, upon a certain policy of insurance theretofore issued by said insurer upon the life of Jesse Manley Wilcox; that thereafter, by order of court made pursuant to a stipulation, these actions were consolidated, and the insurance company deposited in court the amount of the policy, and by appropriate pleadings the rights of the plaintiffs and defendants to such fund were set out and litigated in such consolidated action.

Upon the trial it was found by the court: That the policy of insurance was executed and delivered to Jesse Manley Wilcox on the 26th day of June, 1905. That the defendant Inez C. Wilcox, mother, was named therein as the beneficiary, but that the policy contained a clause conferring upon Jesse Manley Wilcox the right to change the beneficiary. That said policy was delivered by the insured to Inez C. Wilcox, his mother, with the intent and purpose of the insured that the policy should belong to and be the property of the said mother, and the possession of such policy was retained by her until shortly before February 1, 1906, when she, believing from the statements of plaintiff that plaintiff and the insured had intermarried, at the request of the insured, delivered the policy to him. That on the 1st of February, 1906, the insured requested in writing of the insurer that the beneficiary named in the policy be changed from Inez C. Wilcox, mother, to Carrie M. Wilcox, wife, and on the day following the insurer indorsed upon the policy the following: "Carrie M. Wilcox, wife, is hereby made the beneficiary under the within policy in the place and stead of Inez C. Wilcox, mother, named herein; such change being made at the request of Jesse Manley Wilcox, holder of this policy. Dated February 1, 1906." That on the 19th of February following the insured died, and due proof of his death was made. The court further finds that when said request for a change of beneficiary was made by the insured, and when the indorsement on such policy was made by the insurer, there was no such person as Carrie M. Wilcox, wife of said Jesse Manley Wilcox, and there never was such a person as Carrie M. Wilcox, wife of said Jesse Manley Wilcox, and that said Jesse Manley Wilcox died single and unmarried. The court further finds that the insured did not request the insurer to make the plaintiff, Carrie M. Waring, the beneficiary thereof, and that Carrie M. Waring did not give any consideration to said Jesse Manley Wilcox to have herself named as beneficiary, and that Inez C. Wilcox never consented that plaintiff be named as beneficiary in her place and stead; that when said Inez C. Wilcox handed over the policy to the insured he at the time was living in illicit relations with plaintiff, of which fact the mother was in ignorance, and such surrender of the policy by the mother was based solely upon her belief that her son was married to plaintiff. While there is no finding upon the question, there is an averment in both complaint and answer that Carrie M. Waring was sometimes known as Carrie M. Wilcox; and it further appears that plaintiff was in possession of the policy at the time of the death of the insured. Upon these findings the court ren-

dered its judgment in favor of Inez C. Wilcox, the mother, and awarded to her the fund in controversy.

We are of opinion that there is no evidence to support the finding that the insured did not request the insurer to make the plaintiff, Carrie M. Waring, the beneficiary of said policy. There is no room for controversy as to the identity of the person whom Jesse Manley Wilcox intended to be the substituted beneficiary. The averment in the answer that plaintiff was known as Carrie M. Wilcox, the undisputed fact that it was through her insistence that the insured procured the policy from the mother, and her possession of the policy after his death, all point with certainty to the fact that the insured intended that plaintiff should be the beneficiary under the policy. The intention of the insured, then, being ascertained, it is the duty of the court to give that intention effect, provided it does not contravene public policy or any statute. *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 623. It is regrettable that a son should so far forget the duty he owes to the mother who bore him that he should become willing to divert a fund intended for her support to the use of a mistress, who could but dishonor him. Yet the right to manage and control his own confers upon him absolute dominion over his property, and even confers upon him the right to perform this unfilial act. The old rule once obtaining, that the beneficiary named in a policy must consent to a change in order that another beneficiary be substituted, applied only where the right of substitution was not reserved in the contract evidenced by the policy. It is now established that where the contract so provides the beneficiary may be changed at the instance of the insured, and that no vested right exists in the beneficiary, in the absence of any facts or circumstances tending to establish an equitable interest in the proceeds of the policy. "The beneficiary's interest is the mere expectancy of an incomplete gift, which is revocable at the will of the insured, and which does not and cannot become vested as a right until fixed by his death. * * * One cannot be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected." *Hoelt v. Supreme Lodge K. of H.*, 113 Cal. 96, 45 Pac. 185, 33 L. R. A. 174. It follows from this that the false representations as to the relationship between the parties, made to the mother, and her belief therein, are of no consequence in determining the rights of the substituted beneficiary. Nor can we attach any importance to a finding that the policy was delivered with the intent that it should become the property of the original beneficiary; for it contained the reserved right

of substitution, and vested no right other than one to receive the benefit in the event the insured did not elect before his death to change the beneficiary. "It was a part of the contract, as entered into in the beginning, that the assured, of his own free, unrestrained will, might at any time make the substitution he desired." *Bowman v. Moore*, 87 Cal. 311, 25 Pac. 409. The same may be said with reference to the fraud practiced upon the insurance company in the false representation as to the marital relation; for, whatever may have been the effect of such statements as affecting the rights of the insurer, it is not complaining. *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105.

There is nothing in this record indicating that the change in the beneficiary was induced or procured through any promise to continue illicit relations. Were such fact, however, to be assumed from the relations existing at the time of the surrender of the policy and the continuance thereof until death, such fact would not make void a gift by the insured, the right to which became vested at his death. We are not confronted with a question of the enforcement of a contract based upon a void consideration, for no consideration is requisite in support of a beneficiary's right. When the death of the insured intervened, the gift to plaintiff became complete, and her right to the money covered by the policy became vested. This money was in the treasury of the court, paid therein by the insurer, who disclaimed any interest. No other litigant showed any right to the fund, and it was the duty of the trial court to direct its payment to the person to whom the insured intended it to be paid in the event of his death. As we have before said, that person was clearly the plaintiff in this action. Judgment should have been rendered accordingly.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

(8 Cal. App. 342)

KETTNER v. SHIPPY et al. (Civ. 491.)

(Court of Appeal, Second District, California.
May 29, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—UNNECESSARY FINDING.

In an action on a note, wherein plaintiff alleged a transfer to him before suit, for a valuable consideration, it was not error, prejudicial to defendants, to fail to find as to the valuable character of the consideration for the transfer, since the complaint must be construed as alleging transfer after maturity, entitling defendants to avail themselves of any defense available against the original payee; and, since the purpose of the statute requiring an action to be prosecuted by the real party in interest is to save a defendant, against whom a judgment may be obtained, from further vexation or litigation by other parties claiming the same de-

mand, but where plaintiff shows such title that a judgment upon it, satisfied by defendant, will protect him from further annoyance or loss, and where, as against him suing, defendant can urge any defenses he could make against the real owner, defendant is not concerned, and cannot object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4234.]

2. BILLS AND NOTES — CONSIDERATION FOR NOTE—SUFFICIENCY.

That the payee held a note secured by a mortgage on one of defendants' property, the payment of which note such defendant had assumed, that the payee agreed with such defendant, and the defendants who had become associated with him in the ownership of the property, to and did accept the note sued on in satisfaction of the first note, and that the first note was destroyed, and the mortgage released, warrants a finding that the note sued on was executed upon a valuable consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 174.]

3. APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding resting upon competent evidence will not be disturbed, though the evidence is conflicting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by William Kettner against A. B. Shippy and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

J. S. Clack, Bradley & Farnsworth, and Geo. W. Cartwright, for appellants. H. B. McClure, for respondent.

ALLEN, P. J. The complaint declares upon a promissory note, negotiable in form, executed by defendants to one Brown for \$1,300 and interest. Alleges also its maturity, non-payment, and assignment and transfer, before the commencement of the action, for a valuable consideration, to plaintiff, who is the owner and holder thereof. The answers deny the execution of the note, or that for a valuable consideration it was assigned or transferred to plaintiff by Brown, and allege that there was no consideration for its original execution. Upon the trial the execution was admitted, and the court found that after maturity Brown assigned and transferred the note to plaintiff, who is now the lawful owner and holder thereof. The court further finds against defendants upon the issue as to consideration in the original execution.

Appellants contend for a reversal of the judgment, because no finding is made in relation to the valuable character of the consideration for the assignment and transfer to plaintiff. Under the rule the complaint must be construed as alleging transfer after maturity, from which it follows that in the action defendants were entitled to avail themselves of any defense which they could have made had the suit been brought by the original payee. The purpose of the statute which provides that the action must be prosecuted

by the real party in interest is to save a defendant, against whom a judgment may be obtained, from further vexation or litigation, instituted by other parties claiming the same demand; "but where the plaintiff shows such a title as that a judgment upon it, satisfied by defendant, will protect him from further annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object." *Giselman v. Starr*, 106 Cal. 658, 40 Pac. 8. When so protected, the character or extent of consideration paid by the assignee is wholly immaterial, and no prejudice results from any omission to find in relation thereto.

It is insisted, further, by appellants that the evidence is insufficient to support the finding that the note was executed upon a valid consideration. There is evidence in the record which, if true, establishes that Brown held a note for \$1,500, secured by chattel mortgage upon property owned by defendant Noble, the payment of which note Noble had assumed; that, under an agreement with Noble and certain of defendants who had become associated with him in the ownership of said property, Brown agreed to accept the note sued on in satisfaction of the note held by him and so secured. Pursuant to this agreement the note set out in the complaint was executed. Brown thereafter released the mortgage, and destroyed the note which it secured. The court accepted these facts as established. They are sufficient to warrant the finding. That the evidence was conflicting is apparent, but it is not our duty to disturb a finding which rests upon competent evidence.

There is no prejudicial error in the record, and the judgment and order appealed from are affirmed.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 322

PEOPLE v. SOTO. (Cr. 83.)

(Court of Appeal, Second District, California.
May 29, 1908.)

1. CRIMINAL LAW—APPEAL AND ERROR—BILL OF EXCEPTIONS—PRESENTATION—STATUTORY PROVISIONS—CONSTRUCTION.

Act 1905 (St. 1905, p. 761, c. 569) amending Pen. Code, §§ 1171, 1174, relating to the settlement of bills of exceptions, etc., in criminal cases, was not intended to wipe out all general provisions for relief from excusable neglect, rules relating to waiver of the steps necessary to acquire jurisdiction, and to the estoppel of parties to take advantage of their own wrong, but these continue to be a part of the practice applicable to criminal cases.

2. SAME—EXTENSION OF TIME—STIPULATION. Pen. Code, § 1174, as amended by Act 1905 (St. 1905, p. 761, c. 569), provides that in no case can the time, specified therein and in section 1171, for presentation to the judge of the draft of a bill of exceptions be extended by stipulation of the parties. *Held*, that this should

not be construed to include a stipulation of facts in open court, the sufficiency and weight of which the court passes on in granting or denying the order extending the time, but is confined to a stipulation whereby the parties attempt to extend the time without giving the court an opportunity to determine whether or not good cause for the delay exists.

3. SAME.

Pen. Code, § 1174, as amended by Act 1905 (St. 1905, p. 761, c. 569), provides that the time specified for presenting the draft of a bill of exceptions may be extended for a reasonable period by the trial judge, but only for good cause shown, and on affidavit showing the necessity therefor, presented, on written notice of at least two days, to the adverse party. Immediately after sentence was pronounced, all the parties being present in open court, defendant applied for additional time in which to prepare and serve his bill of exceptions. Thereupon the district attorney stated that it would be impossible for the record of the trial to be written up in time for defendant to prepare and serve his bill within the time allowed by law, and on this statement of the district attorney, and without objection on his part, the court made an order granting defendant additional time. *Held*, that this was a statement of fact which the court was entitled to consider as a showing of cause, and equivalent to the affidavit required by said section 1174.

4. SAME.

Where, immediately after the pronouncing of sentence, the parties being present in open court, the district attorney, in response to defendant's application for additional time in which to prepare and serve his bill of exceptions, stated that it would be impossible for the record of the trial to be written up in time for defendant to prepare and serve his bill within the time allowed by law, and on such statement, without objection by the district attorney, the court granted additional time, this amounted to a waiver of the service of notice required by Pen. Code, § 1174, as amended by Act 1905 (St. 1905, p. 761, c. 569), providing that an extension of time for a reasonable period may be granted on written notice to the adverse party.

5. PROHIBITION—EVIDENCE—PRESUMPTIONS.

On application for a writ of prohibition prohibiting the trial judge from settling a bill of exceptions in a criminal case, on the ground that no notice of application for additional time was given, as required by statute, it will be assumed that the court, if necessary, would before settling the bill make its formal order granting relief, under Code Civ. Proc. § 473, providing that the court may relieve a party from a judgment order, etc., taken against him through his mistake, inadvertence, etc.

Shaw, J., dissenting in part.

Rosember E. Soto was convicted of crime. The district attorney applied for a writ of prohibition prohibiting the trial judge from proceeding with the settlement of defendant's bill of exceptions. Alternative writ dismissed, and petition denied.

Albert Nelson, Dist. Atty., for the People.
Lamy & Putnam, for defendant.

TAGGART, J. Defendant was convicted of the crime of rape. He moved the court for a new trial, and his motion was denied on the 7th day of February, 1908, and on the same day judgment was rendered and sentence imposed. Immediately following the pronouncing of sentence, all the parties being present in open court, the defendant made application to the court for 20 days' additional time in

which to prepare and serve his bill of exceptions. The district attorney made a statement that it would be impossible for the record of the trial to be written up in time for defendant to prepare and serve his bill within the time allowed by law; and, upon this statement of the district attorney, and without objection, upon his part, the court made its order granting defendant 10 days' additional time to prepare his bill. Defendant's attorney relied upon the foregoing order, and also upon the assurance of the district attorney that the latter would consent to a 10 days' further extension of time, if necessary, and that he would not insist that the notice required by statute should be given, if defendant should make application for such extension. On February 17th, it appearing that there was some doubt about the order of February 7th having been entered, the counsel for both parties being in court, the question was raised, and the court determined that such an order had been made, and directed the clerk to make an entry thereof in the minutes. This was not done, however, until March 16, 1908, when, by a written order of the court, the minutes were corrected to show this order so made. On the morning of February 17, 1908, all parties being in open court, defendant's attorney, being apprehensive of the effect of the failure to enter the order of February 7th, made application to the court for additional time. The district attorney objected, upon the ground that no notice had been given, and no affidavit of cause served on him, as required by sections 1171 and 1174 of the Penal Code. The matter was continued until the afternoon of the same day, for further hearing, at which time defendant presented, served, and filed an affidavit containing a sufficient showing to sustain either an order granting additional time (if the application was noticed and served in time), or an order granting relief from his failure to give the notice and serve an affidavit in the time required by section 1174. The district attorney again objected to the granting of the order, and the hearing was continued until February 20th. In the meantime, on February 17th, the defendant served notice in writing, on the district attorney, of his intended application to the court (judge) on said 20th day of February, 1908, for an extension of time within which to present his bill of exceptions. The application was based on the affidavit above mentioned, no counter showing being made by the district attorney, who again objected to the court granting the application, on the ground that the defendant had not complied with the provisions of sections 1171 and 1174. The court overruled these objections, took the matter under consideration, and on February 25th made an order as follows: "Motion of defendant for additional time to file his bill of exceptions is granted, and his time is extended from February 17, 1908, to and including February 29, 1908, at 10 a. m." On February 25, 1908, written notice, as required

by section 1171, of defendant's intention to apply on February 28, 1908, to the judge who tried the cause to settle the defendant's bill of exceptions, was served upon the district attorney. At the time set for such presentation, the latter appeared, and objected to the settlement of the bill, on the ground that the judge had no jurisdiction to settle the same, but made no counter showing to the defendant's showing for relief. An alternative writ of prohibition issued from this court to the superior judge, prohibiting the trial judge from proceeding with the settlement of the bill, and the matter now comes on for hearing, on the motion of the district attorney to make the writ permanent.

The position of the district attorney on this application is that no waiver, conduct, misrepresentation, or deceit of a district attorney, whether relied upon by a defendant or not, can excuse him for a failure to give the notice and serve the affidavit required by the statute, and that either or all these cannot estop a district attorney from raising this question as a jurisdictional prerequisite to the settlement of the bill. We take it the amendment of the sections named, upon the recommendation of the code commissioner in 1905, was to accomplish the purpose stated in the notes to those sections, on page 1156 of the Statutes of 1905, and that it was not intended thereby to wipe out all general provisions for relief from excusable neglect, rules relating to waiver of the steps necessary to acquire jurisdiction, and to the estoppel of parties to take advantage of their own wrong. These continue to be a part of the practice applicable to criminal cases in this state. Section 1174 provides that "in no case can the time be extended by stipulation of the parties." This should not be construed to include a stipulation of facts in open court, the sufficiency and weight of which the court passes upon in granting or denying the order extending the time, but is confined to a stipulation whereby the parties attempt to extend the time without the court being given an opportunity to determine whether or not a good cause for the delay exists. The court being in session, the counsel for the respective parties being present, and the district attorney making a statement of the facts relative to the possibility of having the record of the proceedings upon the trial transcribed in time to prepare the bill, this was a statement of fact which the court was entitled to consider, as a showing of cause and equivalent to the affidavit required by section 1174. The district attorney being present, and consenting to the order when there was still abundant time for the defendant to comply with the statutory provision as to service of notice, was a waiver of service of notice, and gave the court jurisdiction. Had this been after defendant was in default, another question would have arisen. Upon these grounds, and for these reasons, the order of February

7th operated to give the defendant 10 days' time in addition to that allowed by law. The application of defendant on February 17th made a showing sufficient for relief and also for an extension of time. It was treated as if an application to extend the time only, and the order made thereon, was limited to this in its terms. If the order of February 7th be considered as ineffectual to grant the 10 days' additional time, and the application of February 17th as one for an extension of time only, the notice and service of affidavit required by section 1174 were lacking. As an application for such an order, accompanied by a showing or excuse why the notice and affidavit had not been made in time, it was before the court. The court made its order granting the extension asked, but did not make any formal or separate order purporting to grant relief under section 473 of the Code of Civil Procedure, on the ground of excusable neglect, from the failure to give the notice. Upon the showing being made by the affidavit of Attorney Lamy in open court on the 17th day of February, the judge continued the matter for hearing in all its features, and gave the district attorney ample time to make a counter showing to the facts stated in the affidavit upon which defendant relied for relief, but none was made. We think the district attorney was in court upon the application for relief, and that the order made was sufficient to grant the relief and extend the time. We do not regard this holding as necessary to the determination of the rights of the applicant here, as the order of February 7th extended the time of defendant until February 27th. If it be conceded that both the efforts to secure an extension of time were ineffectual, we should still be compelled to hold that the petition should be denied.

Passing the order of February 7th as unauthorized, and the order of February 25th as ineffectual, because not preceded by a formal order of relief under section 473 of the Code of Civil Procedure, we come to the action of the court, which we are asked to prohibit. The bill of exceptions is before the judge who tried the cause, for settlement upon notice of two days, as required by section 1171. All the record made, and all the facts arrayed in the affidavit presented upon the former applications for relief and extension of time, are before the trial court, and may be considered by it. We are asked to presume that the court will proceed to settle the bill, even though the making of a formal order of relief under section 473 be first required, without making this prerequisite order. We cannot assume that the court will do this, for the purpose of prohibiting it from settling the bill. Rather must we assume that it will take such action on the application for relief as will make it competent for it to settle the bill without error, and, if necessary, make its

formal order granting relief under section 473 before settling the bill.

In our opinion the alternative writ should be dismissed, and the petition denied, and it is so ordered.

I concur: ALLEN, P. J.

SHAW, J. I concur in the judgment, but cannot assent to all that is said in the foregoing opinion by Mr. Justice TAGGART. Under the provisions of section 1171 of the Penal Code the defendant should have presented the draft of his bill of exceptions to the judge for settlement within 10 days after judgment, or within such extension of time, ordered by the trial judge, in accordance with the provisions of section 1174 of the Penal Code. The bill was not presented within the time specified in section 1171, supra, nor was any legal order made prior to the expiration of the 10 days extending defendant's time for presentation of his bill. The order made on February 7, 1908, but not entered until March 16th following, was a nullity, for the reason that no affidavit showing the necessity for such extension of time was made or filed. *People v. Blis* (Cal. App.) 84 Pac. 676; *People v. Simmons* (Cal. App.) 95 Pac. 48. The time having expired, the court was without authority to make the order, of date February 25, 1908, extending defendant's time to February 29, 1908, within which to prepare and present his bill of exceptions, unless the court had first made an order relieving defendant from his default. Admitting that the affidavit filed on February 17th constituted an application for relief, and performed the dual function of showing the necessity for the extension of time, and also constituted a sufficient showing under section 473 of the Code of Civil Procedure, in support of the application for relief, still, so far as the record shows, the court never at any time made an order relieving defendant from default. The minute entry of February 25th does not purport to be other than an order extending the time. It cannot, in my judgment, be construed as an order relieving defendant from default. Where the court is without jurisdiction to make an order, except by virtue of some intervening action or order, the record must, in order to justify the exercise of jurisdiction, show that such intervening action or order upon which jurisdiction depends was had or made. *Cameron v. Arcata, etc., R. R. Co.*, 129 Cal. 279, 61 Pac. 955.

The expression of opinion by the trial judge wherein he gives his reasons for making the order, as shown by the return, is no part of the record, and cannot be regarded of any weight in support of this application. *Higgins v. Los Angeles Ry. Co.* (Cal. App.) 91 Pac. 344; *Schwerdtle v. Placer Co.*, 108 Cal. 589, 41 Pac. 448. Want of

jurisdiction, however, does not, of itself, warrant the issuance of the writ of prohibition. Petitioner can suffer no injury, for the reason that he has an adequate remedy upon the hearing of the appeal, by interposing objections to the consideration of the bill of exceptions, upon the ground that the bill itself discloses that it was settled after the expiration of the statutory time, and in the absence of an order granting relief, without which there could be no authority for making the order dated February 25th extending the time. *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765. "The writ of prohibition should not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed." *Santa Monica v. Eckert et al.* (Cal.) 33 Pac. 880; *Hayes v. Board of Trustees, etc.* (Cal. App.) 92 Pac. 492.

It is not improper to suggest that ample time remains for defendant, if so advised, to make an application, supported by a showing of facts, which may warrant the trial judge in making an order relieving him from default, thus affording a record of the proceedings under the authority of which he would, in the first instance, be warranted in settling the bill.

8 Cal. App. 329

PEOPLE v. KING. (Cr. 44.)

(Court of Appeal, First District, California.
May 29, 1908. Rehearing Denied by
Supreme Court, July 27, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS COVERED—REFUSAL NOT ERROR.

It is not error to refuse an instruction substantially covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. BURGLARY—POSSESSION OF STOLEN PROPERTY—EFFECT.

Unexplained possession of stolen property, by one accused of burglary and of larceny in connection therewith, however soon after the taking, does not, of itself, justify a conviction, though the burglary be shown to a moral certainty and beyond reasonable doubt, but it is a circumstance to be considered with any other incriminating evidence in determining whether accused is guilty, and if not satisfactorily explained, tends to show his guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, §§ 104–107.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Joseph King was convicted of burglary in the first degree, and he appeals from the judgment, and from an order denying a new trial. Affirmed.

Geo. D. Collins, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. Appeal from the judgment and order denying defendant's motion for a new trial.

Appellant was accused, jointly with Thomas Baker and Harry Hamilton, of burglary, committed on April 23, 1902, in the city and county of San Francisco. The information also alleged two prior convictions of burglary against both appellant and Hamilton, and one prior conviction of robbery against Baker. Appellant admitted the prior convictions charged against him, and pleaded not guilty to the main charge. No evidence was offered on the part of appellant, and he was convicted of burglary in the first degree. He was sentenced to imprisonment in the penitentiary for 20 years, the sentence to run concurrently with another of 10 years, the judgment imposing which has been affirmed by the District Court of Appeal of the Third Appellate District. *People v. King*, 4 Cal. App. 213, 87 Pac. 400.

Appellant does not contend that the evidence was insufficient to warrant the verdict of the jury, but he complains of the refusal of the court to give certain instructions. The first of such instructions is that numbered 40, which reads: "If the evidence in this case proves no more than the fact that defendant had possession of the property in evidence, and that he, with one Hamilton, brought the same to No. 835B Howard street, in this city, then the court instructs you that the defendant cannot be convicted of burglary, and that your verdict must be that he is not guilty." This instruction was substantially given several times, at the request both of the appellant and of the people. Some of the instructions given, which we think cover the one refused, are the following: Instruction No. 2, which, in part, reads: "In other words, if the jury believe, to a moral certainty and beyond a reasonable doubt, that a burglary had been committed on the premises in question, as alleged in the information, that certain personal property had been stolen in the commission of such alleged burglary, and that certain of such property was afterwards in the possession of the defendant, this possession, of itself, and standing alone, is not sufficient to justify his conviction, even if the commission of the burglary be established as aforesaid." By instruction No. 48 the court told the jury that it could not convict the appellant of burglary upon proof that he had received stolen property knowing the same to have been stolen. In instruction No. 61, requested by appellant, the court informed the jury that, unless the evidence satisfied their minds that King actually entered the premises described in the information, or aided or abetted some other person in entering said premises, their verdict should be not guilty. Instruction No. 37, also in effect, covers the subject-matter of the rejected instruction.

Appellant next complains of the action of the court in refusing his instructions Nos. 44, 55, and 62; but the substance of these proposed instructions was amply covered by other instructions given by the court. No.

44 was given almost as proposed by part of appellant's instruction No. 39.

It is further urged that the refusal of the court to give appellant's instruction No. 49, and the giving of people's instruction No. 2, was reversible error. These instructions are as follows: "(49) You are instructed that the defendant is not required, and cannot be required, to explain his possession, if any, of the property in evidence here; and the law prohibits you from making any inference or deduction or drawing any conclusion adverse to the defendant from the fact that he has omitted to furnish any explanation of his possession thereof, if he had any such possession." "(2) The people in this case contend that certain of the property, alleged to have been stolen from the said premises at the time of the alleged burglary, was subsequently in the possession of the defendant. Upon the subject of stolen property in the hands of a defendant charged with burglary, the court instructs the jury that the mere possession of stolen property, unexplained by a defendant, however soon after the taking, is not, of itself, and standing alone, sufficient to justify a conviction, even if it be shown to a moral certainty and beyond a reasonable doubt that the alleged burglary was committed. But it is a circumstance which, taken in connection with other incriminating evidence in the case, if any there be, is to be considered by the jury in determining the question of the guilt or innocence of a defendant so charged. The failure of a defendant to account for such possession, or to show that such possession was honestly obtained, if it is found that there was such possession, is a circumstance tending to show his guilt, and he is bound to explain such possession in order to remove the effect thereof as a circumstance, considered in connection with other incriminating facts, if any such are found in the evidence. In other words, if the jury believe, to a moral certainty and beyond a reasonable doubt, that a burglary had been committed on the premises in question, as alleged in the information, that certain personal property had been stolen in the commission of such alleged burglary, and that certain of such property was afterwards in the possession of the defendant, this possession, of itself, and standing alone, is not sufficient to justify his conviction, even if the commission of the burglary be established as aforesaid. But it is a circumstance which, if not satisfactorily explained, tends to show his guilt, and, when taken in connection with other incriminating evidence in the case, if such there be, may be sufficient to satisfy the jury beyond a reasonable doubt, of the guilt of the defendant of the crime of burglary, as alleged in the information." We think the law on the subject of recent possession of stolen property was correctly declared in instruction No. 2, and that therefore the court did not err in giving it, and in refusing instruction No. 49.

The instruction given has the support of numerous decisions in this state. Among them are *People v. Kelly*, 28 Cal. 423, *People v. Gill*, 45 Cal. 285, *People v. Clough*, 59 Cal. 440, *People v. Velarde*, 59 Cal. 457, *People v. Etting*, 99 Cal. 578, 34 Pac. 237, *People v. Abbott*, 101 Cal. 648, 36 Pac. 129, *People v. Wilson*, 135 Cal. 331, 67 Pac. 322, *People v. Farrington*, 140 Cal. 656, 74 Pac. 288, *People v. Lang*, 142 Cal. 482, 76 Pac. 232, *People v. Horton* (Cal. App.) 93 Pac. 382, and *People v. Hallam* (Cal. App.) 92 Pac. 190.

In the case of *People v. Wilson*, supra, it is said: "The eleventh instruction given to the jury, which is claimed to be error, is as follows: 'If the jury believe from the evidence that the property mentioned in the information, or any portion thereof, was feloniously taken from the person of the prosecuting witness, James A. Carter, as described in the information, and received into the possession of the defendant shortly after being so feloniously taken, the failure, if failure there be, of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose any such.' The instruction is almost a literal copy of that given in *People v. Abbott*, 101 Cal. 647, 36 Pac. 129, and was therein approved. We see no reason to depart from the doctrine of that case."

The instructions given elaborately covered every phase of the case. The record discloses no error; hence the judgment and order should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

(8 Cal. App. 286)

In re HILL'S ESTATE. (Civ. 445.)

(Court of Appeal, Third District, California.
May 27, 1908. Rehearing Denied by
Supreme Court, July 24, 1908.)

1. EXECUTORS AND ADMINISTRATORS—RIGHT TO APPOINTMENT—ORDER OF PREFERENCE—STATUTORY PROVISIONS—COMMUNITY PROPERTY—RELATIVES OF DECEDENT'S DECEASED SPOUSE.

Code Civ. Proc. § 1365, as amended by St. 1907, p. 566, c. 296, provides that administration of the estate of an intestate must be granted to one or more of the persons thereafter mentioned; the relatives of the deceased being entitled to administer only when entitled to succeed to the personal estate or some portion thereof. Brothers are placed fourth in the order of preference, and the next of kin entitled to share in the distribution of the estate are placed seventh. It is further provided that the section shall apply to the relatives of the previously deceased spouse of decedent, when entitled to succeed to some portion of the estate under Civ. Code, § 1386, subd. 8, which subdivision, as amended by St. 1907, p. 567, c. 297, provides that if a decedent is a widow or widower, and any portion of the estate was common property, and neither spouse left issue, one-

half of the common property would go to the parents of each spouse, respectively, or, if both parents on either side were dead, to the brothers and sisters and their descendants by right of representation. I. and her deceased husband, J., both died without issue or surviving parents. I. had no surviving brother or sister, but had nephews. J. had a brother, who survived both J. and I. There was community property, consisting of both realty and personalty. Held, that J.'s brother was entitled to appointment as administrator of I.'s estate over the nephews of I.

2. SAME—EFFECT OF POSSIBLE EXHAUSTION OF PERSONAL ESTATE BEFORE DISTRIBUTION.

The fact that there might be no community personal estate left for distribution would not affect J.'s brother's right to preference, notwithstanding the first portion of Code Civ. Proc. § 1365, as amended by St. 1907, p. 566, c. 296.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Applications for administration on the estate of Isabella Hill by John Hill, a brother of decedent's deceased husband, and by Charles F. McCann and another, nephews of decedent. From an order denying his application and granting the other application, John Hill appeals. Reversed.

A. W. Hill, for appellant. Gregory & Connick, for respondents.

CHIPMAN, P. J. This is an appeal from an order appointing respondents administrators of the estate of deceased, Isabella Hill. It appears that Stephen Hill and Isabella Hill were married in 1865; that Stephen died intestate and without issue of the marriage, December 25, 1906, in the county of Humboldt, leaving quite a large estate therein; that his surviving wife was duly appointed administratrix of his estate January 29, 1907, and died intestate and without issue December 26, 1907; that the said Isabella, as administratrix, filed her inventory and appraisal of the estate of her deceased husband on February 12, 1907, showing said estate to consist of personal and real property, of which \$90,000 was reported as real estate and separate property and \$13,428.61 was community property. Of this latter item \$7,868.61 was personal property and \$5,560 was real property. It appeared, also, that during her administration real estate had been sold to the amount of \$1,160, and that \$160 of personal property had been set apart to the widow, \$2,400 had been paid out on account of family allowance, \$927.65 for payment of claims, including funeral expenses and of last illness, and \$750 for a monument to decedent. There had been no decree of distribution, and no account of any kind rendered or settled. Notice to creditors had been ordered; but it did not appear whether such notice had been given, or whether the time for the presentation of claims had expired. Stephen Hill died without father or mother, and Isabella died without father, mother, brother, or sister. The matter was heard upon the petition of appellant, brother of Stephen

Hill, deceased, and the petition of respondents, nephews of deceased, Isabella Hill.

Appellant specifies insufficiency of the evidence to justify the decision denying the petition of John Hill, in this: that Isabella Hill died, a widow, without father, mother, brother, or sister, leaving as part of her estate an undivided interest in the estate of her deceased husband, and that appellant is a brother to said Stephen; that the evidence is insufficient, because petitioners McCann and Connick are nephews of decedent, Isabella, while petitioner John Hill is brother of deceased, Stephen Hill. For like reasons the decision is specified to be against law. The sole question is: Was the brother of Stephen Hill entitled to letters in preference to the nephews of Isabella?

Section 1386, subd. 8, of the Civil Code, as amended March 18, 1907 (St. 1907, p. 567, c. 297), provides as follows: "If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares" to his or her children and their descendants, and, if none, then one half to the father and mother in equal shares, or, if both be dead then to the brothers and sisters and their descendants, "and the other half goes to the father and mother of such deceased spouse in equal shares, * * * or, if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation." A different disposition is made of the separate property, for by this subdivision 8 all the separate property of the deceased spouse which came to decedent by descent goes, in the case here, "in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation." It will be seen, therefore, that appellant is entitled to succeed to some portion of both the real and personal estate of the decedent and of both the separate and common property involved.

Section 1365 of the Code of Civil Procedure, prescribing the order in which certain persons are entitled to administer, was amended March 18, 1907 (St. 1907, p. 566, c. 296), as follows: "This section shall apply to the relatives of the previously deceased spouse of decedent when entitled to succeed to some portion of the estate under subdivision 8 of section 1386 of the Civil Code." Prior to this amendment the section applied only to the relatives of the deceased, but by this amendment it now applies also to the relatives of the previously deceased spouse. It will be observed that by the amendment the section now applies to relatives of the previously deceased spouse of decedent, "when entitled to succeed to some portion of the estate," whereas, by the first

paragraph of this section, the relatives of the deceased are "entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof." It is not necessary in the present case to determine whether or not this latter provision applies to appellant, for he is shown to be entitled to succeed to some portion of both the personal property of decedent, as well as to a portion of the realty.

It is urged, however, that appellant failed to establish any interest in the personal property of decedent, because her estate is not closed and distributed, and hence it cannot be known whether upon final distribution there will be left any personal estate for distribution. This cannot be the test, for, if it were, it would apply equally to the relatives of decedent, and neither they nor the relatives of the previously deceased spouse would be qualified to apply for letters. Manifestly, there was some personal estate (the amount is not material) to which appellant succeeded at the death of decedent and this satisfies the statute.

By the provisions of section 1365, Code of Civil Procedure, the brothers are fourth in order of precedence, and the next of kin are seventh. As the amended section applies equally "to the relatives of the previously deceased spouse of decedent," the order or precedence must necessarily so apply, and clearly, in our opinion, the order prescribed by the statute must be followed; and this gives the brothers precedence over the next of kin, whether they be "relatives" of decedent or of the deceased spouse.

The order is reversed.

We concur: BURNETT, J.; HART, J.

8 Cal. App. 333

PEOPLE v. DI RYANA et al. (Cr. 116.)

(Court of Appeal, First District, California.

May 29, 1908. Rehearing Denied by

Supreme Court, July 27, 1908.)

1. FORGERY—CHARACTER OF DOCUMENT.

Under Pen. Code, § 470, making guilty of forgery one who, with intent to defraud, counterfeits or forges the seal or handwriting of another, the document forged or counterfeited must not only be false and forged, but it must also be of such a character as to be available in law to work the intended injury or fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 28-47.

For other definitions, see Words and Phrases, vol. 3, pp. 2900-2909; vol. 8, p. 7665.]

2. SAME—INDICTMENT AND INFORMATION.

An indictment for forgery need not expressly allege every fact, the existence of which is assumed by the forged document, when the instrument on its face is valid, and it is not necessary, in an indictment for forging the name of S. to a proof of loss, to allege that the insurance company had issued a policy to S., or that the property insured was damaged by fire.

3. SAME.

Where an instrument is perfect and intelligible, and its nature can be seen by the court itself, no averments as to extraneous facts are necessary; and hence an indictment for forging

a proof of loss under a fire policy issued to S. was not defective for failing to allege the modes in which the proof of loss might be used to deceive others, since such proof, with a forged assignment from S., could have operated to defraud the insurance company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Joseph V. Di Ryana and another were convicted of forgery, and from the judgment and from an order denying motion for a new trial, they appeal. Affirmed.

H. H. McCloskey and Wm. S. Barnes, for appellants. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendants were convicted of forgery. They moved for a new trial and in arrest of judgment, which motions were denied. From the judgment, and from the order denying their motion for a new trial, defendants prosecute this appeal.

The indictment alleges that the defendants committed the crime of forgery "by falsely and fraudulently forging and counterfeiting the handwriting of Pasquale Solimena to a certain instrument in writing for the payment of money," which instrument was an ordinary form of proof of loss used by insurance companies. The document is as follows:

"To the Hamburg-Bremen Fire Insurance Co. of Hamburg, Germany: By your policy of insurance No. 123,915, dated March 23, 1906, issued to Solimena Bros. by Rudolph Herold, Jr., your agent at San Francisco, Cal., for the term of one year to the 23d day of March, 1907, you insured the party herein and therein named against loss or damage by fire, to the amount of two thousand dollars, as more fully appears by the printed portions and conditions of said policy, viz., 1,000 on stock of lumber; 1,000 on machinery, tools and implements of trade, including motor, all while contained in frame building situate No. 814 east side of Battery street, between Broadway and Vallejo street, San Francisco, Cal. (2) The property thus insured belonged to Pasquale Solimena and Alfonso Solimena, doing business as Solimena Bros. and no other person or party had any interest therein. (3) The building was occupied by the following persons and occupations and no other person or persons: First floor, stores and assured manufacturing furniture and fixtures of wood; residences above. (4) A fire occurred on the 20th day of April, 1906, at the hour of 10 o'clock a. m., by which the property named in the policy was destroyed or damaged as hereinafter set forth in detail. (5) The whole value of the respective items of the property amounted to \$——, which was the actual cash value at the time of the fire, as set forth in annexed Schedule A. (6) The whole amount of loss

sustained is \$1,000, as set forth in annexed Schedule A. (7) The whole insurance on said property at the time of the fire, including that above mentioned, was \$2,000, and no more. See Schedule B annexed. (8) We claim of your company its proportion of said loss, viz. \$1,000, as per apportionment Schedule B. (9) The fire originated as follows, viz. (State here fully the circumstances connected with the origin of the fire): From general conflagration, and premises were undamaged by earthquake. (10) Nothing has been done by us or with our privity or consent to violate the conditions of insurance, or void the policy. Witness our hands at San Francisco this 31st day of May, 1906. Pasquale Solimena of and for Solimena Bros.

"State of California, County of San Francisco. ———, 19—. Personally appeared Pasquale Solimena, the signer of the foregoing statement, and made solemn oath that said statement is just and true, according to the best of his knowledge and belief. Before me, Thomas S. Burnes, Notary Public in and for the City and County of San Francisco, State of California. [Seal.]"

The evidence shows that there was also forged, by the defendants, an assignment of the interest in the claim of Solimena Bros., under the policy of insurance to one of the defendants. This assignment was presented to the Hamburg-Bremen Insurance Company, with the forged instrument set forth in the indictment, and thereupon the insurance company paid the defendants the insurance money, amounting to \$1,000. The charge of forgery here, however, is based on the claim of loss alone. The instrument set forth in the indictment is not one of those specifically enumerated in section 470 of the Penal Code which may be the subject of forgery, nor was the indictment altogether framed on the theory that it was; for it will be noted that it alleges that the crime was committed by "forging and counterfeiting the handwriting" of Pasquale Solimena to the named document. This allegation brings the defendant within that part of section 470 of the Penal Code which, in its terms, makes one guilty of forgery who, with intent to defraud, "counterfeits or forges the seal or handwriting of another." In other words, one may be guilty of the crime of forgery by counterfeiting the handwriting of another to an instrument not specifically enumerated in said section. Nevertheless, to constitute the crime of forgery, the document forged or counterfeited must not only be false and forged, but it must also be of such a character as to be made available in law to work the intended injury or fraud. In the case of *People v. Turner*, 113 Cal. 280, 45 Pac. 331, the defendant forged a certificate of recordation on the back of a deed, and it was contended that the act complained of was not known to our law of forgery. The court, speaking of the information, which was based on the same part of

section 470 as is the indictment here, said: "By the terms of that section one who 'counterfeits or forges the seal or handwriting of another's is guilty of forgery. Fraud and deceit are essential elements to the crime, and unless the counterfeited handwriting be of such a nature that some one might possibly be defrauded by it, the mere fact that it is a false writing is not sufficient to constitute an offense. But, on the other hand, if the counterfeit writing might possibly deceive another, and was prepared with intent to deceive and defraud another, then it becomes immaterial whether any person was actually injured or not." A proof of loss is an instrument recognized by the criminal law of this state (Pen. Code, § 549), by text-writers, and by the adjudicated cases of this and other countries. Its functions in insurance matters are well known. The writing in question was a complete and valid proof of loss, and, as such, possessed at least some seeming legal efficacy.

Having said this much about the general nature, both of the indictment and the claim of loss, we turn to the objections urged by the appellant. It is true that the indictment does not aver that there was a policy of insurance issued to Solemina Bros. by the said insurance company, nor, if there was such a policy, that the property insured was damaged or destroyed by fire, etc. Nor was it necessary, in our judgment, as contended by appellant, to allege these matters; for, according to the decisions in this state, it is unnecessary that the indictment should expressly allege every fact the existence of which is assumed by the forged document, when the instrument on its face is valid. Thus, in *People v. Todd*, 77 Cal. 464, 19 Pac. 883, the defendant was charged with forging a will, and it was held unnecessary to state in the indictment the fact that the testator had property that might be subject to the terms of the will. Again, in *People v. Bibby*, 91 Cal. 470, 27 Pac. 781, the defendant was charged with having forged an order of the trustees of a school district, upon the county superintendent of schools, for a requisition upon the county auditor for a warrant against the county school fund; and the court held that the order charged to have been forged was valid on its face, and therefore that it was unnecessary to allege the facts assumed in the forged order, such as the existence of the school district, or that the trustees whose names were signed to the order were the trustees of such district. In *Ex parte Finley*, 66 Cal. 264, 5 Pac. 223, a decree of divorce was forged, and the court said: "It is not necessary to hold that the recitals in a decree of divorce, set out in the information, are the equivalent of an express averment that the parties to the divorce were married. We hold that the marriage need not be averred. They may have been married, and on its face the writing shows that it may have been used to consummate a fraud."

In *People v. Turner*, *supra*, the Supreme Court said: "But on the other hand, if the counterfeit writing might possibly deceive another, and was prepared with intent to deceive and defraud another, then it becomes immaterial whether any person was actually injured or not. It may be readily seen that one may be exposed to fraud and injury by a forged certificate such as this. He might rest under the assurance that the certificate carried with it that his deed was, in fact, of record and is subjected to injury, or perhaps to loss of the property at the hands of the forgers, who might thereafter sell or mortgage to an innocent third party, whose deed was placed of record." There, apparently, it was unnecessary to allege aliunde the ways in which the certificate might be used to effect an injury.

Appellant further contends, substantially, that, if it be assumed that the instrument is a complete proof of loss, it alone could not possibly work an injury on any person; that it might be the subject of forgery under certain conditions, but that those conditions must be pleaded in the indictment, or no crime is charged, and by way of illustration he says: "If, in addition to the forged claim of loss, there were a forged assignment from Solemina Bros. to the appellant, the two instruments, taken together, might tend to defraud." This position is untenable. It is true that whenever a forged writing is defective or unintelligible, and consequently it cannot be seen in what way it could operate to defraud, then its capacity in that respect must be made to appear by the averment of existing extraneous facts. *Hughes on Criminal Law and Practice*, § 935; *Rembert v. State*, 53 Ala. 469, 25 Am. Rep. 639; *State v. Wills*, 70 Minn. 403, 73 N. W. 178. But when, as here, the instrument is perfect and intelligible, and its nature, extent, and capacity can be seen and judged by the court itself, this rule does not apply, and no such averments are necessary. *Snell v. State*, 21 Tenn. 347; *People v. Ah Woo*, 28 Cal. 211; *People v. Todd*, 77 Cal. 465, 19 Pac. 883; *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594; *Hughes on Criminal Procedure*, § 943. *McClain*, in his work on Criminal Law, § 758, expresses the rule thus: "By the weight of authority it is sufficient if the instrument appears to be one that might be good and effectual, if valid, though the circumstances which would render it effectual do not appear." In *Commonwealth v. Costello*, 120 Mass. 369, it is said that an indictment for the forgery of a bond to dissolve an attachment need not state in detail how the bond could have been used to defraud; "it is enough that it appeared from the character of the instrument, together with the provisions of the statute, that it might have been so used, in connection with other facts, real or simulated, either then existing or with which it was to be afterwards connected."

From these authorities, and others to be

presently cited, we apprehend that it was unnecessary to allege, in the indictment, the modes in which the proof of loss might be employed to deceive another. It, with a forged assignment or a power of attorney from Solimena Bros., or by some one impersonating either of them, could have operated to defraud the Hamburg-Bremen Fire Insurance Company. It thus clearly appears that some one could have been deceived and injured by a proof of loss such as this. In the case of *State v. Hilton*, 35 Kan. 338, 11 Pac. 164, one Brown had his life insured in the National Union, a mutual benefit insurance company. One of the officers of the company received notice that Brown had died. Upon receiving the notice he forwarded blanks for proof of death. The defendant was appointed a committee to investigate the cause of death of Brown and after a short time the proofs of death were sent by defendant to the insurance company. These proofs were untrue, because, in fact, Brown was not dead. The papers returned by the defendant to the company were headed, "Official notice and proof of death," and embraced several separate and complete documents. On page 1 there was a statement with questions answered; on page 2 the certificate of the attending physician, with the statement of an officer under oath that the attending physician was respectable, entitled to credit, and in active practice; on page 3 there was a report of a council examining committee on the cause of death. Attached to the proof of death, and on page 3 thereof, there was an undertaker's affidavit and a clergyman's certificate. The defendant was charged with having forged this affidavit and certificate. The court said: "The undertaker's affidavit and clergyman's certificate, as executed, are complete and separate instruments, and are not defective or in any way invalid on their faces. It is true that all of these separate and independent instruments are necessary to complete the proof of death; but, in our opinion, the undertaker's affidavit and the clergyman's certificate, as executed, are as complete and separate instruments as though they were wholly detached from the other papers constituting the proof of death. We do not think that where a certain number of written instruments are required to be presented in connection with each other as indispensable to establish any alleged fact, a person who fraudulently and falsely makes one or more of these written instruments is guiltless of offense because he does not falsely make all, or because, in some of the other written instruments to be presented, a discrepancy or defect occurs which prevents the accomplishment of his fraudulent purpose. The undertaker's affidavit and the clergyman's certificate are in the exact form required, and we think are the subject of forgery. * * *

It has been held in a number of cases that it is forgery to make an instrument with intent to defraud, although, if it had been

genuine, other steps must have been taken to complete the instrument. *Hughes on Crim. Law & Prac.*, § 935. We think the reasoning in those cases is applicable to this case. In *Commonwealth v. Costello*, 120 Mass. 367, quoted with approval in *People v. Bibby*, 91 Cal. 470, 27 Pac. 781, the defendant was charged with forging a bond, to be used for the purpose of dissolving an attachment. It was contended that the bond was invalid in law, because, not having been approved, it could not operate to release the attachment. In that case, before the bond could have been effectual to injure or defraud any one, certain steps must have been taken, yet the court held it to be forgery, although the steps never had been taken. The court said: "It is contended that the bond, alleged to have been intended to dissolve the attachment, could not have operated so to do, and that, as it was void for that purpose (the steps requisite to give it validity not having been taken), there could have been no forgery of it. It is true that the false making of an instrument merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose; but, if the instrument is one made with intent to defraud, although, before it can have effect, other steps must be taken or other proceedings had upon the basis of it, then the false making is a forgery, notwithstanding such steps may never have been taken or proceedings had. * * * How this bond could have been used to defraud need not have been set out in the indictment in detail; it was enough that it appeared from the character of the instrument, together with the provisions of the statute, that it might have been so used, in connection with other facts, real or simulated, either there existing, or with which it was to be afterwards connected."

There are other reasons apparent to us why the false making of the proof of loss in question could operate to injure another; but what we have said above may be deemed sufficient for the purposes of this case.

From what has been said, it follows that the judgment and order should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

itations, but not showing that intervener is in possession, and not connecting himself with defendant, shows no cause of action or defense.

4. PLEADING—SEPARATE COUNTS.

Averments in one count of a complaint in intervention cannot aid another count thereof, into which they are not incorporated by appropriate reference, or otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 117, 118.]

Appeal from Superior Court, Fresno County; W. B. Wallace, Judge.

Action by Ashley D. Cameron, executor of Annie L. Cameron, deceased, against Ah Quong; Chin Shin intervening. There was judgment for intervener, and plaintiff appeals. Reversed.

Welles Whitmore and C. C. Merriman, for appellant. Riordan & Lande, F. H. Short, and F. E. Cook, for respondent.

HART, J. Action in ejectment. The plaintiff alleges ownership of the lands in dispute and ouster by the defendant, and prays for restitution of said premises, for damages for withholding the same and for the sum of \$1,750 as the value of the rents and profits from January, 1898, to and including a portion of the year 1903. The defendant, Ah Quong, answering the complaint, specifically denies the material averments thereof, and then pleads the bar of the statute of limitations. Chin Shin intervened, and as a first cause of action sets up title to the lands in dispute by adverse possession and alleges that the defendant, Ah Quong, holds possession of the same as his tenant; and, as a second cause of action, intervener alleges that he is the owner of two certain mortgages subsisting against the premises, and of which he acquired ownership by purchase from and assignment by the respective mortgagees, and that by reason of his said ownership of said mortgages the "plaintiff is not entitled to the judgment in this action prayed for by him, or to any relief whatever." The plaintiff interposed an answer to the first cause of action set out in intervener's complaint, denying in detail the material allegations thereof, and moved to strike out the second count in said complaint on the ground, among others, that it "does not allege possession or right of possession." The court refused to grant the motion to strike out the alleged second cause of action, and the plaintiff made no answer thereto. Upon the issues thus made up, a trial was had and a judgment rendered that the plaintiff is the owner and entitled to the possession of the lands in controversy, and that he be given possession thereof, "provided that before he shall be entitled to have actual possession or occupation of said lands and premises, or any part thereof, or any right to any writ or process out of this court to place him in possession thereof he, said plaintiff, shall first pay to said intervener, said Chin Shin, the full amount of the principal sums and accrued interest due to said intervener under

8 Cal. App. 310

CAMERON v. AH QUONG (CHIN SHIN, Intervener). (Civ. 437.)

(Court of Appeal, Third District, California. May 28, 1908.)

1. PLEADING — COMPLAINT — MOTION TO STRIKE.

In challenging the sufficiency of the facts, alleged in a count of a complaint in intervention, to constitute a cause of action or a defense, a demurrer, rather than a motion to strike out, is the better practice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 400, 1092.]

2. APPEAL AND ERROR—OBJECTION TO SUFFICIENCY OF COMPLAINT.

Notwithstanding failure to demur to a complaint, objection that it fails to state a cause of action for want of essential facts may be made on appeal, though evidence showing the facts was admitted without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1232-1236.]

3. EJECTMENT — COMPLAINT IN INTERVENTION — SUFFICIENCY.

A count of a complaint in intervention in ejectment, merely alleging that plaintiff in the action ought not to maintain the action and is not entitled to the judgment asked for by him, or to any relief by reason of the following facts, and then proceeding to show notes of plaintiff secured by mortgage on the land held by intervener, right to foreclose which is barred by lim-

the terms and provisions of said two mortgages owned by said intervener and as set forth in the findings of the court herein," etc. The appeal is from the judgment and the order denying plaintiff a new trial.

We are forced to the conclusion that the intervener, in his alleged second cause of action, upon which alone the court below finds that he is entitled to relief, totally fails to state facts justifying the decree entered in his behalf. It may first with propriety be observed that the better practice would have been, perhaps, rather than a motion to strike out the alleged second cause of action, to have interposed a demurrer thereto. The vital ground of the motion, however, is in effect a challenge to the sufficiency of the facts alleged in said purported second count of the complaint in intervention to state a cause of action or defense. Besides, the point is made here that the facts alleged therein do not constitute a cause of action, or a defense, and it is well settled that, where a complaint or pleading is so deficient in its averments as that it does not even attempt to state a cause of action or a defense, the point may be raised here for the first time. In other words, "where a complaint in an action fails to state a cause of action, for want of essential facts, objection thereto is not waived by failure to demur, nor cured by verdict or judgment," and the point may be urged upon appeal, notwithstanding the failure to demur. Code Civ. Proc. § 434; *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20; *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885; *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445.

The facts presented at the trial show, and the proposition is not questioned, so far as the evidence is concerned: That the intervener, through the defendant, Ah Quong, as his tenant, was, for fully seven years prior to the institution of this action by plaintiff, in possession of the premises in controversy; that he was originally put in possession by Chapman, the mortgagee of the second mortgage, upon purchasing and thus acquiring ownership of the latter and the note, to secure payment of which said mortgage was executed by plaintiff's testate, notwithstanding the fact (which we think under the evidence could exert no material influence against the right to the relief asked for by intervener) that there is no provision in said mortgage authorizing the mortgagee to take and hold possession of the premises as an additional security for the debt. Relying upon the undisputed evidence of his possession, the respondent intervener insists that the findings and the decree of the court below should be sustained upon the equitable principles enunciated and applied in the case of *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, as well as upon the equitable principle that "he who seeks equity must do equity," invoked in that class of cases in which the relief sought is

the quieting of title and in which, by virtue of said principle, the mortgagee of an outlawed mortgage, although not in possession of the mortgaged premises, is held to be entitled to the satisfaction of the mortgage debt before the relief demanded by the plaintiff will be awarded. *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74; *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763. But, while the evidence appears to clearly disclose that the "equities of the case" are decidedly with the respondent intervener, and that he is entitled to the relief which the court below has undertaken to grant to him, an insuperable obstacle to the upholding of the decree lies, as already suggested, in the complete failure of his complaint in the second count thereof to state a cause of action. The case here, it must be borne in mind, is not an equitable suit to quiet title. The plaintiff brought an action at law to secure possession of the premises involved against one Ah Quong, who, it is alleged, unlawfully ousted plaintiff of possession of said premises, and who, at the time of the commencement of said action, still unlawfully held such possession. The second cause of action set out in the complaint in intervention nowhere alleges that the intervener has or ever had possession of the premises in dispute. It merely alleges that "the plaintiff in this action ought not to have or maintain said action, and is not entitled to the judgment therein prayed by him, or to any relief whatever by reason of the following facts and circumstances, to wit," and then follow averments of the execution of the notes and of the mortgages on the premises to secure the payment of said notes, of the assignment of said notes and mortgages to intervener, and his ownership thereof. The notes are set out in *hæc verba*, and the right to foreclose the mortgages executed contemporaneously with the execution of the notes is thus shown to have been barred by the statute of limitations at the time this action was instituted. It is therefore plainly obvious that, in order to successfully defend against ejectment by the mortgagor, the intervener necessarily should have alleged possession of the mortgaged premises in himself, and that the omission to do so constitutes failure to state any cause of action or defense whatever. "This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a specific security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent and distinct from any right springing from the mortgage." *Spect v. Spect*, *supra*. Thus it is clear that the gist of the intervener's defense against ejectment by the plaintiff is his possession of the mortgaged premises,

held, by consent of the mortgagor, as an additional security for the debt. It is true that in his first cause of action or defense, in which title to the premises by adverse possession is claimed, intervener alleges that the defendant, Ah Quong, against whom ejectment is brought by the plaintiff, holds possession of the premises as his (intervener's) tenant; but, in his second cause of action, as we have seen, his possession under any circumstances or upon any conditions is nowhere referred to, either expressly or by appropriate or any reference to the allegations contained in the first cause of action or defense. In short, the situation is this: The plaintiff proceeds in ejectment against Ah Quong. The latter tenders an issue upon the question of the right of possession. Intervener (eliminating from consideration his first cause of action, as may properly be done, for the court below was justified in finding that title by adverse possession was not established by the proofs) undertakes to defend against plaintiff's claim of right of possession as against Ah Quong upon a pleading which fails to allege possession in himself or to connect himself in the slightest degree with Ah Quong's possession. His position therefore is no better than or different from that of one having an outlawed mortgage against the premises and who is not in possession under such mortgage. So far as the averments of his second cause of action or defense disclose, the intervener is a perfect stranger to the transaction out of which originates the action in ejectment against Ah Quong. In other words, in an action in ejectment by A. against B., it is not supposable for an instant that C., a perfect stranger to B. and the holder and owner of a mortgage, the right to foreclose which is barred, could intervene and in effect say to the court: "You have no right to eject B., because I have a mortgage on the premises barred by the statute of limitations, and therefore, upon equitable principles, B. is entitled to hold possession of said premises until the debt which my mortgage was given to secure is paid."

The fact that the appellant failed to object to evidence addressed to issues not tendered by the pleadings can be of no service or avail to the respondent intervener. It is well settled that where a complaint, as is the fact in the case of intervener's pleading here, entirely fails to state a cause of action, evidence offered and received, whether against or without objection, upon the theory, unsupported or unfounded by the averments of the complaint, that the issues necessary to be determined are tendered and submitted by the pleadings, cannot cure the total absence of allegations essential to a statement of a cause of action. Of course, the rule is different where there is mere defectiveness in the statement of sufficient facts; but, if the rule were otherwise as to the first stated proposition, then, certainly,

the rules of pleading would be absolutely worthless and count for naught.

Of course, it will not be disputed that when a complaint contains two or more causes of action the rule is that they shall be distinctly and separately stated. If the pleading is of this character, each separate division or count or cause of action or defense must be complete by itself, and must either contain all the averments necessary to a perfect cause of action or defense or the omitted facts supplied by appropriate reference to material facts properly set forth in a former count, thus incorporating them into and making them a part of the subsequent count or cause of action or defense. *Pomeroy's Code Remedies* (4th Ed.) § 466; *Hopkins v. Contra Costa County*, 106 Cal. 570, 39 Pac. 933. As before observed, the principle applied in the case of *Booth v. Hoskins*, supra, and other cases heretofore cited upon the same point, cannot be applied here.

If the plaintiff had proceeded in equity to remove a cloud from or to quiet title to the premises, the situation would be very much different from that presented here. In such a case, the intervener here could, as a defendant, whether directly proceeded against or as an unknown defendant, defend against the relief thus sought by setting up the mortgages, and, under the equitable maxim that he who seeks equity must do equity, prevent plaintiff from securing the relief for which the averments of his complaint called until the mortgage debts had first been satisfied. It may pertinently be suggested that the respondent intervener might have saved himself some trouble and expense if, when the motion was made to strike out his second cause of action or defense, he had amended said second count by inserting therein averments covering the point upon which we feel constrained to reverse the judgment.

The appellant, as before observed, failed to object to testimony offered in support of intervener's possession of the premises, and, as we find no prejudicial errors in the rulings of the court reviewable on an appeal from the order, the same will be affirmed.

For the reasons expressed in the foregoing, however, the judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 295

In re DESANTA. (Cr. 141.)

(Court of Appeal, First District, California.
May 28, 1908.)

1. MUNICIPAL CORPORATIONS — ORDINANCES — CONFLICT WITH STATUTE — RULE OF CONSTRUCTION.

In determining whether an ordinance conflicts with the general law on the same subject, a court must examine the ordinance, the general law, the subject-matter, the evils intended to be

remedied, and then apply common-sense principles to each particular case, and an ordinance should be sustained if it can be reconciled to the statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 274-280.]

2. SAME.

Courts are disinclined to declare void an ordinance of a sanitary nature, or preventing the sale of adulterated or impure food, or other products, but if it conflicts with the general law, it cannot be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 246.]

3. SAME—"ADULTERATED MILK."

San Francisco Ordinance No. 2944 and Amending Ordinance 1208, providing a fine of not less than \$25 nor more than \$500, or imprisonment for not less than 10 days nor more than 100 days, for selling impure or "adulterated milk," defined to be milk containing less than 12 per cent. of milk solids, more than 88 per cent. of water or fluids, or less than 3.3 per cent. fats from January 1st to April 30th, and 3.4 per cent. from May 1st to December 31st, is void within Const. art. 12, § 11, authorizing municipalities to make sanitary, etc., regulations not conflicting with general laws, as being in conflict with Act March 15, 1907, St. 1907, p. 265, c. 216, providing a fine of not less than \$25 nor more than \$200, or imprisonment for not less than 10 nor more than 60 days for selling adulterated milk, defined as containing less than 3 per cent. of milk fats, and less than 8.5 per cent. solids not fat, excepting, etc., and expressly providing a general scheme to prevent adulteration and sale of impure milk or dairy products.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 246.]

For other definitions, see Words and Phrases, vol. 1, pp. 211, 212.]

Application by L. Desanta for a writ of habeas corpus. Prisoner discharged.

Jas. C. Sims, J. A. Spinetti, and Roland Becsey, for petitioner. Wm. H. Langdon and Louis Ferrari, Asst. Dist. Atty., for respondent.

COOPER, P. J. The prisoner seeks to be released on habeas corpus from imprisonment under a judgment convicting him of a misdemeanor, to wit, selling milk containing less than 3.4 per cent. of fats, in violation of certain ordinances of the city and county of San Francisco, known as Ordinance No. 2944, and Amending Ordinance No. 1208. The material parts of said ordinances necessary for a discussion of this case are as follows:

"Sec. 8. The terms 'adulterated,' 'impure,' 'unhealthy' and 'unwholesome,' as used in this ordinance, mean (1st) milk containing less than 12 per centum of milk solids; (2nd) milk containing more than 88 per centum of water or fluids; (3rd) milk containing less than 3.3 per centum of fats from January 1st to April 30th, and 3.4 per centum of fats from May 1st to December 31st, of each year.
* * *

"Sec. 18. Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars and not more than five hundred dollars; or

by imprisonment in the county jail for not less than ten days nor more than one hundred days."

It is claimed that the part of said ordinance involved here is void, because in conflict with the state law upon the same subject, and thus in contravention of section 11 of article 12 of the state Constitution, which provides as follows:

"Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The Legislature, long after the adoption of the ordinance, passed an act entitled "An act to prohibit adulteration and deception in the sale of dairy products, and defining adulteration in dairy products; to establish a standard of quality in dairy products, and to provide for enforcing its provisions," approved March 15, 1907 (St. 1907, p. 265, c. 216 et seq.). The act consists of eight sections, with various subdivisions of such sections, and evidently was intended to cover fully the subjects indicated in its title. So far as necessary for the purposes of this opinion, its provisions are as follows:

"Section 1. It shall be unlawful for any person to produce, manufacture or prepare for sale, or to sell or offer for sale, or have on hand for sale, any milk or product of milk that is adulterated within the meaning of this act. * * * It shall be unlawful for any person under this act, when selling or offering for sale, or having on hand for sale, milk or any product of milk, to use the words 'milk,' 'condensed milk,' 'sweetened condensed milk,' 'evaporated cream,' 'milk,' or 'butter,' either verbally or printed or written on any label or printed matter used in connection with the sale or offering for sale, or having on hand for sale, of milk or any product of milk, or upon any bill of fare used in any hotel, restaurant or other place where meals are served, when the article shall not conform with the provisions of section 2 of this act.

"Sec. 2. Milk and the products of milk enumerated in this section shall be deemed adulterated within the meaning of this act if it or they shall not conform with the following definitions or standards: (1) Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and five days after calving, and contains not less than 3 per cent. of milk fats, and not less than 8.5 per cent. of solids not fat. * * *

"Sec. 3. It shall be the duty of the State Dairy Bureau now existing under the laws of this state to enforce the provisions of this act, provided that nothing in this act shall be construed to prevent any city or county board of health, or other city or county official, from enforcing the provisions of this act.

"Sec. 4. Any person who shall violate any of

the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$200, or by imprisonment in the county jail for not less than ten nor more than sixty days. * * * All fines collected under this act shall be paid to the State Dairy Bureau when the complaint is made through the State Dairy Bureau, and the State Dairy Bureau shall pay the same to the State Treasurer, and the amount paid by the State Dairy Bureau to the State Treasurer is hereby appropriated to the use of the State Dairy Bureau in enforcing this act for the fiscal year in which the amount was paid to the State Treasurer. * * *

"Sec. 6. It shall be the duty of the district attorney, upon application of the State Dairy Bureau, or of any city or county board of health, to attend to the prosecution in the name of the people of any complaint entered for violation of any of the provisions of this act within his district.

"Sec. 7. All acts or parts of acts inconsistent with this act are hereby repealed."

The act provides fully as to correctly labeling all packages of dairy products, and defines skimmed milk, condensed milk, condensed skimmed milk, cream, evaporated cream, milk fat, butter fat and butter. The statute is a general law, and the question is as to whether or not the part of the ordinance under which the prisoner was convicted is in conflict with the statute, for, if so, it must fall in submission to such general law. There is no question as to the rule that an ordinance or by-law must not be in conflict with the general law upon the same subject; but the question as to whether or not an ordinance or by-law is in conflict with the general law is sometimes difficult of solution, and necessarily cannot be determined by any fixed rule. It is the duty of courts to examine the ordinance, the general law, the subject-matter, the evils intended to be remedied, and then to apply the principles of common sense to the solution of each particular case as it arises. It is, and should be, always the endeavor of courts to sustain an ordinance or by-law, and, if possible, to reconcile and uphold both the ordinance and the statute. Courts are loth to declare void any ordinance of a sanitary nature, or relating to and preventing the sale of adulterated or impure food or other products; but in case there is a conflict, in the light of the above rule, the duty of the court must be performed.

After carefully comparing the ordinance in this case and the general law, we are forced to conclude that the ordinance is in conflict with such law. They both prescribe a punishment for the same acts, to wit, the sale of impure or adulterated milk. The ordinance provides a penalty of not less than \$25 nor more than \$500, while the statute fixes the fine at not less than \$25 nor more than \$200. The ordinance provides that the im-

prisonment must not be less than 10 nor more than 100 days, and the statute provides for imprisonment for not less than 10 nor more than 60 days. Under the statute milk is deemed pure, and may be sold anywhere in the state, if it contains 3 per cent. of fats; but under the ordinance any one who sells milk containing 3 per cent. of fats, and less than the percentage named in the ordinance, commits a crime. Under the general law milk may be sold where it contains 9.25 per cent. of milk solids, but under the ordinance every person who sells milk containing 9.25 per cent. of solids commits a crime, unless the milk contains at least 12 per cent. of milk solids. It is thus plain that the ordinance prohibits and prescribes a punishment for the same acts that are legal under the statute. It also fixes a different standard for milk from that prescribed by the statute. The ordinance not only prescribes a punishment for the same acts that are punished under the general law, but it prescribes a punishment for acts that are legal under the general law. It prescribes a greater punishment than the general law for the same acts which are punishable under the general law; and it prescribes a greater punishment for acts that are no crime under the general law than the general law prescribes for acts that it makes criminal. The general law provides for inspection of milk and dairy products by the State Dairy Bureau, and that all fines shall be paid to the State Dairy Bureau, and for its use in enforcing the act. The ordinance makes no such disposition of fines. The general law provides for its enforcement, either by the State Dairy Bureau or the city or county board of health. It provides that the city or county board of health may enter and inspect premises where milk or products of milk are produced or manufactured.

It is thus plain that the state law provides a general and universal scheme to prevent the adulteration and sale of impure milk or dairy products. Milk, which is pure within the meaning and definition of such law, may be sold anywhere in the state. It may be sold in Los Angeles and in San Francisco. It is said that the Legislature, in fixing a minimum beyond which no board of supervisors could go—that is, that no board could by ordinance make it legal to sell milk which did not come up to the standard prescribed by the state law—did not intend to prohibit such board or legislative body from raising the standard or fixing the standard for such city. We do not agree with such contention. The effect of the general law is to authorize the sale of milk which comes up to the standard there prescribed. An ordinance which prescribed a different standard, and punishes any one for selling milk which is pure within the standard prescribed by the general law, is in conflict with the general law.

In *Mayor, etc., of New York v. Nichols*, 4 Hill (N. Y.) 209, it appeared that the defend-

ant had been sued to recover the amount of certain penalties, incurred for the violation of an ordinance of the city relating to the sale of hay, and providing for inspectors to inspect and weigh hay, and to mark the quality and weight on the bundles, and providing that any person who should sell hay without first having the same inspected and weighed according to the requirements of the ordinance should forfeit the sum of \$5 for every bundle sold. The general laws of the state provided that every person who should put up and press any bundle of hay for market should mark or brand, in a legible manner, the initials of his Christian name, and his surname at full length, and the name of the town in which he resides, on some board or wood attached to the bundle. The general statute made further provision as to the hay being of good quality, and provided a penalty for any violation of its provisions. The court held that the ordinance must give way to the provisions of the Revised Statutes, and in the opinion said: "These provisions obviously authorize a sale of pressed hay without inspection, and the corporation of the city of New York possessed no power to repeal or supersede them. If they are violated, a remedy is pointed out, and this remedy must be resorted to. The system of inspecting hay is abolished by the statute, and, in place of it, the seller is required to prepare the article for market in a particular manner, at the peril of being subjected to the penalties annexed."

In *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686, it was held that the defendant could not be prosecuted for a violation of a city ordinance, making it unlawful to offer or expose for sale certain milk without first having obtained from the board of health of the city a license where the subject was fully covered by the statute of the state. The court said: "Judging the ordinance of the city of Waterbury, referred to in the statement, by its words, we should be led to believe that the purpose of the board of aldermen in passing it was to prevent the sale and consumption, in that city, of impure or adulterated milk. To accomplish that purpose the ordinance is intelligent, consecutive, and adapted to the end in view. But the charter of the city forbids the aldermen to enact any ordinance upon any matter which is or shall hereafter be regulated by any public statute, or power to regulate which has been or shall be conferred upon any other authority, by any public statute. The General Statutes of 1888, §§ 2658-2664, inclusive, together with chapter 235, p. 578, Pub. Acts 1895, provide full regulations in respect to adulteration of milk. If, then, the purpose of the aldermen was to regulate the sale of impure milk in Waterbury, it would appear that the ordinance was in excess of their power to enact."

In *State v. Keith*, 94 N. C. 933, it was held that an ordinance of a city or town, which makes an act which is punishable as a crim-

inal offense under the general laws of the state an offense against the city or town, was void because in conflict with the general laws. The court said: "So much of that ordinance as is material here undertakes to make an assault upon a public officer in the city of Raleigh, while in the discharge of his official duty, an offense against the city, punishable by fine or imprisonment. It is indictable under the general law of the state to so assault such officer, and it is settled that a town ordinance, which undertakes to make that which constitutes a criminal offense under the general law of the state an offense against the town, punishable by fine or imprisonment, is inoperative and void."

The rule is thus stated in *McQuillin on Municipal Ordinances*, § 499: "Under the usual grant of municipal powers, which, in general terms, includes the authority to enact all necessary ordinances, to preserve the peace and advance the local government of the community, the local corporation cannot provide, by ordinance, for the punishment of an act constituting a misdemeanor or crime by state statute. The cases in the note fully illustrate the rule." The author cites many authorities which sustain the text.

Our own Supreme Court has, in many cases, held the rule in accordance with the above authorities. In *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34, it was held that an ordinance of the city and county of San Francisco, regulating the granting of certificates of death, and the issuance of permits for interments, and punishing the health officer, as for a misdemeanor, for noncompliance therewith, was unconstitutional and void, because in conflict with the provisions of the Political Code on the same subject. It was there said: "It is very clear that by this article the Legislature has undertaken, as a part of the provisions of the general law relating to the public health, through a local department of the state government, to wit, the board of health for the city and county of San Francisco, all of the members of which, except the mayor of the city and county, are appointed by the Governor, to manage and control certain—we do not say all, but certain—of the sanitary regulations of the city and county, and contiguous harbor of San Francisco, and by section 3025 has particularly undertaken to manage and control the conditions and terms upon which permits for the interment of human bodies within said city and county may be issued, and by whom. * * * It follows that any order or ordinance, or provision of any order or ordinance of the municipality, which conflicts with the provisions of this general law, is prohibited and forbidden to the municipality—is unauthorized and void."

In *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757, it was held that an ordinance of the city and county of San Francisco, fixing the minimum penalty, for having lottery tickets in possession, at \$250, or imprisonment for three

months, and allowing a maximum penalty of \$1,000, or imprisonment for six months, was void, and not in harmony with the provisions of the Penal Code as to kindred offenses. It was there said, in a concurring opinion by Justice Patterson, that there was nothing in the nature of the offense which calls for any severer penalty for its commission in a thickly settled community than for its commission in the country.

So, in this case, there is no reason why in the city and county of San Francisco milk should contain a greater percentage of fats or solids than in other parts of the state. The law should be uniform, unless there is some valid reason for its being otherwise. In *Re Sic*, 73 Cal. 142, 14 Pac. 405, the question was fully discussed in an opinion by Mr. Justice Temple in his usual clear style; and it was held that an ordinance of the city of Stockton, in regard to the smoking of opium, intended to punish precisely the same acts as were punishable under section 307 of the Penal Code, was in conflict with the general law and void. The learned justice there said: "The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code. Still it denounces as criminal precisely the same acts which are intended to be prohibited by the Code. It is admitted that no ordinance is valid which conflicts with the general laws of the state. * * * It would seem that the ordinance must be conflicting with the general law, which may operate to prevent a prosecution under the general law. The Constitution provides that no one should be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law."

In *Flood v. State*, 19 Tex. App. 584, an ordinance relating to selling goods on Sunday was held void where the subject was covered by the state law.

In *State v. McNally*, 48 La. Ann. 1450, 21 South. 27, 36 L. R. A. 533, an ordinance regulating the number of hours during which mechanics and laborers shall be employed each day on public work in the city, was held void because the offense was made indictable by statute.

It is not necessary to discuss the doctrine that where the act prohibited is a crime, both under the ordinance and the statute, and the punishment does not exceed that prescribed by the statute, the conviction will be sustained. In this case the act charged relates to the very things treated of by the general law but is not made a crime by the general law. Counsel for the people earnestly calls our attention to *Polinsky v. People*, 73 N. Y. 65, which it is claimed is directly in

point. We have carefully examined that case, and find in it nothing contrary to the views we have expressed herein. The general statute of the state prohibited the sale, or exposing for sale, of adulterated milk, and prescribed a punishment therefor. It did not pretend to cover the subject of traffic in milk or bringing impure milk into the city of New York. The court held that the offense charged was bringing adulterated milk into New York, an offense "not embraced in the statute." The opinion fully agrees with the views we have expressed, but upheld the ordinance for the very plain reason that that subject was not covered by the general law. In the opinion it is said: "If the board of health could, under its general power to enact sanitary ordinances, pass an ordinance prohibiting the same act which was already prohibited by the statute, an indictment would lie for either a violation of the ordinance or of the statute. A conviction under the ordinance would be a conviction for an offense, the punishment of which is prescribed by some other statute than the general statute for the punishment of misdemeanors, and the statute of 1862 would govern as to the punishment. But the difficulty with the argument addressed to us upon the point is that it proceeds upon a false assumption. The third count charges an offense not embraced in the statute of 1862, but which is embraced in the ordinance, to wit, bringing adulterated milk into the city of New York for sale. The statute relates only to selling or exposing impure or adulterated milk for sale. The ordinance may be violated, and the offense of bringing into the city impure or adulterated milk for sale may be complete, without either selling or exposing it for sale."

In *re Murphy*, 128 Cal. 29, 60 Pac. 465, is also relied upon to sustain the ordinance. That case is not in point, and simply holds that the game of "Keno," as described in the ordinance discussed, is not a percentage game prohibited by section 330 of the Penal Code; the case being directly in line with *Polinsky v. People*, supra. The court said: "Since it was competent for the city, by ordinance, to prohibit all games not denounced by the statute, lack of jurisdiction is not made to appear."

In the case at bar the ordinance is aimed at the very question covered by the statute—the sale of milk containing less than the proper percentage of fats, and, if enforced, would supersede the statute.

We conclude that the ordinance, in the respects involved in this case, is void, and the prisoner must be discharged; and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

154 Cal. 76

**SAN RAFAEL RANCH CO. v. RALPH
ROGERS CO. et al. (L. A. 2,026.)**

(Supreme Court of California. July 21, 1908.
Rehearing Denied Aug. 17, 1908.)

**DEEDS — RESERVATIONS — CONSTRUCTION —
"RIGHT OF WAY."**

One deriving title under a deed executed by an association conveying land subject to the reservation of a reasonable right of way across said lot, and also reserves to said association all springs or other streams of water arising on said lot, etc., does not obtain the right to dig trenches and lay pipe lines for the conduct of water developed on his land on the land of another claiming under a similar deed from the same grantor, since the phrase "right of way" contemplates only a right of ingress and egress to and from the land conveyed, and since the grantee has no title to the water on his land, that being reserved to the association alone, so that he could not need a right of way across the land of the other grantee for the purpose of carrying such water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 465.

For other definitions, see Words and Phrases, vol. 7, pp. 6230-6234; vol. 8, pp. 7790-7791.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the San Rafael Ranch Company against the Ralph Rogers Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McNutt & Hannon, for appellants. Borden & Carhart, for respondent.

HENSHAW, J. Defendants, under claim of right so to do, entered upon the lands of plaintiff and proceeded to cut down the trees and shrubs, and dig up the soil for the purpose of laying a pipe line to conduct water, developed on their land, over the land of plaintiff. Plaintiff sought and obtained an injunction restraining them from thus entering upon its lands, and, from this judgment, defendants appeal.

Both plaintiff and defendants derive title from a common grantor. In all of the deeds executed by this grantor were contained the following reservations: "Said association expressly reserves to itself and each member thereof and to all alienees of the same forever, a reasonable right of way along and across said lot, and also reserves to said association all springs or other streams or waters arising or flowing, visible or invisible, on said lot, with a right to enter upon the same and make the necessary excavations or other works for the development of the same by payment of reasonable damages therefor." Defendants are the owners of a portion of lot 48. By mesne conveyance, the city of Los Angeles became vested both with the title to the land of this portion of lot 48, and also with the reserved right to the waters therein contained. Appellants contend that they, in turn, acquired all of the rights of the city of Los Angeles to the land and to

the water, in brief, all of the rights reserved by the common grantor. They next contend that thereby is vested in them, not only the right to develop water upon their lot 48, but the right to enter upon and cross the lands of plaintiff and all others holding under their common grantor. We need not be at pains to consider at length appellants' contention that they have succeeded to the water rights on lot 48, which, with the land, vested in the city of Los Angeles. The city's deed to the lot expressly excepted and reserved "the right to take and use any and all water or waters in, on, or under any and all of the said land hereinbefore described." The contention of appellants that, if treated as an exception, it is repugnant to the estate granted by the city, is not well founded, and does not find favor. *Painter v. Pasadena L. & W. Co.*, 91 Cal. 81, 27 Pac. 539; *Butler v. Gosling*, 130 Cal. 422, 62 Pac. 596; *Sears v. Ackerman*, 138 Cal. 586, 72 Pac. 171. But, passing this matter, even if appellants had acquired all of the rights of the city to the waters in lot 48, they acquired no right to enter upon the lands of plaintiff, as here they were doing. Neither the city itself had this right, nor did the common grantor, the San Gabriel Orange Grove Association. In the reservations above quoted the association reserved to itself, its members and alienees, "a reasonable right of way in and across" the lands which it granted. The phrase "right of way," as thus used, has a well-defined meaning. It contemplates a right of ingress and egress to and from the grantee's lands. It does not contemplate the right to dig trenches and lay pipe lines for the conduct of water. Indeed, such construction of this reservation of a right of way is distinctly negated by the reservation immediately following, which reserves to the association alone (and not to any of its members or alienees) the right to the waters upon the lands which it conveys. In the nature of things, since the grantee of such a piece of land had no title to the water upon it, he could not need a right of way across his neighbor's land for the purpose of carrying such water away.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.

8 Cal. App. 237

YOUNGER v. MOORE et al. (Civ. 489.)

(Court of Appeal, First District, California.
May 8, 1908.)

1. JUDGMENT—DEFAULT—ALLOWING ANSWER.

Defendants having had no legal right to have their defaults set aside and be allowed to answer, so that they could only file the kind of answer for which consent had been given by plaintiff, and this being insisted on by plaintiff, they cannot complain that they were not allowed to file a different kind of answer, though, had they filed the answer permitted, they might have been per-

mitted to amend, if it appeared during trial that the ends of justice would be subserved thereby.

2. NEW TRIAL—PROVINCE OF MOTION.

A motion for new trial is not a proper proceeding to review the action of the court in giving judgment, where no issue of fact was tried.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 5.]

Appeal from Superior Court, Santa Cruz County, M. T. Dooling, Judge.

Action by Helen Younger against Charles Moore and others. From an order denying their motion for new trial, said Moore and certain other defendants appeal. Affirmed.

Charles M. Cassin and Benj. K. Knight, for appellants. Chas. B. Younger, for respondent.

COOPER, P. J. This is an appeal by Charles Moore, Stella Moore, Alice Hoffmann, and William C. Hoffmann, from an order denying their motion for a new trial. The case is the same as No. 488 of the same title, this day decided,¹ but involves a different question as to the rights of appellants on this appeal.

It appears from the record that each of the appellants was regularly served with summons, and made default, which default was duly entered. The defaults were entered in August, 1902, and not until the trial had commenced, in December, 1903, was any motion made by said appellants to be relieved of the default. The court held—and it seems to be conceded—that, the application having been made more than six months after the entry of the defaults, it had no power, upon the showing made, to relieve the defendants by setting aside such defaults. Accompanying the application of appellants, and as a part thereof, was an answer, which they served with their motion and asked to be permitted to file in case the defaults were set aside. This answer alleged that the appellants Charles Moore, Stella Moore, and Alice Hoffmann are (each) the owners of an undivided one-fourth interest in and to "all the tract of land described in plaintiff's complaint lying and being situate south of the county road leading from the city of Santa Cruz, in said county of Santa Cruz, in the state of California, to the town of Pescadero." They further stated that as to the proportions in which the remaining one-fourth of the tract is owned they had no information or belief sufficient to enable them to answer. The answer sets forth a plea in abatement of another action pending in regard to the same subject-matter, and alleged to be between the same parties. During the discussion of the motion of these appellants to have the default set aside and to be permitted to file their said answer, counsel on the part of the plaintiff and the other parties to the suit stated that, notwithstanding the default of appellants, they had no objection to the action being tried on its merits, and to the appellants offering testimony as to what their rights were, but that they objected to having any delay in the matter by setting aside the defaults. The court

¹ Rehearing pending.

remarked that it was not the policy of the law to set aside a default, so that the defendant could put in a plea in abatement. After some preliminary discussion the following took place:

"Mr. Leonard (Plaintiff's Attorney): Now, if this is to be set aside for that purpose, I would like it specifically understood that they are not to come in and have the default set aside, and be allowed to answer, and then save an exception to not being allowed to enter that plea.

"Mr. Cassin: I am not saving any exception to that.

"Mr. Leonard: I would like an understanding about that.

"The Court: The answer is there with the motion. So much of the answer as is necessary, aside from the plea of another action pending, whatever the plea is, the answer will be permitted, and that portion of the answer will be stricken out. Now, all that portion of the answer beginning on page 2, at line 4, commencing, 'Said defendant, as a special answer and plea in abatement,' running through page 2 down to and including the words 'in said action is the same Helen Younger who is plaintiff named in the complaint herein,' on line 6, page 3, that will be stricken out. And commencing on page 3, line 29, 'Further answering, and as a plea in abatement herein, said defendants allege,' running down to 'to which reference is hereby made, and that part of the answer is hereby repeated,' on line 5, page 4, that will be stricken out.

"Mr. Cassin: If your honor wishes, I will file the answer at noon to-day, eliminating that part of it."

On the following day the defendants offered to file, not the answer that they had before prepared and served, with the plea in abatement eliminated therefrom, but a different answer, setting up different matter than alleged in the answer that the court permitted them to file, and alleging that at the time of his death the father, William H. Moore, held nine-tenths of the lower portion of the ranch in trust for his wife; that the interests of appellants were different from that they had stated in the answer they had first prepared and served. Objection being made to this answer, the court held that, as the default was set aside with the consent of the parties for the purpose of allowing a particular answer as then proposed to be filed, it would not allow appellants to change the answer they had been permitted to file. No permission was given to file any but the original answer, eliminating therefrom the plea in abatement. The original answer was not filed. When another and different answer was offered the following day, the court refused to permit it to be filed. No exception was taken to the court's ruling. The court during the trial, although appellants had not filed the answer which the court had given them permission to file, asked appellants' attorneys if they had any testimony to offer. After mature consideration

counsel for appellants declined to introduce any testimony in support of such answer. Then the following took place:

"The Court: You must remember in this connection that you were allowed to file the defense to this action that you then offered. Under the answer they have already offered, which they have been given an opportunity to file, they would make certain proofs if you would agree to make no objection.

"Mr. Younger: No, sir; we don't agree to anything of the kind.

"The Court: To which counsel declined to agree, as I understand it. If that is the case, then you have no proofs to offer?

"Mr. Cassin: We have not an answer on file at the present time.

"The Court: That situation was fixed yesterday. I am not prepared to say that the answer offered is not an answer.

"Mr. Cassin: I want it understood, so that the record will be clear. I don't claim the right, or waive the right, to set up any plea of abatement, anything of that kind. The only thing we ask is to set up a proper answer under the provisions of section 758 of the Code of Civil Procedure.

"The Court: Whether or not you have an answer, here is a legal proposition that will be determined by the facts that occurred yesterday.

"Mr. Cassin: I am satisfied we have not, because we were given until yesterday to file it, and we have not filed it.

"Mr. Cassin: I will take leave of the court, and bid your honor good-by.

"The Court: I am sorry to part with you at this stage of the road."

It will thus be seen that, even with the appellants in default, counsel were willing to allow them to be heard to file an answer that they had prepared, but eliminating the dilatory plea. The court by its order permitted the answer to be filed as by consent of attorneys representing parties who had not defaulted. This they declined to do, and no answer was filed. It is sufficient to say that, it being conceded that appellants had no legal right to have their defaults set aside and be allowed to answer, they could only insist on filing the kind of answer to which consent had been given. The conditions were insisted upon, and imposed by the court, by which the defaults were to be set aside. As appellants did not comply with the terms, they cannot here complain. *Dennison v. Chapman*, 102 Cal. 618, 36 Pac. 943. If the appellants had filed the answer which the court permitted them to file, they would no doubt have been permitted to amend it, if it appeared to the court during the trial that the ends of justice would be subserved by such amendment. As the facts appear, we do not think that the court abused its discretion in refusing to allow the second answer to be filed.

It may be further said that, as to these appellants, there was no trial of an issue of fact,

because there was no answer on file. A new trial is a re-examination of an issue of fact, and a motion for a new trial is not a proper proceeding to review the action of the court in giving judgment in a case where there is no issue of fact tried. *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

PEOPLE v. LEBUS. (L. A. 2,178.) (Supreme Court of California. May 29, 1908.) In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge. Action by the people against Martha C. Lebus. Judgment for plaintiff, and defendant appeals. Affirmed. O'Melveny, Stevens & Millikin, for appellant. U. S. Webb, Atty. Gen., J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for the People.

PER CURIAM. This appeal presents the same question, namely, that of the taxation of the half of the community property which goes to the wife on the death of the husband under the collateral inheritance act of 1905, which was considered and decided in *Estate of Moffitt* (S. F. No. 4,896, filed April 20, 1908) 95 Pac. 653; and upon the authority of this case the judgment here appealed from is affirmed.

CALIFORNIA REPORTER

97 PACIFIC REPORTER

CALIFORNIA REPORTER

97 PACIFIC REPORTER

154 Cal. 53

O'DEA et al. v. HOLLYWOOD CEMETERY ASS'N et al. (L. A. 1,948.)

(Supreme Court of California. July 8, 1908.
On Rehearing, Aug. 13, 1908.)

1. CORPORATIONS—UNPAID SUBSCRIPTIONS—ASSESSMENTS—INJUNCTION.

In an action to enjoin the sale of shares of stock for a delinquent assessment on unpaid subscriptions, on the ground that other shares had not been assessed, the complaint was framed upon the theories: First, that the unassessed shares were not fully paid up and stood upon the same plane as to assessments as the stock held by plaintiffs, and that the assessment should have been levied upon them as well as upon plaintiffs' shares; and, secondly, that, if the unassessed shares were fully paid up, the shares held by plaintiffs were equally so, that they had been purchased by plaintiffs in good faith and for value, and upon the representations of the corporation that said shares were fully paid up. *Held*, that plaintiffs could not insist that the evidence showed their shares to have been fully paid, as the complaint was not framed on that theory, but was in fact framed on the theory that their shares were not issued as fully paid stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 430.]

2. SAME—EVIDENCE.

In an action to restrain the sale of corporate stock for a delinquent assessment on unpaid subscriptions, on the ground that all shares had not been assessed, evidence *held* sufficient to show that plaintiffs' shares were subscription shares not fully paid for, and that the shares not assessed were fully paid.

3. SAME—ISSUE OF STOCK AS FULLY PAID—POWER OF DIRECTORS—RIGHTS OF OTHER STOCKHOLDERS.

Directors of a corporation have a right to issue stock as fully paid up, on such terms and at such price as they see fit, and, in the absence of fraud, their action is final, and cannot be attacked by the stockholders or the validity of the issue assailed on the ground that the consideration was inadequate.

4. SAME—DISTRIBUTION OF CAPITAL.

Where a new corporation takes the property of an old corporation, for which fully paid stock is issued to a trustee to be distributed among the stockholders in the old corporation, the stockholders in the new corporation cannot object that the transaction is in violation of Civ. Code, § 309, prohibiting the distribution of the capital of a corporation prior to its dissolution.

5. SAME.

Under Civ. Code, § 309, prohibiting the distribution of the capital of a corporation prior to its dissolution, neither the directors of the corporation nor its stockholders have any right

to distribute the corporate capital or the property received in exchange for it among the stockholders.

6. SAME—ASSESSMENT ON STOCK—AUTHORITY TO MAKE—DE FACTO DIRECTORS.

Even if directors of a corporation, by reason of the invalidity of the issue of stock to them, were not de jure directors, they were at least de facto directors, and as such had ample power to levy an assessment on unpaid subscriptions, and their right to do so cannot be collaterally questioned or attacked.

7. SAME—PART OF STOCK FULLY OR PARTLY PAID.

Under Civ. Code, § 332, providing that an assessment on corporate stock may be for the full amount unpaid upon the stock to meet the liabilities or to satisfy claims of creditors, it is proper, where part of the stock of a corporation has been fully paid or partly paid, to levy an assessment for the unpaid portions of the subscription price upon those other shares upon which a less amount or nothing has been paid, in order to equalize the subscription payment on all the stock.

8. SAME.

Assessment is the proper method to collect unpaid subscriptions to corporate stock.

9. SAME—TRANSFER OF SHARES—BONA FIDE PURCHASERS—ESTOPPEL OF CORPORATION.

Before the amendment of Civ. Code, § 323, requiring certificates of stock issued prior to the payment of the full amount due to state the amount paid, a corporation had the right to issue its shares for cash or upon credit, and was not required to have the certificate show the terms on which it was issued, and purchasers of shares had no right to assume that the stock was fully paid, and no estoppel by representation could be invoked against the corporation.

10. SAME.

Certificates of corporate stock are not negotiable instruments, and the stock represented is subject to assessment for subscription calls, though in the hands of purchasers having no knowledge that the subscription is unpaid.

11. SAME—SALE FOR UNPAID SUBSCRIPTION—RIGHTS OF PURCHASER.

When a corporation offers stock for sale to pay a delinquent assessment, it acts as the agent of the delinquent stockholder, and the purchaser takes the title that the delinquent stockholder had, and no other, and he takes it subject to liability for the unpaid subscription price.

Shaw, J., dissenting. Beatty, C. J., dissenting on rehearing.

In Bank. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by M. F. O'Dea and others against the Hollywood Cemetery Association and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Frank G. Finlayson, Walpole Wood, and Jesse F. Waterman, for appellants. J. S. Chapman, E. C. Moore, and Herbert Cutler Brown, for respondents.

LORIGAN, J. This action was brought by four stockholders of the defendant corporation against it, and its board of directors, to enjoin the sale by them of 7,690 shares of stock of said corporation, owned by plaintiffs, for a delinquent assessment of \$4 a share levied on said stock. The corporation was organized October 25, 1899, with a capital stock of \$200,000, divided into 20,000 shares of the par value of \$10 a share. All the stock of the corporation was issued. The seven directors of the company subscribed for, and there was issued to them, 10 shares each, and the remaining 19,930 shares were issued in two certificates; one certificate numbered 8 being for 7,680 shares, and another certificate numbered 9 being for 12,250 shares. Certificate No. 8 was issued to F. W. Samuelson individually, and No. 9 to F. W. Samuelson, as trustee. The assessment in question was levied on 7,750 shares of the corporate stock which embraced the 70 shares originally issued to the directors of the corporation, and the 7,680 shares issued to Samuelson individually, represented by certificate No. 8, and to which particular shares the plaintiffs had succeeded as purchasers. This assessment, levied upon the 7,750 shares only, was levied upon the theory that these shares were not fully paid up shares, and was levied as a call for an unpaid portion of the subscription price thereof. No assessment was levied upon the remainder of the shares of the capital stock, being the 12,250 shares issued to Samuelson, as trustee, and represented by certificate No. 9, upon the theory that said stock was fully paid up, and not subject to said assessment or call. The assessment on 60 of the shares originally issued to the directors was paid. The other 10 shares so issued to the directors were acquired by plaintiffs, and upon these shares and the 7,680 acquired by them, and represented by certificate No. 8 issued to Samuelson individually, they refused to pay, contending that the assessment was invalid, and it is the validity of such assessment that is involved in this action. The complaint was framed upon the theories: First, that the 12,250 shares represented by certificate No. 9 were not fully paid up and stood upon the same plane as to assessments as the balance of the stock of the corporation, and that the assessment should have been levied upon them, as well as upon the 7,750 shares; secondly, that if the 12,250 shares were fully paid up, the shares held by the plaintiffs were equally so, that they had been purchased by them in good faith and for value, and upon the representation of the corporation that said shares were fully paid up, and the corporation was thereby estopped to take to these shares the character of fully paid up

stock, and the claim of plaintiffs is that, upon either theory, any assessment levied should have been upon all the shares of stock of the corporation, and that a levy upon a portion thereof only was invalid for want of equality. The findings of the court were against the plaintiffs upon the issues made under these theories. It found that the assessment was valid and entered judgment in favor of the defendants. This appeal is taken by the plaintiffs from the judgment accompanied by a bill of exceptions bringing up the evidence for review in an attack by them upon the sufficiency of the evidence to sustain the findings.

Before approaching a consideration of the main propositions involved in the attack upon the findings, it may be said that, as to the 10 shares originally issued to one of the directors of the corporation and held by one of the plaintiffs, there can be no manner of doubt but that the finding of the court that nothing was paid on its subscription price save a 10 per cent. assessment is correct. This brings us to a consideration of the really controlling question on this appeal, which is the correctness of the findings of the court as to the status of the stock represented by the certificates numbered 8 and 9, respectively.

It must be conceded, as the respondents freely do, that if the 7,680 shares of stock included in the 7,750 shares upon which the assessment in question was levied, stood in the same position with reference to the payment, or nonpayment of the subscription price thereof, as the 12,250 shares did which were not assessed, such assessment would clearly be void for want of equality in its levy. The court found that it did not stand in the same position. As to certificate No. 8 for the 7,680 shares, the court found: That on October 16, 1899, F. W. Samuelson, who was then president of the defendant corporation, caused to be issued to himself the certificate representing such shares; that he caused said certificate to be issued without any authority of the board of directors of the corporation therefor; that nothing whatever was paid upon said certificate at the time of its issuance; and that nothing has been paid thereon since, with the exception of an assessment of 10 per cent. levied in March, 1904. The court, however, found that after the issuance of said certificate, by levying and collecting the assessment of March, 1904, and by other acts and conduct on its part, the corporation recognized and treated the said certificate as having been validly issued to said Samuelson, upon his credit, for the full par value thereof, and is now estopped to assert that said certificate or the said shares are invalid, but is not estopped to deny that anything has been paid thereon in addition to said assessment levied in the month of March aforesaid. The finding of the court as to the 12,250 shares evidenced by certificate No. 9 was that they were fully

paid shares of stock of the corporation issued in consideration of property received by it.

The main attack made by appellants here is as to the sufficiency of the evidence to sustain these findings, and a consideration of this attack will necessitate a somewhat extended reference to the transactions surrounding the formation of the defendant corporation and relating to the issuance of these two certificates 8 and 9. Upon these matters the evidence in the case shows that F. W. Samuelson and one Lombard were in 1897 the owners of a 60-acre tract of land near Hollywood in Los Angeles county, and in that year, they, with others, formed a corporation known as the "Hollywood Cemetery Association" for the purpose of establishing a cemetery upon said tract of land. Subsequent to the formation of this corporation (which shall hereafter be referred to as the old corporation), and when it was about to actively engage in opening up and conducting the cemetery on this land, opposition developed, and its operations were stopped by an injunction issued in the superior court of Los Angeles county. After the injunction was granted, an appeal was taken by the corporation to this court. While the appeal was pending, the defendants H. C. Brown, N. M. Entler, and John Freeman, who had no connection whatever with this corporation, conceived the idea of starting a cemetery in Los Angeles county, and with that object in view procured options upon a tract of land located about a mile and a half from the cemetery of the old corporation. Before anything else was done by them in furtherance of their project, this court reversed the judgment of the superior court enjoining the Hollywood Cemetery Association from establishing its cemetery. County of Los Angeles v. Hollywood Cemetery Association, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. After such reversal, and in order to avoid the establishment of two competing cemeteries in close proximity to each other, Brown and his associates entered into communication with Samuelson, who, with Lombard, was the principal owner of the old corporation, with the view to combining the two enterprises. An understanding was reached between them which, however, was not reduced to writing, and as to it Brown testified that it was agreed that a new corporation was to be organized, and of the stock thereof he and his associates were to receive 45 per cent., and 55 per cent. thereof was to go to Samuelson and those associated with him in the old corporation. The consideration for the issuance of 45 per cent. of the stock to Brown, Entler, and Freeman was their withdrawal and abandonment of their proposed enterprise, and "throwing their energies, as far as they amounted to anything, in the direction of building up the other cemetery proposition." Thereafter the Hollywood Cemetery Association, defendant in this case

(hereafter to be referred to as the new corporation), was formed. The signers of the articles of incorporation were Samuelson, Brown, Entler, Freeman, and three others, each of whom subscribed for 10 shares of stock. Upon the trial the corporate records, consisting of the minute book and stock and transfer books, were offered in evidence, and the minutes disclosed that the first meeting of the board of directors of the new corporation was held on September 14, 1899. At this meeting Samuelson was elected president and Freeman secretary of the corporation. Another meeting was held on October 17, 1899, at which Samuelson, Entler, Freeman, and Brown were present, and at which it was decided that the corporation should purchase from the Hollywood Cemetery Association, the old corporation, the lands and premises owned by it in Los Angeles county "upon some such terms as was outlined by Mr. Samuelson, and to that end that a bonded indebtedness be created." At a meeting of the directors held on October 24, 1899, a meeting of the stockholders was called to be held on October 25, 1899, for the purpose of considering the creation of a bonded indebtedness of the corporation to the amount of \$60,000. Pursuant to this call a stockholders' meeting was held. It is shown by the minutes that at this meeting there were represented 7,750 shares of the stock; 7,690 shares thereof being entered as held by F. W. Samuelson, and 10 shares by each of the other 6 directors, and this being all the stock at that time issued. An adjournment of this meeting was had, at which a resolution was adopted authorizing the creation of a bonded indebtedness in the amount of \$60,000, to be evidenced by 300 bonds of the denomination of \$200 each, secured by a mortgage or deed of trust of all the lands then owned, or thereafter to be acquired by the corporation. This resolution, according to the minutes, was adopted by a vote of the stockholders holding the 7,750 shares. A meeting of the board of directors was held upon the same day, at which a resolution was adopted creating a bonded indebtedness as authorized by the stockholders. Upon October 27, 1899, another meeting of the board of directors was held, at which a resolution providing for the acquisition of the property of the old corporation was adopted. This resolution recited an offer by the old corporation to sell to the new one the 60 acres of land owned by it for \$40,000 of the bonds of the new corporation at par and 12,250 shares of the capital stock of the new corporation, issued full paid up at the par value thereof; said shares to be turned over to the stockholders of the old corporation in proportion to their respective holdings. It further recited the agreement of the stockholders of the old corporation to turn over to the new one all of their shares of stock in the old corporation. The resolution declared that the corporation should

purchase the property upon these terms and conditions, and that the president and secretary be authorized to deliver to the Hollywood Cemetery Association (the old corporation) upon receipt of a good and sufficient deed conveying the property, and the assignment by the stockholders of all of their shares of stock in the old corporation, the bonds of the new corporation in the sum of \$40,000, and to issue and deliver to Samuelson, as trustee, for the purposes aforesaid, the said \$12,250 shares of the capital stock of the corporation full paid, and at the par value thereof. Samuelson, though present, refrained from voting upon this resolution, but all of the other directors present voted in favor of it, and it was subsequently consented to in writing by the one director who had been absent from the meeting when it was adopted. A meeting of the board of directors was again held on January 18, 1900, at which time a resolution was adopted, which, after reciting the purchase of the property of the old corporation, the issuing of the \$40,000 in bonds to that corporation, the conveyance by the latter of the property, and the assignment by the stockholders of their stock, ratified the issuance of the 12,250 shares of the capital stock of the new corporation as theretofore authorized. As to the subsequent history of these 12,250 shares represented by certificate No. 9, which, as heretofore stated, was issued to F. W. Samuelson, as trustee, it appears that Samuelson indorsed and surrendered this certificate and received in exchange a certificate for 9,390 shares in his own name and certificates for 2,860 shares in the names of the other stockholders of the old corporation, which later he delivered to them. The 9,390 shares he at once transferred to Brown, Entler, and Freeman; they each receiving 3,130 shares. Upon the trial it was stipulated between the parties that Samuelson took the 12,250 shares "for the very purpose of splitting the same up as aforesaid and for the purpose of turning over to each of said three persons, viz., H. C. Brown, Entler, and Freeman, said 3,130 shares, in accordance with the pre-existing understanding, that according to said understanding it was not necessary for either of the three persons, viz., H. C. Brown, Entler, and Freeman, to pay any sums of money whatever to Samuelson." Certificate No. 8 for 7,680 shares was issued to Samuelson on October 16, 1899, prior to the meeting at which the purchase from the old corporation, and the issuance of bonds and stock in consideration thereof was authorized. From the stock and transfer book of the new corporation offered in evidence, there appeared opposite certificate No. 8 the following statement: "This stock was subscribed for by F. W. Samuelson, issued to him subject to calls for all or any part of the full subscription at the par value thereof." Across the entry of certificate No. 9, issued to Samuelson, as

trustee, for the stockholders of the Hollywood Cemetery Association, is the note: "This stock is full paid and is so issued." While the evidence in the case shows that the books of the corporation in which these entries are found were frequently examined by Samuelson, there is no direct evidence that he ever actually saw the entries, and for present purposes it will be assumed that he did not, and no consideration will be given to them.

It is insisted by appellants, from the facts recited, that the findings of the court as to the status of the respective blocks of stock represented by the two certificates referred to were wrong. This point is pressed with great earnestness; the stress of the argument being that it is apparent from the terms of the preliminary agreement entered into between Samuelson, and Brown and his associates, that it was contemplated that all the stock to be issued by the corporation was to be of the same character, that if the evidence warranted the court in finding that the 12,250 shares, represented by certificate No. 9, were issued as fully paid up stock, it equally warranted a finding that the 7,680 shares represented by certificate No. 8 were of the same class. There would be much plausibility in the position of the appellants if there were nothing in the record relative to the circumstances under which the stock was ultimately issued conflicting with their claim, or if the complaint had been framed upon the theory under which the claim is now made as to the apparent purposes of said agreement so that it could have been considered by the court. Under the agreement itself it may well be claimed that it was never contemplated that Brown and his associates, who were to contribute neither money nor property to the contemplated enterprise, should obtain fully paid up stock in the new corporation, and that Samuelson, who contributed valuable property, should only receive an issue of subscription stock. In other words, it would be unreasonable to say that Samuelson, who owned approximately two-thirds of the stock of the old corporation, would enter into a contract whereby he was to surrender to the new corporation valuable holdings in the old one (in fact, the only tangible property it secured) and receive only 7,680 shares of stock in the latter corporation, upon which he was liable to the extent of \$76,800 for unpaid subscription, while Brown and his associates, who were to contribute nothing tangible, should receive a large proportion of fully paid up stock, solely for abandoning a contemplated opposition enterprise and devoting their energies to the service of the new corporation, and that his fellow stockholders with Samuelson in the old corporation should likewise receive paid up stock; that, on the contrary, a reasonable construction of the agreement was that all the stock to be issued was to be of the same

class, either subscription stock or fully paid up.

In harmony with this claim, counsel for appellants now insist that this is the construction the court should have given the agreement; that it was the intention of the parties that all of the stock issued should be of the same character; that there was nothing in the evidence as far as the corporate records are concerned, indicating that the stock to be issued to Samuelson, individually, was to be of a different status from that issued to him as trustee for the purpose of apportioning it among Brown and his associates and the stockholders in the old corporation; and that the court should have found that the stock issued to Samuelson, individually, was the same character of stock as that issued to him as trustee, and was fully paid stock. Whatever merit there may be in the present position of appellants, it was neither available to them in the court below, nor can it be insisted on here, for at least two sufficient reasons, the first of which is that their complaint was not framed on the theory they now advance, and, secondly, because it was in fact framed on the theory that the 7,680 shares of stock were not, in fact, issued to Samuelson as fully paid stock. If their complaint had been framed on the theory that, under the preliminary agreement, it was the intention and understanding of the parties that all the stock of the new corporation was to be issued as fully paid shares, in the respective proportions agreed to, notwithstanding that upon the face of the corporate records this appeared not to have been done as far as the 7,680 shares was concerned, their contention would not be without merit. It might then have been insisted that under all the evidence—the agreement and the corporate records—that it was obviously the intention of the parties that all the stock of the new corporation was to be issued as fully paid up shares, and that the actual purpose of the resolution authorizing the issuance of fully paid up stock to Samuelson as trustee was simply to have it appear upon the records of the corporation that the 12,250 shares of stock, proportional amounts of which were to be delivered to Brown and his associates, who had really contributed no tangible property to the corporation, were, in fact, issued for property of the old corporation which was actually received by the new one. Under such a theory, if presented in the complaint, the plausible claim which is now made here might have been insisted on, although, even under the evidence as it stands, the finding as the court has made it, that these 7,680 shares were issued to Samuelson, not as fully paid up, but as subscription stock, would not have been unjustified. The court might well have found, and doubtless did, that while the preliminary agreement called for the issuance of stock in certain proportions, and in all probability it was understood that all stock should be of

the same class, that this preliminary agreement was not the one which the parties ultimately proceeded under. None of its terms seem to have been filled. As to the proportionate distribution of stock called for in it, it appears that the 9,390 shares distributed by Samuelson to Brown and his associates was something in excess of 45 per cent. of the capital stock, and that Samuelson and the other stockholders in the old company received less than 55 per cent. of it. Then, as to the matter of bonds, nothing was said in the agreement as to them. In the \$40,000 issue thereof, Samuelson had, on account of his corporate holdings in the old corporation, an interest to the extent of probably two-thirds. It will be thus observed that in the final adjustment between the parties there was an entire departure from the terms of the preliminary agreement as to the percentage of distribution of stock and its character, and an additional element as to bonds incorporated into it.

Samuelson was not a witness on the trial, and the only witness speaking clearly on all the transactions, from the making of the preliminary agreement up to the passage of the resolution authorizing the issue of the 12,250 shares of paid up stock and the bonds, was Brown. Samuelson was a director of the corporation and acted in all the transactions, save as to the resolution authorizing the purchase of the property of the old corporation for the bonds and 12,250 shares of paid up stock, when, being interested on both sides, he refrained from voting. Brown testified: That, at the time the resolution was passed relative to the bonds and this stock, it was understood that the 12,250 shares should be considered paid up stock; that, as to the other stock, Samuelson subscribed for it, and there was no understanding that it was to be fully paid up; that there was no order of the board of directors authorizing the issuance of this 7,680 shares to Samuelson; and that he had the stock issued to himself and did not pay a dollar for it. Whatever, too, may be said as to the preliminary agreement contemplating that the stock to be issued to Samuelson should be of the same class as the other stock, it is certain that the issuance of stock alone did not figure in the transaction between the parties as ultimately consummated. Samuelson received stock and bonds—the latter of which had no mention in the preliminary agreement. It is not to be presumed that Samuelson had any doubt of the success of the enterprise into which the new corporation was entering. The prudence of his conduct in taking subscription stock is not to be determined in the light of the subsequent unfortunate entanglement of the corporation. He doubtless then thought the project would be a success.

As every intentment must be had in favor of the findings of the trial court, it is to be assumed that the court concluded that, if it was originally contemplated that the same

class of stock in the new corporation was to be issued to all parties to it, this arrangement, which was not in writing, was abandoned, and that Samuelson, in consideration of receiving his share of the bonds of the new corporation, agreed to take the 7,680 shares of stock as unpaid stock, allowing the shareholders of the old company associated with him, and Brown and his associates, to take as their share of the stock, 12,250 shares, fully paid up. Independent of this, however, the second reason we have heretofore assigned is an all-sufficient answer to the appellants' challenge relative to the status of these 7,680 shares. It is nowhere alleged in the complaint that these shares were intended to be, or were, issued as fully paid up stock. There are numerous allegations in the complaint as to the different holdings by the plaintiffs of portions of this block of stock, but it is barren of any allegation that it was, in fact, issued to Samuelson as fully paid. In truth, the allegations, as made, negative the proposition that it was of this character. As to the status of all the stock of the corporation involved here—the 7,680 and the 12,250 shares—the allegations as to the former are, not that it was fully paid, in fact, but that the corporation and its officers at the time these plaintiffs acquired their holdings of it, represented it to be fully paid, and set up these representations as an estoppel on the part of the corporation to assert that it was not fully paid stock. There is clearly a very essential distinction between an allegation that a corporation by reason of its conduct is estopped from denying that stock which it has issued was fully paid and an allegation that stock which it had issued had been in fact fully paid for before or at the time of its issuance. As it is not alleged in the complaint that these 7,680 shares of stock were, in fact, fully paid, no issue as to that matter could arise under the pleadings. The court was not authorized to make any finding on the subject, and, had it found as appellant claims it should have done, it would have been a finding outside the issues, and reversible error. So that, aside from the considerations we have advanced in support of the finding of the court that these 7,680 shares were subscription shares subscribed for by Samuelson, the appellants are not in a position to insist that this finding is erroneous, because under their theory of the evidence it shows them to have been fully paid. There was no issue on this latter point, and appellants cannot be heard to insist on a reversal on account of facts which they claim the evidence established, but upon which they did not rely by any proper pleading. This disposes of the claim of insufficiency of the evidence to support the finding as to the 7,680 shares of stock being simply subscription stock.

Now as to the 12,250 shares: It would be idle to attempt to discuss the evidence relative to the finding that these shares were

fully paid. The evidence that they were is not open to any serious question. The main contention against the finding as to character of these shares is that the evidence shows that the value of the property transferred by the old corporation to the new in consideration of the delivery of this stock and the \$40,000 bonds was far less than the face value of the stock and bonds given for it. It may be conceded that this is true. At least there was considerable evidence to this effect. The court, however, found that the transfer was acquiesced in by all the stockholders then interested in the new corporation, and that the assets turned over to said corporation in consideration of said stock and bonds were of great value, "in the estimation and judgment of the defendant corporation and of the board of directors of the said corporation at the time of said transfer, and were equivalent in value to the full value of the said shares and of the said bonds, and were a just and adequate consideration for the issuance of said 12,250 shares of stock as fully paid stock." These findings were all in harmony with the evidence. Every stockholder of the new corporation assented to this transaction, and the directors authorized, approved, and ratified it. Samuelson himself was one of the actors in the matter, and these plaintiffs, who have succeeded to the shares of stock, which he then held, cannot be heard to question the validity of the issue of this paid up stock for inadequacy of its price. Directors of a corporation have a right to issue stock as fully paid up, upon such terms and at such price as they see fit, and in the absence of fraud, as far as the stockholders or their assignees are concerned, the action of the directors in issuing it is final, and the action of the corporation cannot be attacked by the stockholders, or the validity of the issue assailed on the ground, merely, that the consideration was inadequate for which the corporation issued it as fully paid up. Creditors may attack the transaction; stockholders cannot. *Cook on Corporations*, § 35; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Vermont Marble Co. v. Declez Marble Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

Neither is it of any moment, as affecting this conclusion, that the fully paid stock was issued to Samuelson as trustee for the benefit of, and to be distributed to, persons who were not interested in the property which was received by the corporation, and towards the payment of which this stock was issued. The proposition advanced by appellants is that this issue of 12,250 shares was invalid because they were distributed to the stockholders of the old company through that medium—of Samuelson as a trustee—in violation of section 309 of the Civil Code, prohibiting the distribution of the capital of a corporation prior to its dissolution; but we cannot see

how these appellants are entitled to raise this point. They are not stockholders of the old corporation whose capital stock they say was distributed through the method they complain of. It is difficult to see how they are in a position to object or question the transaction. They do not claim that this issue might not be validly made to Samuelson, but that its issue for the purpose of distributing it partly to Brown and his associates made it invalid. But this appears to us to be a matter in which these appellants have no concern. Whether Samuelson kept the shares or turned them over, among others, to Brown, Freeman, and Entler, was a matter entirely between these parties themselves, which did not concern either the new corporation or its stockholders. It is not claimed that the new corporation distributed any of its capital thereby, and the old corporation is not complaining and is not a party to this action. If the old corporation or its stockholders have any ground of complaint, these appellants, as stockholders in the new corporation, are not authorized to make it for them. Nor, examining the particular medium through which the shares were ordered transferred to the old company, their validity was not affected by the mode adopted. It is of no consequence that the 12,250 shares were ordered to be issued to Samuelson as trustee, instead of directly to the old corporation. It is true that these 12,250 shares constituted part of the capital of the old corporation, and it is equally true that under the law of this state neither the directors of a corporation nor its stockholders have any right to distribute the corporate capital or the property received in exchange for it, among the stockholders. Civ. Code, § 309; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Kohl v. Lilienthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Schaake v. Eagle, etc., Can Co.*, 135 Cal. 474, 63 Pac. 1025, 67 Pac. 759. But we do not see how this claim of illegality in this respect could advantage appellants at all, even if their position were correct. If the issue of this stock in the manner complained of was invalid, it would result at most in rendering the issue of this 12,250 shares void. If this were the effect, the only result which would follow would be that these shares would not be liable to any assessment at all. Such a result could not aid appellants in their attack on the present assessment, because, if the issue of the 12,250 shares was void, then the issue of the stock which appellants hold—which was alone assessed—comprises the only legally issued stock of the corporation, and was therefore the only stock of the corporation liable to an assessment.

But it is said by the appellants, pursuing this same line of reasoning relative to the alleged illegal issue of these shares, that if the issue of them was illegal, then the directors of the corporation—who were such only by virtue of owning this illegal stock—had no authority to levy an assessment. We

think it may be fairly concluded from the evidence that all the directors save Brown were owners of stock subscribed for in the articles of incorporation, which were not part of these 12,250 shares; but this is really of no moment. If they were not stockholders by virtue of the fact that this issue of stock was invalid, and hence were not de jure directors, they were at least de facto directors, and that is sufficient for present purposes. As such directors they had ample power to levy the assessment, and their right to do so cannot be collaterally questioned or attacked.

There is nothing in the point that this assessment was invalid because it was not levied on all the capital stock of the corporation; that is, that it was not uniform. Section 332, Civ. Code, provides that an assessment may be for the full amount unpaid upon the capital stock to meet liabilities, or to satisfy claims of creditors. Under this section it is proper, where part of the stock of a corporation has been fully paid, or partially paid, to levy an assessment for the unpaid portion of the subscription price upon those other shares of the capital stock upon which a less amount or nothing has been paid, in order to equalize the subscription payment on all the stock. To take the case at bar as an illustration: Of the capital stock of the corporation 12,250 shares had been fully paid up, and 7,750 shares had not been so fully paid. Hence the whole capital stock had not been paid. The shares stood in a different class. As to one, full payment had been made; as to the other, but a partial payment—the dollar assessment. Under the section cited, the directors had a right to levy an assessment upon the 7,750 shares as a distinctive class of corporate stock, for the whole or a part of the subscription price unpaid. This was uniformity of assessment. It would not be proper to levy an assessment to call in a given amount on a portion of the unpaid stock, and a less amount on another, if all the stock stood in the same class as to the unpaid subscription price. A call cannot be made which will affect only a portion of those who stand in the same class as to the amount of unpaid subscription, but if upon a portion of the stock all or half should have been paid, and nothing or but a small amount had been paid on the other portion, an assessment could be properly levied on the stock which had made the smaller payments, in order to equalize the contributions of all the stockholders. This is the only mode of assessment as to different classes of stock which would not be violative of the rule that all assessments on stocks must be uniform. That assessment is the proper method to collect unpaid subscriptions is well settled. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Union Savings Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *Union Savings Bank v. Lieter*, 145 Cal. 696, 79 Pac. 441; *1 Cook on Corporations*, § 114; *1 Morawetz on Corporations*, 154.

These objections of the appellant to the

findings and against the validity of the issue of these 12,250 shares and the assessment being disposed of, brings us to a consideration of the only remaining point of any consequence, namely, how far the original character of the 7,680 shares were subsequently affected by representations or conduct on the part of the corporation or by mesne transfers from the holder thereof to the present holders, these plaintiffs. It is insisted, in that regard, that prior to the purchase of this stock by appellants the corporation represented to them that said shares were fully paid up, and that it is now estopped to assert that the stock is of a character different from what they represented. The court, however, found that the corporation had never made such representations, that there was nothing on the records of the corporation which indicated anything other than that the shares were subscription shares and nothing had been paid thereon, and that the officers of the corporation had made no representations or statements to the contrary, and the evidence sustains these findings. The main claim of all these appellants is, however, that they acquired these shares of stock in the open market from the holders of certificates of stock, that these certificates had been issued by the corporation defendant to the transferors of each of the plaintiffs and did not show that the stock represented thereby had not been paid in full, that the issuance of these certificates in this form constituted a representation by defendant corporation that the shares represented thereby were fully paid, that the plaintiffs who acquired the said certificates from the holders thereof were bona fide purchasers, without notice that the stock had not been paid, and therefore, as between themselves and the corporation, these shares held by plaintiffs must be deemed fully paid. There is nothing in the particular point made that the issuance of the certificates without it appearing thereon that the stock had not been fully paid was a representation by the company that it had been so paid. These certificates were issued long before section 323 of the Civil Code was amended as it now reads, requiring certificates issued prior to the payment of the full amount due to state the amount paid. Nor was there anything on the face of these certificates indicating whether the shares were fully paid or not. The certificate to Samuelson was of the ordinary form, reciting that he was the owner of 7,680 shares, transferable on the books of the company by indorsement and surrender of the certificate. There was nothing indicating what Samuelson had paid for the shares. The corporation had a right to issue its shares for cash or upon credit and was not required to have the certificate show full or any payment, or the terms on which it was issued, and plaintiffs had no right to assume anything as to the payment. Under these circumstances, no estoppel by representation could be invoked against the corporation. Stockton

C. H. & A. Works v. Houser, 109 Cal. 1, 9, 41 Pac. 809.

But independent of this claim of representation, the broad proposition of appellants is that, because they purchased their certificates of stock in good faith and without notice in the open market, such stock is to be deemed fully paid up, and they are protected as bona fide purchasers, even though upon the face of the certificates there was nothing to indicate that the stock had been fully paid. In effect, their claim is that certificates of stock are negotiable securities and subject to the same rules governing the transfer of such instruments; but this position under the law of this state is untenable. Whatever the rule may be in other jurisdictions (and some authorities therefrom are cited by appellants in support of their claim), it is well established in this state that certificates of stock are not negotiable instruments, either in the commercial sense or within the definition of the Civil Code, and that the stock represented by them is subject to assessment for subscription calls, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation, and are not negotiable instruments. *Barstow v. Savage M. Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Graves v. Mono Lake Min. Co.*, 81 Cal. 304, 22 Pac. 665; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316. Such certificates of shares not being negotiable instruments, the rule analogous to other nonnegotiable instruments applies, and a purchaser takes them subject to all equities in favor of the corporation. The transfer relieves him from no liability to the corporation which his transferrer was under, so that when one purchases stock and causes the transfer to be entered upon the books of the corporation, he thereafter holds his shares on the same conditions as did the stockholder from whom he purchased. He acquires under them all his rights and is subject to all his liabilities and obligations respecting them. *Visalia, etc., R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; *Craig v. Hesperia L. & W. Co.*, supra; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858. Many authorities from other states might be cited to the same effect, but these from our own state declare the rule here.

The plaintiff O'Dea purchased 1,386 shares of the stock in question at a sale by the corporation of the same for a delinquent assessment. This was part of the Samuelson stock and assessed to him. O'Dea claims that this was, in effect, a purchase by him directly from the corporation of these shares as the property of the corporation, and not from the stockholder who theretofore had held and owned them. There is nothing in this point. When a corporation offers stock for sale to pay a delinquent assessment, it acts as the

agent of the delinquent stockholder. It could only acquire title in default of bidders and by bidding it in itself. When the stock is offered for sale and is purchased thereat, the purchaser takes the title that the delinquent stockholder had, and no other, and he takes it subject to liability for the unpaid subscription price. 1 Cook on Stockholders, § 133; Purdy's Beach on Corporations, § 377b.

Some other points are made by appellants for reversal, but in our judgment they are untenable and without sufficient merit to warrant special consideration.

The judgment is affirmed.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.

SHAW, J. I dissent. The evidence shows that Samuelson, at the beginning of his cemetery enterprise was the owner of all the land now belonging to the new corporation, apparently free of all incumbrances, and that through the manipulations of the other parties concerned in the enterprise with him, and without the expenditure of any substantial sum of money or the contribution of any considerable effort or property by any other person, at the close of the proceedings, Samuelson stood as a subscriber for something over 7,600 shares of stock in the new corporation upon which subscription he owed the new corporation the full par value of \$76,000, and was not the owner of any other property, while the other parties, who contributed nothing and did nothing substantial, were the owners of all the residue of the stock in the new corporation as full paid stock on which they owed the corporation nothing; their stock being about two-thirds of the total capital stock of the new corporation. It also appears that the new corporation was then the owner of the Samuelson land and of the entire capital stock of the old corporation and by reason of such ownership of said stock was entitled to the entire beneficial interest in the \$40,000 of bonds which the new corporation has issued to the old corporation. In short, Samuelson went in with property in his own right of the value of something like \$50,000 and came out with no property and owing \$76,000, and all of this was brought about by mere manipulation of documents and papers without anything of value having passed to him. Such a thing is to me absolutely incredible, and some other explanation of the transactions must be possible. I think it is found in the proposition that when, after the issue of practically all the stock of the new corporation to Samuelson, the 7,600 shares represented by certificate 8 and the 12,250 shares represented by certificate number 9, and when he thereupon made the distribution of the stock in accordance with the agreement, it was fully understood by all concerned that all the stock was to be considered as full paid, as in fact it was by virtue of the original agreement. While there may be

some evidence of a somewhat evasive character that is contrary to this conclusion, there is really no substantial evidence against it.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I dissent from the order denying a rehearing of this cause. In my opinion the whole merits of the case are bound up in the question whether it is true, as found by the trial court, that the assets of the old corporation which were transferred to the new corporation in exchange for \$40,000 in bonds and 12,250 shares of its stock were, in fact, or in the honest judgment and estimation of the parties to that transaction, equal in value to the bonds (\$40,000) and the par value of the shares (\$122,500). If they were of that value, or honestly believed to be of that value, it is not only lawful, but strictly just, to assess the remaining 7,750 shares of subscription stock exclusively until they have contributed to the capital of the company as much per share as the 12,250 shares have contributed, viz, \$10 a share. In the opinion of this court it is said that the finding on this point is sustained by the evidence. I dissent from that view. I cannot discover in the record any substantial evidence that the assets of the old corporation were actually worth more than \$40,000—worth, in other words, any more than the value of the bonds issued to Samuelson and his associates in the old corporation. Nor do I find any evidence that in the honest judgment and estimation of any of the parties they were worth more than \$50,000. The statement therefore that the 12,250 shares issued to Samuelson in trust for himself and his associates in the old corporation had been fully paid was a fiction. They were certainly not fully paid, and if anything was paid on them, either in fact or according to any reasonable estimate of the value of the assets of the old corporation, it was a very small fraction, and probably less than 10 per cent. of their par value.

Samuelson, however, does not appear to have been defrauded. He was himself a consenting party to the statements recorded in the books of the corporation to the effect that the 12,250 shares of stock issued to him as trustee had been fully paid. Why he chose to turn over his portion of those shares to Brown and Freeman and Entler is unexplained, and, in the absence of any complaint from him, is immaterial. Aside from the stock, he received, in bonds, the full value of his interest in the assets transferred to the new corporation, and he, if a party here, would have no right to complain of the court for refusing to violate the Constitution (article 12, § 11) and the statute (Civ. Code, § 359) by treating as fully paid his 7,690 subscription shares, upon which, admittedly, only a small percentage of their par value has ever been paid. But in my opinion any bona fide holder to

whom Samuelson's subscription shares have been transferred for value has a right to ask a court of equity to enjoin the sale of such shares to satisfy an assessment levied upon them exclusively, when it is made to appear that a large part of the so-called full paid shares remain in the hands of those who took them with full knowledge that little or nothing had in fact been paid for them. The decree of the court should have been based upon the real character of the shares which the defendants are seeking to exempt from assessment, and not upon the fictitious character which they have chosen to ascribe to them. If there are any innocent holders of these exempted shares who have paid value for them on the faith of the recorded statements that they were fully paid, they perhaps might claim the exemption; but those who took them with full knowledge of their fictitious character, or gratuitously, are, in the view of equity, liable to the same assessments as the plaintiffs.

154 Cal. 36

LOMITA LAND & WATER CO. v. ROBINSON et al. (L. A. 2,096.)

(Supreme Court of California. July 6, 1908.
On Rehearing, July 30, 1908.)

1. APPEAL AND ERROR—RECORD—OPINION OF TRIAL COURT.

The opinion of the trial court rendered in deciding the case is no part of the record on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2339.]

2. CORPORATIONS—PROMOTERS—LIABILITY.

Promoters of a corporation formed to purchase property from another occupy a fiduciary relation to those whom they induce to become with them subscribers to the stock, and are bound to declare to their associates any personal interest that they have in the matter, and without such disclosure they cannot legally profit at the expense of their associates, and, where they are guilty of any misrepresentation of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation may either set aside the transaction or recover compensation for the loss sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 264.]

3. SAME.

That one of the promoters of a corporation, formed for the purpose of purchasing certain property from another person, on learning that the subscribers to the stock were dissatisfied on account of secret profits made on the purchase, returned the sum given him to a co-promoter from whom he had received it, does not affect his liability to the corporation for the loss it sustained.

4. SAME.

Persons conspiring with promoters of a corporation formed to purchase the property of another, to induce it to purchase the property at a price in excess of the sum for which the owner has agreed to convey it, by representing that the excessive price is reasonable and is the agreed price, are, equally with the promoters, liable for the secret profits made on the sale of the property to the corporation, though such persons had no dealings with the corporation, or its members, or did not occupy fiduciary relations towards them.

5. SAME.

A person conspiring with promoters of a corporation, to induce it by false representations to purchase property at a price in excess of that agreed to by the owner, is liable equally with the promoters for the secret profits made on the sale, though he was not originally a party to the fraud, if, knowing the fraud, he aided in its execution, he became a party thereto and was chargeable with the consequences.

6. SAME.

All persons co-operating in a fraud, inducing a corporation to purchase property at a price in excess of that agreed to by the owner, are jointly liable for the ensuing injury, irrespective of the degree of culpability.

7. SAME.

A person conspiring with promoters of a corporation to induce it to purchase property at a price in excess of that agreed to by the owner is liable equally with the promoters for the secret profits made on the sale, though he did not share in the profits of the fraud.

8. TRIAL—FINDINGS—CONSTRUCTION.

Findings must be construed to support the judgment, if they can be reasonably so construed.

9. CORPORATIONS — PROMOTERS—LIABILITY — FINDINGS—SUFFICIENCY—"AID AND ABET."

On the issue of the liability of a person on the ground that he had conspired with promoters of a corporation to induce it to purchase property at a price in excess of that agreed to by the owner, the court found that such person did not, on the date of the execution of the agreement for the sale of the property to the subscribers for formation of the corporation, know what representations had been made by the promoters, but also found that he knew that the property was being sold to the subscribers, and that the subscription agreement signed by them contained false representations of the price at which the property was to be acquired, and that he executed an agreement for the sale containing the false representations as to price, and gave a false receipt for the excess, and that by signing the receipt he "aided and abetted" the promoters in their scheme to increase the price to the subscribers. *Held* to show knowledge on the part of such person of the scheme of the promoters to obtain a secret profit at the expense of the subscribers; the words "aid and abet" implying an intentional participation with knowledge of the object to be attained.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 291-293.]

10. SAME.

One of several co-owners of certain land employed a broker to procure a purchaser thereof. The broker induced third persons to enter into a contract for the purchase for \$33,000. Such persons promoted the organization of a corporation to purchase the premises for \$39,500. The broker aided them in their scheme, with actual knowledge of the fact that they would make a secret profit of \$6,500 not only by signing the subscription agreement for himself and for another, but also by procuring the signatures of two other subscribers. *Held*, that the broker was jointly liable to the corporation for the secret profits made on the sale of the property, irrespective of motives.

11. APPEAL AND ERROR—REVIEW — FINDINGS — INFERENCES.

The court on appeal may draw necessary inferences from the findings to support the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3908-3911.]

12. CORPORATIONS—PROMOTERS—LIABILITY.

One of several co-owners of certain land, after employing a broker to procure a purchaser thereof, obtained an authorization from the co-owners to sell the premises for \$27,500. He

contracted to sell the premises to a third person for \$33,000. The third person and others organized a corporation to purchase the same for \$39,500. He dealt solely with the purchaser up to the time he ratified the broker's act in signing his name to the corporate subscription agreement, which was consistent with the statement contained therein that he was selling to the subscribers at a profit on his option to purchase, and the court found that the subscribers had no knowledge that the promoters or any of the subscribers, other than such co-owner, were to receive any part of the \$39,500 stated in the agreement as the price. *Held*, that such co-owner was not liable to the corporation for the profits made by him in the transaction, since, the subscribers knowing that he was making a profit, the mere fact that they did not know the amount did not entitle them to complain, in the absence of misrepresentations.

13. SAME.

A broker was employed to procure a purchaser of real estate for \$33,000, at a compensation of \$3,000. He did not find a purchaser, and for the purpose of bringing about a sale he associated himself as a joint purchaser with others in the organization of a corporation formed to purchase the premises. *Held* that, as against such corporation, he was not entitled to the agreed compensation, though one or two of the corporate subscribers knew the facts.

14. JOINT ADVENTURES—MUTUAL RIGHTS AND LIABILITIES OF PARTIES—JOINT PURCHASERS OF REAL PROPERTY.

The implied understanding between joint purchasers of real estate is that each is engaged in an enterprise solely for the mutual and common benefit and advantage of all, and that each has a common interest with the others according to the amount of his subscription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Joint Adventures, §§ 3-6.]

15. PRINCIPAL AND AGENT — AUTHORITY OF AGENT—RIGHT TO PROFITS MADE BY AGENT.

An agent will not be allowed to make profits for himself at the expense of his principal, by any deception as to the purchase price of property, and he is a trustee of any profits so obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 132, 133.]

16. CORPORATIONS—PROMOTERS—LIABILITY.

An owner of land and promoters of a corporation formed to purchase the land, who conspired to induce the corporation, by fraudulent representations as to the agreed price, to purchase the property at a price in excess of that agreed to by the owner, are joint tort-feasors, and the law will afford no relief to the vendor merely because he is compelled to pay more than his proportion of the loss sustained by the corporation.

17. COSTS — COSTS OF DEPOSITIONS — ALLOWANCE.

The successful party is entitled to recover the costs incurred in the taking of necessary depositions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 596-603.]

18. SAME.

Where the depositions taken by the successful party could not be necessary to the protection of his rights, the court did not err in disallowing the costs thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 598.]

19. SAME—RETAXATION OF COSTS—MOTIONS.

It is not essential that a motion to retax costs should be accompanied by any affidavit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 811.]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Lomita Land & Water Company against F. E. Robinson and others. From a judgment granting insufficient relief, plaintiff appeals, and certain of the defendants also appeal. Modified and affirmed.

Hunsaker & Britt, for plaintiff. W. R. Bacon and Denis & Loewenthal, for defendant Robinson. Porter, Sutton & Cruickshank, for defendant Whitlock. Percy R. Wilson, for defendant J. C. Cline. Milton K. Young, for defendant A. C. Freeman.

ANGELLOTTI, J. This is an action brought by a corporation organized under the laws of this state to recover from four of the original subscribers to the stock thereof certain alleged secret profits realized by them on a sale of a tract of land to such corporation. There are appeals by different parties from the judgment. The case comes before us on the judgment roll alone, and the question presented by all the appeals is as to the sufficiency of the findings to sustain the judgment.

The findings show the facts, so far as material, to be as follows: The land involved consists of some 700 acres of land in Los Angeles county, valuable both for farming purposes and the purposes of a gun club and duck preserve. It was held, subject to a mortgage for \$18,000, by several persons, of whom Robinson was one. Under these circumstances, Robinson employed defendant Whitlock to find a purchaser therefor without fixing any price. Some time prior to July 5, 1903, Whitlock interested defendant Freeman in the matter of the purchase of the property and induced him to examine the same. At Freeman's request, defendant Cline examined the property, in company with Freeman and Robinson, and pronounced it suitable to the uses of a gun club as a duck preserve. On July 5, 1903, Freeman paid Robinson \$500 for an option to purchase said property within 30 days. No price was then agreed on, and Robinson gave Freeman a receipt for the money, stating therein that the same was "in payment for an option for 30 days on approximately seven hundred acres of the Rancho La Bolsa Chica, which said option is to be executed by me as soon hereafter as same can be formally drawn from description to be by me furnished," and that such \$500 was to be applied on price to be specified therein. Subsequent to this, Robinson's associates in the property gave to him a written authorization to sell the property for \$27,500 net, dated July 5, 1903, stating therein: "You may have thirty days from the 5th inst. to close the sale. It is further understood that you are to deposit in the American National Bank of Long Beach the sum of five hundred dollars for this option, which money will be applied on the purchase price if the sale be accepted; otherwise to be paid to us as a forfeit." Robinson, upon obtaining this authorization or option, entered into an arrangement with Whitlock that he "would fix

the purchase price of the said real property to defendant Freeman at the sum of \$33,000, of which Whitlock should receive as his compensation for finding a purchaser, * * * the sum of \$3,000, and that defendant Robinson should have and retain the balance of \$30,000." Early in August, 1903, the so-called option of July 5, 1903, given Freeman by Robinson, was in writing extended until August 25, 1903, and it was stated in such writing that the price agreed on was \$33,000. In the meantime, Freeman and Cline had commenced and were engaged in efforts to form a corporation to take this property for the purposes of a gun club. It is not found that Robinson knew anything about their plans or efforts in this direction until after he had definitely agreed in writing with Freeman as to the price for which Freeman might purchase the property, or that he had anything whatever to do with the formation of the corporation, other than to become a subscriber for one share therein. At the instance of Freeman, a written instrument in the nature of a subscription agreement was prepared by one Paul W. Schenck, dated July 14, 1903, reading as follows: "Whereas, F. E. Robinson, one of the undersigned, is the owner of an option to purchase a certain portion of the Rancho La Bolsa Chica, in the county of Los Angeles, * * * and comprising between 600 and 700 acres of said Rancho; and whereas, it is proposed to form a gun club corporation, * * * and by such formation secure for its members the land aforesaid for the sum of \$39,500, payable \$14,500 cash and the balance in installments extending over a period of 9 years: Therefore the undersigned, each for himself, does hereby subscribe for one share and agree with every and all other subscribers hereto as follows: (1) Within five days hereafter to pay to A. C. Freeman in trust, for the purposes herein set forth, the sum of \$500 on each such share as the initial payment thereon. * * * This agreement is made contingent upon securing subscriptions for the total 36 shares, and if they be not so secured within 30 days, all money so paid in in trust to be refunded."

Prior to August 25, 1903, this agreement was signed by 36 men for one share each, including each of the defendants; Robinson's name being the thirteenth signed, and Whitlock's the fourteenth. Prior to July 5, 1903, Robinson had stated to Whitlock that he wanted to be a member of the gun club, and Whitlock signed the name of Robinson to the subscription agreement, assuming that he had authority to do so, and informed Robinson thereof some time prior to August 25th, and Robinson ratified Whitlock's act. Most of the subscribers were obtained by Freeman and Cline, but Whitlock obtained two, Messrs. Hickcox and Dotter. Robinson never saw the agreement until after this action was commenced, but on August 25th was informed as to the statement made therein concern-

ing the price at which the property was to be sold to the corporation. None of the persons who signed the subscription agreement, except the defendants and S. Schenck, Paul W. Schenck, George C. Dotter, and Ross T. Hickcox, ever was informed or had any knowledge that either Whitlock, Freeman, or Cline, or any subscriber "other than said Robinson," was to receive any part of the \$39,500 mentioned in the agreement, or that any subscriber "other than said Robinson" was in any way interested therein other than as a subscriber. All that Dotter and Hickcox knew was that Whitlock had at one time urged them to form a gun club to purchase the property, saying that he had it for sale at a probable price of about \$30,000 or \$33,000, and they supposed when they signed the agreement that he was making some profit out of the matter. The Schencks were partners and confidential business associates of Freeman. No subscribers other than defendants and the Schencks ever were informed or knew the price Robinson was to pay for the property. On August 25, 1903, by the direction of Freeman, an agreement for the sale of the property to the subscribers was executed by Freeman with Paul W. Schenck, as trustee for the subscribers. The consideration for the sale named therein was \$39,500, the property to be taken for \$21,500, subject to the \$18,000 mortgage, which was assumed by Schenck as trustee. It was stipulated therein that of the \$21,500, \$14,500 cash was to be paid on the execution of the agreement, \$5,000 one year from date, and \$2,000 eighteen months from date; interest at 9 per cent. to be paid on deferred payments. Thereupon Freeman paid to Robinson, from moneys in his hands received from the subscribers, the sum of \$7,000, which, with the \$500 due from Robinson on the subscription agreement and the \$500 theretofore paid by Freeman to Robinson for the option, made a total payment of \$8,000. Robinson then gave Freeman, at his request, a written receipt for \$14,500, as follows: "Los Angeles, Cal., Aug. 25, 1903. Received of A. C. Freeman, fourteen thousand five hundred dollars, first payment on gun club grounds. \$14,500. F. E. Robinson." Of the \$6,500 thus receipted for, but not paid, Freeman retained for his own use \$2,600, and paid to Cline \$1,300, to Sam Schenck \$1,300, and to Paul W. Schenck \$1,300. Cline subsequently returned his \$1,300 to Freeman, as did also Sam Schenck. Robinson paid to Whitlock from the money received by him the sum of \$3,000 for his services, and this left him, including the moneys still due him under the contract, a profit of \$2,500 on the transaction. Pursuant to the subscription agreement, plaintiff was organized as a corporation by the subscribers, and on April 9, 1904, said Schenck, trustee, transferred to it the agreement of purchase. On August 25, 1904, plaintiff paid Robinson under said agreement \$5,490, but has made no

other payment except such installments of principal and interest as have become due on the subsisting mortgage. Robinson has acquired from his associates the legal title to the property.

Other facts were found by the trial court, but we deem the foregoing to be a fair statement of the material facts, except in so far as we hereinafter specify other findings. It is important to bear in mind that, so far as the findings show, Robinson had absolutely nothing to do with the matter of the formation of the corporation to purchase this property (except in subsequently agreeing to become a subscriber for a share of its stock), even to the extent of suggesting the organization of such a corporation. The theory of the findings is that Robinson was dealing solely with Freeman, agreeing to sell the property to him for \$33,000, and that the scheme of a corporation to take over the property so to be acquired by Freeman was the scheme of Freeman and his associates, and that Robinson had nothing to do therewith. The opinion of the trial court rendered in deciding the case is no part of the record, but it is proper to state that it is in line with this construction; the learned judge stating emphatically that the evidence satisfied him that the intention of Robinson and Freeman was that Robinson was to sell the property to Freeman for \$33,000. It is further important to bear in mind that the trial court did not find that the subscribers had not been informed or did not know that Robinson was to personally receive a portion of the \$39,500, and was interested in the matter other than as a co-subscriber. The lack of knowledge on the part of the subscribers as to such matter was limited by the findings to the other defendants. It is further clear under the findings that Whitlock was Robinson's agent only so far as the sale of the property by Robinson to Freeman was concerned, and that the promotion by him of a corporation to purchase was not authorized by Robinson, and that anything he may have done in the matter of the formation of the corporation was not done as Robinson's agent and could not bind Robinson. The facts found distinguish this case from that of *Ex-Mission, etc., Co. v. Flash*, 97 Cal. 610, 32 Pac. 600, in this regard. The trial court concluded that plaintiff was not entitled to recover the \$5,500 difference between \$27,500 and \$33,000 received by Robinson, and of which Robinson had paid \$3,000 to Whitlock. As to the \$6,500 difference between the price at which Freeman purchased from Robinson, \$33,000, and the \$39,500, for which the property was purchased by the subscribers to the stock of the proposed corporation, the court found that plaintiff was entitled to recover from Freeman and Cline, as secret profits realized by them as promoters of the corporation from their co-subscribers, and also from Robinson and Whitlock, upon the theory that

they had aided and abetted Freeman and Cline in their scheme to secretly increase the price of the property to their co-subscribers for their own benefit, Whitlock by procuring signers to the subscription agreement, and Robinson by making it appear in the agreement of sale that the price to be paid was \$39,500 instead of \$33,000, and by giving the receipt for \$14,500, when in fact he received only \$8,000. The trial court found as a fact that in this way Whitlock and Robinson aided and abetted Freeman and Cline in such scheme. Judgment was accordingly given against all four defendants for the amount already paid by the subscribers and the corporation in excess of the amount which should have been paid, viz., \$4,500, with \$490 interest, and decreeing the \$2,000 and interest still to be paid Robinson under the terms of the contract not to be a valid claim against plaintiff, and directing Robinson to execute a conveyance of the property to plaintiff. Plaintiff appeals from the judgment, claiming that it should have been awarded judgment against Robinson and Whitlock for the \$5,500 difference between the \$27,500 and the \$33,000. Robinson and Whitlock each appeal from the judgment against them. There is no appeal on behalf of either Freeman or Cline.

1. As to defendants Freeman and Cline, the case, under the authorities, is, of course, a clear one so far as the \$6,500 profit made by Freeman and shared by him in part with others is concerned. They were essentially promoters of the corporation formed for the avowed purpose of purchasing this property from one other than themselves, and they misrepresented to those whom they induced to join in the enterprise, and who became with them subscribers to the stock of the proposed corporation, the amount the corporation would be required to pay in order to obtain the property, for the purpose of making \$6,500 secret profit from the subscribers in the transaction, and this secret profit was in fact made. The findings show that their plan from the beginning was to form a corporation to purchase this property, and that they practically procured its formation. As promoters of the corporation, they occupied a fiduciary relation to their co-subscribers, and were bound to truthfully declare to their associates any personal interest that they had in the matter of the purchase. Without such disclosure they could not legally profit at the expense of their associates. If they were guilty of any misrepresentation of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered. See *Ex-Mission, etc., Co. v. Flash*, 97 Cal. 610, 626, 32 Pac. 600, and cases there cited. In *Burbank v. Dennis*, 101 Cal. 90, 102, 35 Pac. 444, this court quoted approvingly the following: "The substance of the law is that promoters are corpo-

rate fiduciaries. Transactions with their companies wherein they deal honorably, with full disclosure, and without seeking to influence the action of the corporation will be upheld; but transactions in which they suppress or misrepresent material facts, or otherwise deceive the company, or corruptly control its action, are fraudulent, and the company may elect either wholly to set aside such transaction, or to recover the promoter's profits." It should be noted, in justice to Cline, that, when he learned that the subscribers were dissatisfied on account of these secret profits, he returned the \$1,300 given him to Freeman from whom he had received it. This, however, does not affect his liability in this case.

2. So far as such \$6,500 secret profit is concerned, we think there can be no doubt that Robinson is also liable to plaintiff. In 1 Clark & Marshall on Private Corporations, at page 327, it is said: "Persons who conspire with promoters of a corporation to induce it to purchase property at a certain price, upon the representation that it is a reasonable price, and the one which has been agreed to be paid to the owner, whereas it is greatly in excess of the sum agreed to be paid, are, equally with the promoters, liable for the secret profits made on the sale of the property to the corporation, although it is not alleged that such persons, other than the promoters, had any dealings with the corporation or its members, or occupied fiduciary relations towards them. * * * This is on the well-established principle that, where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains or the degree of his activity in the scheme." It is not essential to such a liability that such participant was originally a party to the contrivance of the fraud. If, knowing the fraud contrived, he willfully aids in its execution, he thus becomes a party to the plan and is chargeable with the consequences. See *Lincoln v. Chafin*, 7 Wall. (U. S.) 138, 19 L. Ed. 106. All persons uniting or co-operating in such a wrong are jointly liable for the ensuing injury, irrespective of the degree of culpability. See *Marriott v. Williams* (Cal.) 93 Pac. 875, and cases there cited; *Cooley on Torts* (3d Ed.) 213; *More v. Finger*, 128 Cal. 319, 60 Pac. 933. As said by the learned judge of the court below: "It is not necessary that the defendants shall have all been in league from the beginning to defraud the investors or any of them. They need not be in *pari delicto*. It is enough that each was at some time and in some degree a party to and aided the improper transaction, and it matters not how unequal may have been the assistance rendered." Nor is it even essential that such a participant should have shared at all in the profits of the fraud. This is illustrated by the case of *Stoney Creek, etc., Co. v. Smalley et al.*, 111 Mich. 321, 69 N. W. 722, where

the vendor of certain real property gave to the vendee at his request a receipt designed to show a larger consideration than was in fact to be paid, to enable the vendee to impose on his associates. The court said: "It is urged that Davis was not an agent of Smalley, that the latter did not authorize Davis to make any representations, that he was to have no interest in the corporation, had no partnership relations with Davis, and that he was not concerned in and received no part of the purchase money for which the property was to be sold, above his original price of \$2,500. This defense cannot obtain. Smalley gave Davis a false paper. He knew it was false, and that it could not be used for any legitimate purpose. He knew that a fictitious consideration was stated in the deed. * * * Where one deliberately gives another a false statement in writing, knowing the purpose for which it is to be used, which that other uses to deceive a third party, he is a joint wrongdoer, and must be held responsible for the consequences which follow. Smalley cannot defend upon the ground that he received no benefit from the fraud."

It is urged that the findings do not show any knowledge on Robinson's part of any scheme on the part of Freeman to obtain a secret profit at the expense of the subscribers, and that without this element there is no basis for a conclusion that he was knowingly a party to the fraudulent scheme. In this connection, reliance is placed on the finding that "defendant Robinson did not on the 25th day of August, 1903, know what representations had theretofore been made by any of his codefendants herein to the plaintiff, or its stockholders, or signers of said subscription agreement." This finding must, however, be read in connection with the other findings. From these, it appears that Robinson knew that the property was in fact being sold to persons who had been induced to subscribe to an agreement to form a corporation to acquire the property for gun club purposes, and that the subscription agreement presented to and signed by the subscribers contained the false representation that the price at which it was to be acquired was \$39,500, when, in fact, he was selling it for not exceeding \$33,000. He then had knowledge of this false representation made in writing by those who were promoting the corporation. When he was requested to make his agreement for sale state the same false representations as to price, and was requested to give a false receipt for the excess that he was not to receive, it is incredible that he did not know that the object of the request was to obtain for Freeman and his immediate associates written evidence confirming the false representation theretofore made, and enabling them to conceal from their co-subscribers the fact that they were making a secret profit in the matter of the acquirement of this land. We have in addition, the finding that he, by signing

such receipt, "aided and abetted defendants Freeman and Cline in their scheme to increase the price of the real property in question to the signers," etc. The words "aid and abet" as thus used have a well-understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained. It is well settled that findings must be construed to support a judgment if they can reasonably be so construed, and we are satisfied that the findings here must be held to establish that Robinson knew the purpose for which the false papers given by him were to be used.

3. We are of the opinion that the conclusion that Whitlock was, with the other defendants, jointly liable as to the \$6,500 secret profit is supported by the findings. He is found to have aided and abetted Freeman and Cline in their scheme to increase by this amount the price of the property to the subscribers, by securing signers to the subscription agreement. We have seen that, by the terms of this agreement, it was contingent upon securing 36 subscribers for 1 share each within 30 days, and the whole scheme of Freeman and Cline was dependent on this being accomplished. With actual knowledge of all the facts relative to this purchase, including the facts that the representation in the subscription agreement as to the price at which the property was to be acquired was false, and that Freeman and his immediate associates were making a secret profit of \$6,500, Whitlock not only signed the subscription agreement for himself and for Robinson, but also procured the signatures of two other subscribers, thus knowingly aiding and abetting in the consummation of the scheme. As we have heretofore stated, it was not essential to liability on his part that he should have been a party to the scheme from its inception, or that he should have shared in the secret profits obtained by Freeman by means thereof. It is immaterial what his motive may have been, whether he felt that his own commission from Robinson was dependent on the success of Freeman's plan to make the subscribers pay \$39,500, or desired to assist for some other reason. He with knowledge of all the facts willfully aided and abetted Freeman and Cline in their scheme, and is therefore jointly liable.

4. We are satisfied that, in view of the findings, the judgment in favor of Robinson as to the profits made by him upon the transaction cannot be disturbed. Whatever suspicions various facts found may arouse as to the existence of a scheme on the part of all the defendants to procure the formation of a corporation to purchase this property from the original owners, with a large secret profit to each of them, the findings as made prevent that conclusion so far as Robinson is concerned. According to the findings he was dealing solely with Freeman up to the time that he ratified Whitlock's act in sign-

ing his name to the subscription agreement, and there is nothing therein to require the conclusion that he even knew prior to this that a corporation was being formed by Freeman to take the property. We may assume, in accord with the contention of learned counsel for plaintiff, that, when he became a subscriber, a joint purchaser with his associates, holding as he did only a mere option to purchase the property, he was required to abstain from making a profit in the matter of the purchase without the knowledge of his associates. But the difficulty of plaintiff's case in this regard is that the findings do not show that the subscribers did not have full knowledge that Robinson was to make a profit on the transaction. The subscription agreement did not represent to the contrary, and it was entirely consistent with the statements therein contained that he was selling to the subscribers at a profit his option to purchase, and was interested in the matter other than as a subscriber. There was, of course, nothing wrong in his making a profit under the circumstances, unless the fact that he was so doing was not known to his associates on the subscription agreement. The findings on this point are limited to the proposition that they (except the defendants) did not know the terms of his authority to sell, or the price he was required to pay his co-owners; that he did not inform them as to the amount of his profit. But it is a necessary inference from another finding that they did know that he was to receive a profit. The court found "that none of the persons who signed said subscription agreement, except defendants, * * * had any knowledge that said Whitlock, Freeman, and Cline, or any of them, or any of the subscribers other than said Robinson, were to receive any part of the sum of \$39,500 mentioned in said subscription agreement as the purchase price of said real property, or that said defendants, other than said Robinson, or any of them, were in any way interested therein other than as co-subscribers to said subscription agreement." We are entitled to draw necessary inferences from findings in order to support a judgment, and, as said before, must construe findings to support a judgment, where such a construction is not unreasonable. See *Paine v. San Bernardino, etc., Co.*, 143 Cal. 656, 77 Pac. 659; *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Krasky v. Wollpert*, 134 Cal. 342, 66 Pac. 309. If the subscribers knew he was making a profit, as we must hold in view of the findings, the mere fact that they did not know the amount will not entitle them to complain, in the absence of some misrepresentation in the matter.

5. We do not see upon what theory the judgment in favor of Whitlock as to the \$3,000 commission received by him from Robinson can be upheld. He had a \$3,000 interest in the consummation of the purchase by the subscribers, which was unknown and

undisclosed to his associates other than the other defendants, the Schencks, Dotter, and Hickcox. His arrangement with Robinson as to compensation, as found by the court, was that Robinson would fix the price of the property "to defendant Freeman at the sum of \$33,000, of which defendant Whitlock should receive as his compensation for finding a purchaser the sum of \$3,000, and that defendant Robinson should have and retain the balance of \$30,000." The court found that Whitlock did not find in Freeman a purchaser willing and able to buy the property for \$33,000. Under these circumstances, and undoubtedly for the purpose of bringing about a consummation of this sale and enabling himself to realize this profit, he chose to associate himself as a joint purchaser with the other subscribers and to actively assist in procuring other necessary subscribers. When he did this, he assumed, as to his associates, under a well-established rule of law, a relation analogous to that which exists between partners, and was precluded from making any secret profit out of the contemplated purchase at their expense. The implied understanding between joint purchasers is that each is engaging in an enterprise solely for the mutual and common benefit and advantage of all, and that each has a common interest with the others, according to the amount of his subscription. See *Getty v. Devlin*, 54 N. Y. 403. Whitlock knew that the property was being obtained from Robinson for \$30,000, and that \$3,000 of the amount stated in the subscription agreement as the price at which the property could be obtained from Robinson and his associates represented his own personal profit in the transaction, to be made at the expense of his associates. It is elementary that a partner or an agent will not be allowed to make a profit for himself at the expense of his associates or his principal by any deception as to the purchase price, and that he will be held as a trustee for any profits so obtained. This rule has often been applied in transactions of the kind here involved. See *Walker v. Pike Co., etc., Co.*, 139 Fed. 609, 71 C. C. A. 593; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *King v. Wise*, 43 Cal. 628; *Barry v. Bennett*, 45 Cal. 80; *Getty v. Devlin*, supra; *Mattern v. Canavan*, 3 Cal. App. 493, 86 Pac. 618; *Johnston v. Little*, 141 Ala. 382, 37 South. 592; *Hodge v. Twitchell*, 33 Minn. 389, 23 N. W. 547; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159. We think the facts in this case make the decision in *Milwaukee, etc., Co. v. Dexter*, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 837, inapplicable. In view of the specific facts found, the further finding that Whitlock's services in finding a purchaser for said real property were fully performed and completed prior to the time he signed the subscription agreement and prior to the time when he agreed to become a member of the club

and prior to the time when he asked either Dotter or Hickcox to sign the subscription agreement can mean no more than that the specific acts theretofore found by the court to have been done by him, viz., the interesting of Freeman in the matter and the bringing of Freeman and Robinson together, were done prior to his becoming an associate in the joint enterprise. The fact that some one or two of the subscribers other than the defendants knew or supposed that Whitlock was interested other than as a subscriber does not assist him. *Colton Impr. Co. v. Richter*, 26 Misc. Rep. 26, 55 N. Y. Supp. 486, 489. See, also, *Burbank v. Dennis*, 101 Cal. 101, 35 Pac. 444. There is absolutely nothing in the claim that the fact that Robinson's name appeared in the subscription list to have been signed "per B. W.," showed that Whitlock was acting as Robinson's agent in the matter of the sale of the property. Upon the facts found we are satisfied that it must be held that Whitlock is a trustee of plaintiff to the extent of his secret profit of \$3,000, and accountable therefor.

6. We find no error in the judgment other than the failure to grant a recovery against Whitlock on account of the \$3,000 secret profit. It is suggested that, in so far as the judgment cancels the \$2,000 note given Robinson on account of the purchase price and remaining unpaid, because of the \$6,500 secret profit made by Freeman in which Robinson did not participate, it is unjust; but, as we have seen, Robinson was jointly liable as to this \$6,500, and plaintiff has paid all that it is legally required to pay on account of the purchase, and should not be required to pay this amount which it does not owe to one of those liable to return it in the event of its payment. If, by reason of the arrangement between themselves, one of those jointly liable is compelled to pay more than his proportion, it is simply his misfortune. The law can afford him no relief. As to the liability in question, the defendants occupy the position of joint tort-feasors.

7. There is also an appeal by plaintiff from an order taxing costs and striking out of plaintiff's memorandum of costs items aggregating \$97.20, notary fees for taking the depositions of defendants before trial. The affidavit annexed to the cost bill stated that such disbursements were necessarily incurred. The motion to strike out these charges was made on the ground, among others, that the taking of the depositions was unnecessary. It was stated in the notice of motion that said motion would be made upon the records, files, and papers in the above-entitled action, which, of course, included said depositions; the same having been filed among the papers in the cause. These records, files, and papers were considered by the court below on the hearing of the motion; but none of them except those constituting the judgment roll have been brought before us, and we cannot tell what they show. Plaintiff undoubtedly

had the right to have the depositions taken, and is entitled to recover the cost thereof if it was necessary to take them. *California Farm & Fruit Co. v. Schlappa Pietra*, 151 Cal. 745, 91 Pac. 593; *Lindy v. McChesney*, 141 Cal. 351, 353, 74 Pac. 1034. It may, however, have appeared to the trial court from the evidence considered on the motion that the taking of these particular depositions was entirely unnecessary to the protection of the rights of the plaintiff under any reasonable view of the case. We are not prepared to hold that the trial court is without power to disallow the cost of taking depositions, where it appears to the court that such taking could not under the circumstances be necessary to the protection of the rights of a party. We must assume in support of the order that the evidence before the court, consisting of the files, records, and papers in the case, showed a case warranting such a conclusion. See *Lindy v. McChesney*, supra. It was not essential that the motion to retax costs should be accompanied by any affidavit. *Senior v. Anderson*, 130 Cal. 299, 62 Pac. 563.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in accord with the views herein expressed. The order taxing costs is affirmed. Each party shall pay his own costs of appeal.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

ANGELLOTTI, J. The judgment entered herein on July 6, 1908, is hereby modified to read as follows: "On the appeal of defendant F. E. Robinson and on the appeal of defendant Ben Whitlock, the judgment of the superior court is in all respects affirmed. On the appeal of plaintiff from said judgment, the judgment of the superior court is amended and modified, by adding at the end thereof the following, viz.: 'It is further ordered and adjudged that plaintiff, Lomita Land and Water Company, do have and recover from defendant, Ben Whitlock, the further sum of \$3,399.55'—and, as thus amended and modified, said judgment is affirmed. The order taxing costs is affirmed. Each party shall pay his own costs of appeal."

We concur: SHAW, J.; SLOSS, J.

154 Cal. 78

HELLMAN v. LONGLEY et al. (L. A. 2,041.)

(Supreme Court of California. July 21, 1908.)

1. APPEAL AND ERROR—APPEAL FROM JUDGMENT—TIME TO TAKE.

An appeal from a judgment taken more than six months from the date of the entry of the judgment will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1926.]

97 P.—2

Cal. Rep. 95-97 P.—33

2. SAME—APPEAL FROM ORDER DENYING NEW TRIAL—TIME TO TAKE.

An appeal from an order denying a new trial taken 61 days after the entry of the order will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1926.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Isaias W. Hellman against John Longley and others. From a judgment for defendant, and from an order denying a motion for a new trial, certain of the defendants appeal. Dismissed.

Chas. S. McKelvey, for appellant. J. H. Shankland and J. P. Chandler, for respondent.

HENSHAW, J. This is an appeal by the defendant Anaheim Landing, Mining & Development Company from the judgment and from the order denying its motion for a new trial. The judgment was entered April 14, 1906. The motion for a new trial was denied, and the order of denial entered October 18, 1906. Notice of appeal from the judgment and from the order denying a new trial was filed December 18, 1906. The appeal from the judgment, therefore, was taken more than six months from the date of the entry of the judgment, and the appeal from the order denying a new trial was taken 61 days after entry of the order.

Upon this condition of the record respondent urges and moves that the appeals be dismissed. No answer is made by the appellant, and, indeed, we see none that could be made. The court being without jurisdiction, therefore, to entertain these appeals, it is ordered that they be, and they are hereby, dismissed.

We concur: LORIGAN, J.; SLOSS, J.

154 Cal. 83

EMERY v. KIPP. (L. A. 2,089.)

(Supreme Court of California. July 29, 1908.)

1. JUDGMENT—CONCLUSIVENESS.

Plaintiff may not complain of the admission of the judgment roll in a former action on the ground the judgment is void because of the insufficiency of the facts set forth in the affidavit for publication of summons, where, on the same objection made by her in the former case, the affidavit was held sufficient.

2. SAME—COLLATERAL ATTACK.

A judgment, to be successfully attacked collaterally, must be void on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 920.]

3. HUSBAND AND WIFE—WIFE SUED AS FEMALE—EFFECT OF JUDGMENT.

A judgment against a married woman is valid, though she is sued as a feme sole and in her maiden name, particularly on any contract made in such name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 856.]

4. NAMES—RIGHT TO CHANGE.

At common law one may change his name at will and sue or be sued in any name in which he is known and recognized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, § 18.]

5. SAME.

One may adopt a name in which to prosecute business, and may sue or be sued in such name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, § 7.]

6. PARTIES—DESIGNATION—ASSUMED NAME—TITLE TO LAND.

If one takes title to land in any other than his true name, so far as that property is concerned, he has assumed the name in which he takes title, and he may be sued thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 109.]

7. HUSBAND AND WIFE—WIFE SUED AS FEME SOLE—JUDGMENT VALID.

A judgment against "Louisa Munro," quieting title to land deeded to her under that name, is not void because, when sued, she was a married woman, her name being "Madeline Louisa Munro Emery," and because her husband was not joined, the record of her marriage designating her as "Madeline L. Munro," and there being nothing to apprise a prudent person that she had married, though jurisdiction over her was obtained by published summons.

8. PROCESS—SERVICE BY PUBLICATION—EFFECT.

Service of process by publication is as effective for all purposes as personal service, where authorized, and when the statutory requirements have been met; the only distinction being found in the privilege accorded by Code Civ. Proc. § 473, allowing a defendant not personally served, on such terms as may be just, to appear within a year after default judgment against him and answer the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 138.]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Madeline L. Emery against Sylvester Kipp. From a judgment for plaintiff and from an order refusing a new trial, defendant appeals. Reversed, with directions.

Stearns & Sweet, for appellant. L. L. Boone, for respondent.

HENSHAW, J. Plaintiff commenced this action to quiet title to lands situate in the county of San Diego. She obtained judgment, and from that judgment and from the order of the court denying defendant's motion for a new trial, he appeals.

Upon the trial the following facts were established without conflict: The maiden name of plaintiff, who is an Englishwoman by birth, is Madeline Louisa Munro. In England she was usually called Louisa. After coming to California she was usually called Madeline by her friends and family, although she was sometimes addressed and spoken of as Louisa. In 1888 one Phipson, the then owner of the land in controversy, executed a deed thereof to this plaintiff, naming her therein as Louisa Munro. In December, 1894, under the name of Madeline L. Munro, she married Alfred A. Emery, and continued to be his wife until the time of his death in 1903. In the marriage license she was named and designated Madeline L. Munro, and in the certificate of the minister who performed the marriage ceremony her name was

written Madeline L. Munro. She had never executed any conveyance of the property, and, so far as her title is concerned, since the date of her deed, it has always stood on the records of the recorder's office in San Diego county in the name of Louisa Munro, and not in the name of Madeline Louisa Munro or Madeline L. Munro. Defendant's title comes by mesne conveyance from a judgment obtained in an action to quiet title to the land in controversy prosecuted by Nellie Rue against Louisa Munro. Proof of plaintiff's title having been made as above outlined, defendant, to establish his interest in the land, offered the judgment roll in the action of Nellie Rue v. Louisa Munro, and upon objection of plaintiff the judgment roll was refused admission in evidence. The soundness of the court's ruling upon this proffer embodies the questions presented for consideration upon this appeal. Respondent's objections to the admission of the judgment roll, while couched in different forms, resolve themselves into two: First, that the judgment is void because of the insufficiency of the facts set forth in the affidavit for publication of summons; second, that the court acquired no jurisdiction of this plaintiff by the substituted process and constructive service, she being a married woman, and her husband not having been joined with her (Code Civ. Proc. § 370), and she not having been sued in her true name, which at the time of the commencement of the action of Rue v. Munro was Madeline L. Emery, and not Louisa Munro.

The first objection thus advanced needs little consideration. This plaintiff connected herself with the action of Rue v. Quinn by making a motion therein, after judgment by default had been entered against her, to set the judgment aside upon the ground that it had been entered without any jurisdiction having been obtained over her person. The ground there urged was the same as that here presented, that the facts set forth in the affidavit for the publication of summons were entirely insufficient. The trial court granted her motion, but upon appeal to this court its order was reversed; it being here held that the affidavit was sufficient. Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. The ruling and determination in Rue v. Quinn have subsequently been approved in numerous cases. Weis v. Cain, 140 Cal. xvii, 73 Pac. 980; People v. Wrin, 143 Cal. 13, 76 Pac. 646; People v. Norris, 144 Cal. 424, 77 Pac. 998; Cargile v. Silsbee, 148 Cal. 260, 82 Pac. 1044; Shepard v. Mace, 148 Cal. 272, 82 Pac. 1046.

The questions presented under the second objection are both more interesting and more important. Preliminarily, it is to be borne in mind that the attack here made upon the judgment in Rue v. Emery is collateral, and to be successful it must be established that the judgment is void on its face. Hahn v.

Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp v. Daugney, 33 Cal. 505; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Van Fleet, Coll. Att. §§ 3, 614, 616. That the judgment was not void for nonjoinder of the husband as party plaintiff is established by the case of Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618. The facts in that case were that a married woman, while a feme sole, had executed a promissory note. Suit was brought upon this promissory note against the maker. She was sued in her maiden name, and her husband was not joined. Personal service upon her was had, and judgment went for plaintiff upon her default. The original plaintiff then commenced another action to enforce the judgment against the wife sued under her married name; her husband being joined as defendant. There, as here, a collateral attack was made upon this judgment; it being contended that it was void, first, because of the misnomer of the married woman defendant, and, second, because, being a married woman, her husband was a necessary party, without whom the court could not obtain jurisdiction of the person of the wife. The trial court took this view, but upon appeal the judgment was reversed by this court, holding that when the wife suffered such a judgment to be given against her, either after trial on the merits or by default, the objection of the nonjoinder of the husband was waived, and holding further that the judgment was not void because of misnomer in describing her by her maiden name, the name under which she executed the contract; she being sufficiently identified by the name under which she was sued. The only distinction between the Bogart Case and the case at bar is that in the former personal service on the defendant was had, while in the latter substituted service by publication of summons was the mode adopted for acquiring jurisdiction. Whether or not any different conclusion is necessitated by reason of this fact is a matter for later consideration.

The rule as laid down in the Bogart Case, namely, that a judgment is valid when obtained against a married woman sued as a feme sole and in her maiden name, particularly upon any contract which she has executed in such name, is a rule of general acceptance. 1 Freeman on Judg. § 150; Van Fleet on Coll. Att. §§ 603, 616; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Winchester v. Everett, 80 Me. 535, 15 Atl. 596, 1 L. R. A. 425, 6 Am. St. Rep. 228; McCaffrey v. Corrigan, 49 Ind. 175. This is in consonance with the principle of common law that a man may change his name at will and sue or be sued in any name in which he is known and recognized. Linton v. First Nat. Bank (C. C.) 10 Fed. 894. So a person may adopt any name in which to prosecute business, and may sue or be sued in such a name. Graham v. Elzner, 28 Ill. App. 269. This principle has been applied in this state, where it is held that, if the owner of property con-

vey by any name, the conveyance as between himself and his grantee is valid and will transfer title. Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347; Wilson v. White, 84 Cal. 239, 24 Pac. 114. So, when it comes to examining the authorities dealing with actions affecting real estate, this same principle, it will be found, is universally applied. If a man chooses to take the title to real estate in a name other than his true name, so far as that property is concerned, he has assumed the name in which he takes title as his true name, and in suits affecting the property he may be sued by such designation. A leading and well-considered case upon this subject is that of Blinn v. Chessman, decided by the Supreme Court of Minnesota. 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. In that case the purchaser was George Chessman. He accepted a deed executed to him in the name of George Cheeseman, and the deed was so recorded. Thereafter an action was brought by one Leonard against George Cheeseman to determine adverse claims to the property. Summons was served by publication, and judgment by default was rendered in favor of Leonard that he was the owner of the property. In time plaintiff Blinn succeeded to Leonard's title and brought suit against George Chessman, and, as the court stated, the question presented in that case "was whether a judgment against Cheeseman was of effect as to this defendant Chessman as respects his title to the land." The reasoning of the court is full and convincing. It declares the presumption to be that a grantee who personally accepts, retains, and records a deed of conveyance does so with knowledge of its contents. It affirmed the trial court in holding that the Leonard judgment against Cheeseman was binding upon Chessman, who had taken title to the property in the name of Cheeseman, saying: "This conclusion is not based upon the ground of the likeness of the two names, either in spelling or in sound; but upon the ground—upon which also the decision of the court below was placed—that the defendant is to be deemed to have adopted the name of Cheeseman for the purpose of acquiring and holding the title to this land, and he can have no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. From the fact that this was not his true name it does not follow that the court did not acquire jurisdiction. If he had assumed this name, or any other, generally, and for all purposes, and especially if he had come to be known by the name assumed, there would be no doubt that legal proceedings against him in such name would, in general, be sustained. The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him. * * * In this case it is

probably true that the defendant did not intend to change his name, nor to adopt for general purposes the name of Cheeseman, but he did—if he knew the misnomer, as we must assume he did—most effectually assume that name for the purpose of taking and holding the title to this land. He not only accepted the conveyance made to himself by that name, but he placed it on record, for the purpose, and with the effect, presumably, of giving notice to the world that the title had been so conveyed and was so held. * * * In proceedings concerning this land it would be at least quite as likely that the name disclosed by the record as the grantee would be used in a summons or notice intended to be addressed to such grantee as that the record should be disregarded, and the true name of the defendant used. Hence there was as much reason why his attention should be arrested by the name of George Cheeseman in a published summons or notice as there would be if his true name were used. He had placed himself under the necessity of having regard to the former as well as the latter. He cannot well complain that the name in which he took the title, and which he put forth to the world by the records, as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title." The same principle is enunciated by the Supreme Court of Missouri in *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922. The court was passing upon a judgment obtained in a suit brought against R. O. Elting to enforce a lien for taxes upon his property. Judgment had been given against R. O. Elting, and the land was sold and conveyed by sheriff's deed. Upon the records of the county the land stood in the name of R. O. Elting, but Elting's name was Richard O. Elting, and he contended that a judgment rendered against him in the name of R. O. Elting was void. The service, as here, was by publication. The court upheld the judgment, saying that the patent to the land which was recorded and which was the only conveyance of title on record showed that R. O. Elting owned the land. "It is by this name and description that he is known in his title papers. We think it is sufficient."

Applying the principle of these cases to the facts in the case at bar it appears that this plaintiff took title to the land in the name of Louisa Munro, that in her recorded certificate of marriage her name was given as Madeline L. Munro, that there was nothing of record to disclose that Louisa Munro was the same person designated as Madeline L. Munro, and consequently there was nothing of record to disclose that Louisa Munro had ever changed her name. So far as the real estate was concerned, she held title to it only as Louisa Munro. No steps, which a reasonable or prudent person might take, would under our existing laws serve to give a party desirous of commencing an action any knowledge or information that Louisa Munro had married or

had in any other way changed her name. The law does provide that any person in whom the title of real estate is vested who shall from any cause have his or her name changed shall upon any conveyance of real estate set forth the name in which he or she derived title to such real estate. St. 1874, p. 345, c. 245; Civ. Code, § 1096. The law, too, might well have provided that, when a woman in whose maiden name title to real property stands shall marry, she shall cause recordation of the fact to be made in such manner as to give notice thereof to the world; but the law not having done this, it may not be said that a plaintiff is in fault who, after exhausting the means of information open to him, commences an action against a person holding such title by the same name in which the title is held. The inconvenience, and, indeed, the grave consequences resulting from a different view would render actions to quiet title by substituted process of little or no benefit. In nearly every state there are statutes authorizing the change of a man's name. A nonresident owner of land in California may legally cause his name to be changed in another state and an adverse claimant in this state, after satisfying the court that after due diligence the nonresident owner cannot be found within the state, may commence an action against the party under the name in which his record title stands. If a judgment so obtained can be collaterally attacked by a showing that the nonresident claimant had legally changed his name, and that therefore jurisdiction was not acquired, which is the contention here made, the value of such an action is at an end.

But does the fact that in this case jurisdiction of the defendant was secured by published summons, in any respect, change the rule? We think not. In every case where service by publication is authorized, if the statutory requirements have been complied with, it is as effective for all purposes as personal service. The only distinction in this state is found in the privilege accorded by section 473 of the Code of Civil Procedure, which allows a defendant not personally served, on such terms as may be just, to appear within a year after the rendition of a judgment by default against him and answer to the merits of the original action. We have here a case where the claimant to the real estate is served by published summons under the name by which she took and recorded her title to the land. In *Blinn v. Chessman*, supra, the service was by publication, and, addressing itself to this question, the court there said: "If such a name is employed in legal process or notices, whether served personally or by publication—where such service is authorized—the notice is effectual; the person who has assumed the name is presumed to understand that the process or notice addressed in that name is addressed to him." In *Mosely v. Reily*, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721, the same subject is

considered; the court saying: "As has been said, the object of the publication is to give notice of the proceeding to the real person who is interested. The name is only used to identify such person, and may be the only means of identification; but, if the name as used is the same as the party himself uses and under which he is known, and the facts recited in the notice sufficiently identify the person intended, and advise him that his property is brought before the courts, we think that would be sufficient to give the court jurisdiction to render the judgment. * * *

Notice by publication, though only allowable from necessity, is, when authorized, as effective as personal service. Every one is presumed to have had opportunity to read these publications and to learn from them the nature and objects of the proceedings of which they give notice." In *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, the Supreme Court of Minnesota declared that "any notice which would give jurisdiction if personally served upon the party is good when served by publication if that publicity of the pendency of the action which the law intends is thereby given." See, also, *Van Fleet on Coll. Att.* §§ 361, 367.

As against this reasoning and authority, our attention is called to but one conflicting case, that of *Freeman v. Hawkins*, 77 Tex. 493, 14 S. W. 364, 19 Am. St. Rep. 769. In that case land was conveyed to Mary E. Robison. She subsequently married a man by the name of Freeman. Thereafter suit was brought against her in the name of Mary E. Robison to quiet title. The court declared that Mary E. Robison upon marriage took the surname of her husband, saying: "A citation, whether to be served personally or by publication, must contain the names of the parties to the action. We are of the opinion that a citation by publication, requiring 'Mary E. Robison' to be cited and to appear, was not sufficient to give the court jurisdiction to render a judgment that would bind 'Mary E. Freeman.'" In this brief statement there is no consideration paid to the general rules which we have discussed, nor to the authorities which support them, and we think the conclusion reached by the Texas court is at variance with the otherwise universally accepted doctrine.

For the foregoing reasons the judgment is reversed, with directions to the trial court upon a new trial to admit in evidence the proffered judgment roll.

We concur: LORIGAN, J.; SHAW, J.

154 Cal. 79

ERVIN v. RECORD PUB. CO. (L. A. 2,088.)
(Supreme Court of California. July 28, 1908.)

1. LIBEL AND SLANDER — PUBLICATION OF
LIBELOUS ARTICLE—INNUENDOES.

A newspaper publication, averring that a woman had a great admirer in a Chinese pugilist, who wired her to meet him at a designated

place and time, that the time fixed was too early for her, that there were some things better left unsaid, and that it was best to pass over the meeting between the two, some things being too sacred for words, is on its face equivocal and capable of meaning that she was a member of the underworld, familiar with the Chinese prize fighter, and on such terms of intimacy with him that things took place between them that were not proper for publication, and, if intended and understood to convey such meaning, the article was libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 71-78.]

2. SAME.

To maintain an action for words which on their face appear harmless, but which may under certain circumstances convey a covert meaning, it is necessary to aver that the author intended them to be understood, and that they were in fact understood by those who read them, in their covert sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 206.]

3. SAME.

It is sufficient to make a publication libelous, if it is of such a character that persons unacquainted with the female referred to and hearing of her for the first time through the article reasonably would and did understand therefrom that she was a person of low character and guilty of immoral conduct; the charge as so understood being false and malicious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 71-78.]

4. SAME.

A complaint in libel is sufficient where it appears from the article complained of and from the innuendo assigning its meaning that the article as a whole was false and scandalous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 184.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mabel Clare Ervin against the Record Publishing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones & Drake, for appellant. Edwin A. Meserve (Paul H. McPherrin, of counsel), for respondent.

SHAW, J. The plaintiff recovered judgment for damages against defendant in an action for libel. The defendant appeals from the judgment upon the judgment roll.

The defendant is a publisher of a newspaper in the city of Los Angeles. As a part of its daily issue, it published what was known as the "Pink Sheet," or "Sporting Edition," in which was contained sporting news, with pictures of prize fighters, wrestlers, and other persons of that class, and other news relating to sporting events. The charge made in the complaint is that it maliciously published in a "Sporting Edition" or "Pink Sheet" of its newspaper, of and concerning the plaintiff, the following article: "Too Early for the Queen. Ah Wing Wired 'Queen Mab' to Meet Him, But Hour Was Too Early. Mab Ervin, 'Queen Mab,' has a great admirer in one Ah Wing, champion Chinese pugilist of the world. Ah Wing arrived in

Los Angeles Monday morning from his home in Sacramento, to put the finishing touches to his condition for his battle Friday night with Eddie Menny at the pavilion of the Pacific Athletic Club. Before he left home, he wired 'Queen Mab,' asking her to meet him at the depot at 7 a. m., but the hour was too early for her majesty, and Ah Wing came into town with nobody to welcome him. He was dressed in his bulliest and brassiest Chinese costume, consisting of a pair of pale blue flowered trousers, a dark blue broadcloth jacket, and a black pot-shaped chapeau surmounting by a cute little rosette of red silk. The first time he was here he had on his second best suit. The queen interviewed him and made the biggest hit of her life. This time Ah Wing wore his best clothes because—well, because he wanted to look well in the eye of her majesty, and he never dreamed that she wouldn't be at the depot to meet him. He forgot that one of the prerogatives of royalty is to do as you please, and Ah Wing was sad as he came into the Record office to find Queen Mab. There are some things which are better left unsaid, so it is best to pass over the meeting between the queen and her humble subject. Some things are too sacred for mere words." It is further alleged that, by the use and publication of said words, the defendant intended to assert, and be understood as asserting, and by the readers of the said newspaper was, in fact, understood as asserting, that plaintiff was a person of low character, a sweetheart and boon companion, and the consort of the said Chinaman prize fighter, that she associated with him, was in the habit of meeting him socially and intimately, and would have met him at the train, except that it was too early, that they did thereafter meet in defendant's office, and that because of their said intimacy there were some things that happened between them that could not be told, and that their relations were such that there were some things too sacred for mere words. It is further alleged that the charge, as thus understood, was false and scandalous, and imputed to the plaintiff a low and base character, without shame or self-respect.

The only error urged upon this appeal is that the court erred in overruling a demurrer to the complaint, assigning as a ground that the complaint did not state facts sufficient to constitute a cause of action. The objection is not well taken. It is not necessary here to decide whether or not the article is libelous per se, but the best that can be said of it is that it is upon its face equivocal and capable of a meaning injurious to the plaintiff of the character stated in the innuendo. It might readily be understood by any one reading it as implying that the plaintiff was a member of the underworld, familiar with the Chinese prize fighter, and upon such

terms of intimacy with him that when they met things took place between them that were not proper for publication, implying that they were of an indecent or improper character. Being capable of this meaning, it was proper for the plaintiff in her complaint to allege, by way of innuendo, the meaning which it was intended by the defendant and was understood by its readers, to convey, as set forth above. So understood, there can be no question that the article was libelous. "The rule which governs the action for libel in such cases is perfectly well settled. Words, which on their face appear to be entirely harmless, may, under certain circumstances, convey a covert meaning, wholly different from the ordinary and natural interpretation put upon them. To render such words actionable, it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood by those who read them, in their covert sense." *Maynard v. Fireman's Fund Co.*, 47 Cal. 208; *Edwards v. Publishing Soc.*, 99 Cal. 435, 34 Pac. 128, 37 Am. St. Rep. 70; *Ingraham v. Lyon*, 105 Cal. 257, 38 Pac. 892. "If the words are equivocal, or ambiguous, and admit of several meanings, it is proper to attribute to them in the innuendo, the fixed and definite meaning the plaintiff thinks they ought to bear." 25 Cyc. 451.

In addition to the facts heretofore stated, the complaint alleges that the plaintiff was an unmarried woman of marriageable age and known as "Mab Ervin"; that at the time of the publication of the alleged libel she was engaged in the business of writing for newspapers, and was in the employ of the defendant on its staff of reporters. It is claimed by the defendant that persons acquainted with plaintiff and having knowledge of these facts could not understand the article published in any other than an innocent sense. This, however, would not remove its libelous character. It is sufficient to make a publication libelous if it is of such a character that persons unacquainted with the plaintiff, and hearing of her for the first time through said article, reasonably would and do understand therefrom that she is a person of low character and guilty of improper and immoral conduct; the charge, so understood, being false and malicious.

Another ground of demurrer was that the complaint was uncertain, in that it could not be ascertained what portion of the article it was which plaintiff claimed was false and scandalous. There is no merit in this assignment of insufficiency. It is sufficient, if it appears from the article and from the innuendo assigning its meaning that the article, as a whole, was false and scandalous.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

154 Cal. 91

In re EDWARDS' ESTATE. (L. A. 2,188.)
 (Supreme Court of California. July 30, 1908.
 Rehearing Denied Aug. 27, 1908.)

1. WILLS—TESTAMENTARY DIRECTIONS—AUTHORITY OF COURT.

Generally speaking, the law favors testacy to intestacy, and is zealous to see that the testamentary directions of a testator are complied with, and only in case of intestacy does the state distribute the property of decedent under its laws of succession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

2. EXECUTORS AND ADMINISTRATORS — APPOINTMENT—JURISDICTION OF COURT.

Under Code Civ. Proc. §§ 1299, 1303, 1304, authorizing enumerated persons to petition for the probate of a will, etc., and section 1373, providing for notice of hearing of petition for administration by posting the same, etc., the court must postpone the hearing of an application for administration on the estate of a decedent, who left a will alleged to be invalid, until, in appropriate proceedings, the question of the validity of the will has been determined.

3. SAME—SPECIAL ADMINISTRATORS—APPOINTMENT.

The court, on postponing consideration of an application for administration of a decedent, who left a will alleged to be invalid, until its validity has been determined, may protect the estate by appointing a special administrator, as authorized by Code Civ. Proc. § 1411.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 119.]

4. WILLS—PETITION FOR PROBATE.

The purpose of a petition for the probate of a will, as authorized by Code Civ. Proc. § 1299, is to give jurisdiction, and, while the person who petitions for the probate is generally interested in sustaining the will, it is not necessary that he should be such a person, and the court on obtaining jurisdiction must take all proper evidence to the end of establishing the will, or the contrary.

5. SAME—"TO HAVE THE WILL PROVED."

The words "to have the will proved," in Code Civ. Proc. § 1299, authorizing enumerated persons to petition the court having jurisdiction "to have the will proved," mean no more than that the court shall hear all evidence offered in proof or disproof of the will, and, if on any material matter there is a failure to offer evidence, the production of it shall be had at the instance of the court itself, in order to satisfy the court, under section 1317, of the testamentary capacity of testator and the lack of duress or undue influence.

6. SAME.

While a creditor is in no sense interested in upholding the will of the deceased debtor, and is interested only in securing payment of his debt out of the estate, he may petition for the probate of the will, and thereby advance the administration of the estate to the end that he may be paid.

7. EXECUTORS AND ADMINISTRATORS — PETITION FOR ADMINISTRATION.

Where petitioner for administration of a decedent, who left a will alleged by petitioner to be invalid, did not indicate a willingness to postpone the hearing of the petition until the validity of the will had been determined in an appropriate proceeding therefor, the court was justified in dismissing the petition.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the estate of Walter M. Edwards, deceased. From a judgment dismissing the petition of Sarah Edwards for letters

of administration on the estate of the deceased, she appeals. Affirmed.

Holcomb & Shaw, Will H. Holcomb, and George N. P. Shaw, for appellant. Collier, Smith & Hoff, for respondent.

HENSHAW, J. The petitioner, in seeking letters of administration upon the estate of the deceased, set forth facts which indisputably entitled her to such letters, if the deceased died intestate. Upon this matter she alleged: That deceased left a purported will, executed in due form, with certain codicils thereto; that the will and codicils were on file with the court. She then averred that, at the time of the attempted execution and publication of the will and codicils, the deceased was insane and not of sound and disposing mind and memory, and that therefore he died intestate. Contest over the issuance of the letters was joined, upon the ground that the petition for letters disclosed the fact that instruments testamentary in character and executed with the formalities required by law were on file with the court, that they had not been presented to the court for probate, that no adjudication of their validity or invalidity had been made, and that by reason of the existence of these instruments, not as yet offered for probate, the court had not jurisdiction to determine the petition for letters of administration. After hearing, the court so ruled and denied the petition for letters, and upon appeal the single question presented may be thus stated: Where it is made to appear that an instrument testamentary in character and executed with the formalities required by law has not been offered for probate, may a court, upon application for general letters of administration, hear and determine the question of the validity or invalidity of this instrument, and, as it shall determine, grant or refuse to grant general letters of administration, or does it become the duty of the court, upon such a showing, to postpone the consideration of the application for letters of administration until, in the appropriate proceeding provided by law for the proving of a will, the question of the validity or invalidity of the instrument shall have been determined?

In effect, the latter was the course which the court adopted, and its determination we think was sound. Generally speaking, the law favors testacy to intestacy, and is zealous to see that the testamentary directions of a testator are fully complied with. Only in case of intestacy does the state distribute the property of the decedent under its laws of succession. The case here presented is one which, in the nature of things, will rarely, arise. Evidence of this appears from the fact that it is the first time that it has arisen in the history of this state, and the researches of learned counsel have disclosed but two cases from other states where the matter has come before the courts. Where an instru-

ment is in form a will, there will usually be somebody interested in maintaining its validity who will therefore petition the court to have it proved. Under our procedure such a petition seems necessary to confer upon the court jurisdiction to act (Code Civ. Proc. § 1299 et seq.), though under our earlier probate procedure no petition was required. In *re Howard's Estate*, 22 Cal. 395. Manifestly, the petition for letters of administration, in such a case as this, is presented by one in hostility to the asserted will. The notice required to be given (Code Civ. Proc. § 1373) is an entirely different notice from that required to be given upon petition for the proving of a will (sections 1303, 1304). No notice is given to the executors, devisees, or legatees, or to any person who may be interested in supporting the alleged will. Upon the hearing therefore it may be assumed that no evidence will be forthcoming to substantiate the validity of the will, while evidence against that validity will be offered. The result may be foreseen. The court will be compelled to find against the validity of the instrument and to issue letters of administration, and, while it may at once be conceded that such a determination would not be conclusive against those claiming an interest under the will, the practical result would be that an estate would go into the hands of an administrator antagonistic in interest to the will. Distribution of such an estate may readily be had in ten months, and after such distribution has become final the difficulties standing in the way of a recovery of the property from the distributees are too apparent to need enumeration. It is not necessary here to say that the court, under such circumstances, is without power to adjudicate the matter until after the determination of the validity or invalidity of the purported will under proceedings for the proving thereof; but it must be apparent, aside from the question of power, that the court should treat such a showing as equivalent to a plea in abatement, and at least suspend the hearing of the application for letters until the question of the validity of the will has been determined in appropriate proceedings. The law provides ample means for the protection of the estate until this shall have been accomplished. The situation presented is one which the law expressly contemplates may arise, and which it meets by turning the custody of the estate for its preservation into the hands of a special administrator. It is the simple case of the delay in granting letters testamentary or administration. Code Civ. Proc. § 1411. Nor need it be apprehended that the situation which appellant argues may result, namely, a situation where nobody applies for the probate of a will, and therefore the estate forever remains unadministered, will ever in fact occur. Some devisee or legatee, desirous of upholding the will, or some heir desirous of obtaining his share of the estate, in the event of intestacy, or even a creditor, will

assuredly appear and present his petition to have the will proved. That a creditor may do so as a person "interested in the estate" will not, of course, be questioned (Code Civ. Proc. § 1299), and it is so expressly provided in New York, from the provisions of whose Code so many of our probate enactments have been drawn (Code Civ. Proc. N. Y. § 2614). Nor are the apprehensions of appellant that one petitioning to have a will proved, while holding the belief that it is invalid, will thus stultify himself beyond rehabilitation, based upon any solid foundation in fact. Generally speaking, it is true that the person who petitions for the probate of a will is one interested in sustaining the validity of the proffered instrument, but it is by no means necessary that he should be such person. The purpose of the petition is to give jurisdiction to the court, and, jurisdiction having been obtained, it becomes the duty of the court, with or without contest, to take all necessary and proper evidence, not to the end of establishing the will, or, per contra, not to the end of denying it probate, but to the end of determining whether or not it be a legal expression of a testamentary intent upon the part of the deceased. It is not required that the petition be verified. The petition is merely a request to the court "to have the will proved," which means no more than that the court shall hear all evidence offered in proof or disproof of the will, and, if upon any material matter there be a failure to offer evidence, the production of it shall be had at the instance of the court itself. Thus the sole question in controversy over the probate of a will may be whether the signature of the testator was forged, yet nevertheless, before admitting the will to probate, upon disproof of the forgery, the court must be satisfied, not only that the will was duly executed, but that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence. Code Civ. Proc. § 1317. A creditor is in no sense interested in upholding a will. He is interested only in securing payment of his debt out of the assets of the estate. Yet he may petition for the probate of a will; his object in so petitioning being nothing more than to advance the administration of the estate to the end that he may be paid. No unseemly delay may therefore be feared, as has been said, in such a case; but, upon the other hand, there is the distinct gain that the decree of the validity or invalidity of the instrument will have been made in a proceeding especially designed for the purpose of determining that very fact, and that determination is a final, conclusive, and binding determination upon the whole world. During the delay which may result, the estate itself and its interests are being protected by a special administrator—an officer of the court, appointed by the court for this particular purpose. Such, it seems, must be the natural and orderly procedure, and for

this reason, as we have said, aside from the question of the power of the court to hear and determine the matter in an application for letters of administration, it was clearly proper for it to postpone the hearing of the letters until the validity of the instrument in its custody, and executed with all the formalities of a will, had been determined in proceedings brought for that purpose.

It has been said that but two cases have been called to our attention bearing directly upon this matter. One, to which we have not access, declares, in the language of appellant's brief, that "administration will be granted, as in case of intestacy, where the testator was insane when he made the will." In *re Goods of Rich* [1892] Prob. Div. 143. Such undoubtedly would be the determination in this state, but the question here before us is: In what proceeding is the question of insanity to be determined? Much more nearly in point is the New York case (*In re Taggart's Estate* [Sur.] 16 N. Y. Supp. 514). It is there said: "On application for letters of administration by a creditor of deceased, it having been shown to the court by the next of kin that deceased left an instrument purporting to be his will, administration cannot be granted until the question of the validity of the will is disposed of in an independent proceeding, although the next of kin declare their purpose not to offer it for probate." In that case the court adopted what we think to be the correct rule. It expressed its willingness to postpone the consideration of the application until after the hearing and determination in another proceeding of the question of the validity of the will. But, if petitioner did not indicate that such was his wish, it ordered that the proceedings should be dismissed. In this case, if there had been any expression of a willingness upon the part of petitioner to have a postponement of the hearing of her petition, doubtless the court would have ordered it; but, under the circumstances, it was justified in dismissing the petition.

The decree and judgment appealed from are therefore affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.

154 Cal. 96

BOTTLE MIN. & MILL. CO. v. KERN. (L. A. 2,108.)

(Supreme Court of California. July 31, 1908.)

1. COURTS—JURISDICTION—APPELLATE JURISDICTION—"ASSESSMENT."

The word "assessment," in Const. art. 6, § 4, conferring appellate jurisdiction on the Supreme Court in cases at law in which the demand amounts to \$2,000 or more, or which involve the legality "of any tax, impost, assessment, toll, or municipal fine," and giving appellate jurisdiction to the District Court of Appeal of cases where the demand amounts to \$300, and does not amount to \$2,000, when considered in connection with section 5, conferring

original jurisdiction on the superior court of cases involving the legality of any "tax, impost, assessment, toll, or municipal fine," refers to assessments for public taxation or for the raising of funds for local public improvements, and does not include assessments by a private corporation to compel stockholders to contribute to its treasury additional sums in proportion to their ownership of paid-up stock; and the Supreme Court does not have appellate jurisdiction of an action by a private corporation for \$350 for an assessment by it on paid-up stock held by a stockholder, but the appeal lies to the District Court of Appeal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 549-555; vol. 8, pp. 7583-7584.]

2. SAME—TRANSFER TO PROPER COURT.

Where a case, improperly appealed to the Supreme Court, instead of to the District Court of Appeal, was formally submitted in the Supreme Court on the briefs on file, the submission will stand; but the case will be transferred to the District Court of Appeal for decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Bottle Mining & Milling Company against Charles Kern. From a judgment for plaintiff, defendant appeals. Transferred to the District Court of Appeal for decision.

Haas, Garrett & Dunnigan, for appellant. B. J. Bradner and C. S. Burnell, for respondent.

SHAW, J. This is an appeal taken by the defendant to this court from a judgment of the superior court against him for the sum of \$350. The action was for the recovery of that sum alleged to be due to plaintiff from the defendant upon an assessment made by the plaintiff upon its paid-up capital stock; the plaintiff being a private corporation, with all its stock fully paid up, and the defendant one of its stockholders. The complaint demanded judgment for the sum of \$350 only.

The Constitution gives this court appellate jurisdiction in all cases at law in which the demand, exclusive of interest, amounts to \$2,000 or more, or which involve "the legality of any tax, impost, assessment, toll, or municipal fine." It also gives appellate jurisdiction to the District Court of Appeal of all cases on appeal from the superior court, where the demand, exclusive of interest, amounts to \$300, and does not amount to \$2,000. Const. art. 6, § 4. The word "assessment" in the clause just quoted refers to assessments relating to public taxation or to raise funds for local public improvements, and it does not include assessments or calls made by a private corporation to collect subscriptions to its capital stock or to compel its stockholders to contribute to its treasury additional sums in proportion to their ownership of paid-up stock. Section 5 of article 6, confers original jurisdiction on the superior court of all cases at law involving "the legality of any tax, impost, assessment, toll, or municipal fine." In *Arroyo D. & W. Co. v.*

Superior Court, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91, the suit was to collect an assessment or call by a private corporation for an unpaid subscription to its capital stock, the amount demanded was less than \$300, and it was held that this clause did not give the superior court original jurisdiction of the action. The same principle is applicable to the language of section 4, which by identical words confers appellate jurisdiction upon this court. The cases cannot be distinguished.

The fact that the assessment here was upon paid-up stock does not bring the case within our jurisdiction. Being a mere action at law to recover money, and the demand in the complaint being for less than \$2,000 and amounting to more than \$300, the appellate jurisdiction lies with the District Court of Appeal, and not with this court. The appeal was taken to the wrong court, and under the further provisions of section 4 the proper procedure is to transfer the cause to the District Court of Appeal. The case was formally submitted here upon the briefs on file. The submission will stand, but the case will be transferred for decision.

It is ordered that the cause be transferred to the District Court of Appeal of the Second District for consideration and decision.

We concur: SLOSS, J.; ANGELLOTTI, J.

154 Cal. 99

BOORAEM v. POTTER HOTEL CO. (L. A. 2,031.)

(Supreme Court of California. Aug. 1, 1908.)

MALICIOUS PROSECUTION—"PROBABLE CAUSE."

Want of probable cause, the burden of proving which is on plaintiff in an action for malicious prosecution, the determination of any disputed facts as to which is for the jury, and the sufficiency of the facts shown as to which is for the court, and which is absence of a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true, does not exist where a draft given a hotel by a guest is thrown out by the bank on which it is drawn, with the indorsement, "Has no account," and the hotel has him arrested, without further communication with the bank, and without consulting the district attorney; and this, though it knows the guest has correctly given it the name of another hotel to which he has gone, and which is further away from the bank.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5620-5627; vol. 8, p. 7765.]

Department 2. Appeal from Superior Court, Santa Barbara County; Frank F. Oster, Judge.

Action by Robert E. Booraem against the Potter Hotel Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Henley C. Booth and Louis H. Roseberry, for appellant. Baker & Bowen, W. S. Day, and Gray, Baker & Bowen, for respondent.

HENSHAW, J. This action was prosecuted against the defendant to obtain damages for malicious prosecution. At the conclusion of the taking of plaintiff's testimony, defendant moved for a nonsuit upon several grounds. The court granted the motion, and, from the judgment which followed, plaintiff appeals. As we think the court was correct in granting the nonsuit upon the ground that plaintiff had failed to prove a want of probable cause, no other of the grounds need be considered.

The law touching the question is both simple and settled. It is incumbent upon the plaintiff, and the burden of proof is upon him in an action of this kind, to prove want of probable cause. *Davis v. Pacific Telephone Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698. "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury." *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174. If the facts going to establish the presence or absence of probable cause are controverted, they must be passed upon by the jury before the court can determine the issue, but it is always for the court to say as matter of law whether or not the facts, the existence of which the jury may find, do or do not establish probable cause. Where the facts are uncontroverted, as in this case, the question resolves itself into one of pure law for the court's determination.

Coming to a consideration of the facts in

this case, in connection with these well-established principles of law, the following was shown without conflict: Plaintiff was a mining engineer of high social and professional standing. Visiting California, he purchased from the First National Bank of Los Angeles a letter of credit for \$500. He went from Los Angeles to the Potter Hotel at Santa Barbara, where he remained for about three days. During his stay he associated upon terms of friendship with other guests of the hotel, who were also of high social standing, though it is not made to appear that this fact was known to the hotel management. Making ready to leave Santa Barbara for San Francisco, he left word at the hotel office that he was about to depart for San Francisco, and would stay at the St. Francis Hotel in that city. He left specific directions that his mail should be forwarded to his new address. He likewise presented his letter of credit, asking the cashier in the office whether a draft upon this letter of credit would be accepted in payment of his bill, or whether he should go to a bank in Santa Barbara and draw the money to pay his bill. The hotel management agreed to accept a draft against his letter of credit. His bill amounted to about \$20, and the cashier of the hotel herself drew a draft against his letter of credit in favor of the Potter Hotel Company for \$30, paying him the difference. He then pursued his journey to San Francisco and took up his abode at the St. Francis Hotel. He had been there but a short time when the manager of the St. Francis Hotel informed him that he had received a message from the Potter Hotel at Santa Barbara, asking to know upon what Los Angeles bank his letter of credit was drawn. He exhibited his letter of credit to the manager of the St. Francis Hotel, and thinking that some mistake might have been made in drawing the draft—which it will be remembered he did not himself draw but only signed—he wrote to the Potter Hotel to the effect that his letter of credit was upon the First National Bank of Los Angeles and was good. That evening he was arrested by a police officer of San Francisco, was refused permission to communicate with friends so as to obtain bail, and was incarcerated in the common jail overnight. The next morning he was released and discharged; word having been received from the Potter Hotel Company that the arrest was a mistake. The Potter Hotel Company, after accepting the draft, deposited it in the usual course of business with its commercial bank in the city of Santa Barbara. By that bank it was forwarded to its correspondent in Los Angeles for collection. It passed through the clearing house, and was thrown out by the First National Bank of Los Angeles upon which it was drawn, with the indorsement placed upon it, "Has no account," and thus dishonored it was returned to the Commercial Bank of Santa Barbara, which notified the Potter Hotel Company. There-

upon the head bookkeeper, the cashier of the bookkeeping department, consulted with the manager of the hotel about procuring the arrest of plaintiff. The manager was reluctant to proceed, and the head bookkeeper, thinking that a mistake might have been made in the name of the bank upon which the draft was drawn, telephoned to the St. Francis Hotel and learned from the management there, as has been indicated, that the letter of credit was, in fact, issued by the First National Bank of Los Angeles. Since that bank had returned the draft with the indorsement above quoted, this served to confirm the suspicion that the letter of credit, as well as the draft, was fraudulent, and upon this the head bookkeeper consulted the chief of police of Santa Barbara, a complaint was sworn to, and plaintiff was arrested upon a telegraphic warrant following the filing of this complaint. Subsequent to this the Potter Hotel Company received advices from the Los Angeles bank to the effect that it had made a mistake, that the draft was good, and that it would pay it, whereupon the Potter Hotel Company immediately telephoned to San Francisco and secured the release and discharge of plaintiff.

Here are presented, upon either side, all of the facts necessary for consideration. Upon the one hand, it is argued that lack of probable cause is shown from the very conduct of the plaintiff in designating the hotel to which his mail was to be forwarded, and in actually going to that hotel as represented; that the First National Bank of Los Angeles is nearer to Santa Barbara than the St. Francis Hotel; and that before taking criminal proceedings the hotel company should have communicated with the Los Angeles bank and asked an explanation of the reason why the check was dishonored. It is further urged that the hotel company, before resorting to such drastic measures, should have consulted the district attorney, or have obtained other legal advice; and, finally, it is said—and, of course, it is true—that the conduct of plaintiff throughout was that of an honorable and upright man, and that there was nothing in his conduct to have excited suspicion. But, upon the other hand, it is quite apparent that the hotel company in its conduct was not inspired by any malicious motive. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *Davis v. Telephone Co.*, supra; 2 Greenleaf on Evidence, §§ 453, 457. It is equally apparent that there were presented to the hotel company very strong circumstances of suspicion. It was under no obligation to assume that an institution as prudent and careful as is a bank would have made so grave a mistake. It was under no duty, therefore, to have communicated with the bank to ask whether or not it had made a mistake. The indorsement upon the rejected draft meant but one thing—that it had been drawn upon a bank—not where the drawer

had no funds, but where he had no account; and such an act, in the absence of explanation, was both a fraud and a crime. If the Potter Hotel Company, as is suggested it should have done, had consulted the district attorney, doubtless that officer, or any other attorney, would upon this presentation of the facts have said that the evidence was sufficient to justify the issuance of a criminal warrant. Such being the case, it cannot be said that plaintiff established a want of probable cause for his prosecution, absolutely unwarranted as that prosecution unquestionably and admittedly was. The fault and error lay with an institution, which, of all, is supposed to be the least liable to errors of the kind—with the Bank of Los Angeles.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; SLOSS, J.

153 Cal. 516

STERNE v. MARIPOSA COMMERCIAL & MINING CO. (S. F. 4,208.)

(Supreme Court of California. May 11, 1908.
On Rehearing, June 8, 1908.)

1. TRIAL—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT.

The rule that, where a portion of the testimony is unobjectionable, the party moving to strike out must designate with precision the particular portion challenged, has no application where the whole answer is subject to the objection made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 248.]

2. APPEAL AND ERROR—HARMLESS ERROR—EVIDENCE.

In an action for injuries to an employé through the alleged negligence of defendant in not furnishing a socket wrench for tightening the nuts on a machine, plaintiff stated on cross-examination, in answer to a question where he acquired his information regarding certain kinds of wrenches, that one of defendant's employés, who was subsequently shown to have had charge of part of defendant's machinery, and who presumably had considerable knowledge concerning the matter under inquiry, told him that, if a socket wrench had been used, he, plaintiff, would not have been hurt. *Held*, that the refusal to strike out the answer was prejudicial error.

3. MASTER AND SERVANT—INSTRUCTIONS.

In an action for injuries to an employé through the alleged negligence of defendant in furnishing a spanner wrench instead of a socket wrench for tightening the nuts on a machine, instructions making the question of defendant's negligence turn on the conclusion of the jury as to whether or not the spanner wrench furnished and used was in fact a suitable wrench for the work, without regard to whether or not there had been any want of ordinary care on defendant's part in failing to furnish a socket wrench, were erroneous; it being essential to the existence of negligence on the part of defendant, not only that the appliance was in fact not a safe one for the work, but also that defendant knew, or ought in the exercise of reasonable care for the safety of its employés to have known, that the wrenches furnished were not safe and sufficient.

4. SAME—APPLIANCES—DUTY OF MASTER.

The obligation of an employer in furnishing safe appliances for the servant to work with is

simply to use reasonable care; that is, the degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

Beatty, C. J., dissenting on rehearing.

Department 1. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Stanley Sterne, by his guardian ad litem, against the Mariposa Commercial & Mining Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Lindley & Eickhoff, J. M. Corcoran, and B. L. Quayle, for appellant. Charles F. Hanlon, for respondent.

ANGELLOTTI, J. This is an appeal by defendant from a judgment in favor of plaintiff for \$7,000 damages for personal injuries, alleged to have been suffered by him through the negligence of defendant, and from an order denying its motion for a new trial.

Plaintiff, a boy nearly 17 years of age, was in the employ of defendant at its mine in Mariposa county. There was a hoisting plant operated by steam used in the mining work, and plaintiff was employed as fireman and in assisting around the engine used as a part of such hoisting plant, and to perform certain other duties, such as running the air compressor, etc., and there was evidence sufficient to sustain a conclusion that he was required to work wherever directed by one Pettis, the engineer of defendant. On March 13, 1903, certain repair work was done on the bearings on the pillow block of the hoist, on which bearings revolved the shaft of a cogged wheel. This work was done by Maguire, the general foreman and representative of the company at the mine, Pettis, Mills (a machinist), and one Thorn. This work having apparently been satisfactorily completed, Maguire ordered the engineer to start up the engine, and he and Thorn left the engine room. The engine having been started, Mills was engaged in making a final adjustment about the pillow block and bearings, and, for the purpose of tightening one of the nuts, had applied to the nut a wrench variously denominated in the record a spanner or stationary wrench. At this point plaintiff appeared upon the scene. There was in plaintiff's own testimony evidence sufficient to support a conclusion that Pettis told plaintiff to get a monkey wrench and assist Mills in his work, although the other evidence indicates that Mills was already using a monkey wrench in connection with a spanner wrench in tightening the nut; the nut being so situated that it could not be turned without a combination of two wrenches. A monkey wrench was applied to the spanner wrench being used by Mills, and, Mills holding in place the spanner wrench, plaintiff turned

the spanner wrench by means of the monkey wrench, and was in the act of making a second turn, when, according to plaintiff's contention, the spanner wrench in Mills' hands slipped sideways from the nut, and plaintiff's hand, in consequence thereof, came in contact with the cogs of the wheel and was so mutilated as to require amputation. The nut was hexagonal, and there had been supplied no socket wrench which would fit it.

Much is said in the brief of counsel for plaintiff as to the effect of the failure of defendant to deny certain allegations of the complaint which we take to be nothing more than attempted allegations of the legal duty of an employer to his employés in the matter of furnishing suitable tools and appliances, and keeping the same in proper repair. Such allegations had no proper place in the complaint and tendered no issue of fact. The failure to deny them in the answer in no way affects the determination of the case, which must be determined upon the facts admitted or proved, in the light of the law as settled by our statutes and decisions. The basis of the alleged liability of defendant for the injury suffered by plaintiff was (1) the claim that defendant negligently failed to furnish a proper wrench for the tightening of this particular nut, the claim being that a socket wrench, to be used in connection with the monkey wrench, was the only proper and safe appliance for the particular work; and (2) the claim that defendant was negligent in sending plaintiff, alleged to be an inexperienced minor, without warning, into a place and position of danger. It is earnestly urged that the evidence was insufficient to support a conclusion that there was any negligence in the failure to furnish a socket wrench. We deem it unnecessary to consider this contention in view of the fact that the judgment and order must be reversed for an error occurring at the trial. It is impossible for us to say upon which theory the jury rendered the verdict against defendant—whether upon the theory that it had failed to use reasonable care in the matter of furnishing a safe and suitable wrench, or upon the theory that it had negligently sent plaintiff, without warning, to work in a dangerous place. It follows that, if prejudicial error was committed in regard to the issue relative to the wrench, a reversal must be had.

Plaintiff, in his testimony on direct examination, having spoken of a "stationary wrench" and a "monkey wrench," stated that there was no socket wrench on the premises, and no wrench similar thereto. He then described a socket wrench as being one with six sides and covering the whole of the six-sided nut; whereas the stationary wrench covered only two sides of such nut. This was his only testimony in relation to wrenches on direct examination. On cross-examination he was asked by defendant's counsel: "Well, where did you acquire the information which you gave in response to the questions recently

asked you by Mr. Hanlon in reference to stationary wrenches or socket wrenches?" The plaintiff in answer was proceeding to state that he had been told certain things by one of the men, when he was interrupted by defendant's counsel with a statement that what he was saying was not an answer to the question, and they did not want it. Plaintiff's counsel insisted that the plaintiff be allowed to finish the answer he was giving, and, against the protest of defendant, the witness was allowed to give the following so-called answer: "I was told by J. H. Lind that, if a socket wrench had been used, I never would have been hurt." Defendant's counsel immediately moved that the answer be stricken out on the ground that it was not responsive to the question, and earnestly and at length set forth the reasons in support of the motion, but the trial court denied the motion and allowed the answer to stand. It was subsequently made by plaintiff to appear that J. H. Lind was an employé of defendant at the mine who had charge of a part of the machinery, and who presumably had considerable knowledge concerning the matter under inquiry. There was thus placed before the jury, as proper evidence for their consideration in determining the cause of the accident and the question of defendant's negligence, the extrajudicial statement of a man whose opinion was apparently entitled to some weight, as to the exact cause of the accident. That statement was of such a nature as to intimate negligence on the part of defendant in not supplying a socket wrench. It came to the jury without the sanction of an oath and without opportunity to defendant to cross-examine the maker of the statement. We can conceive of no ground upon which the ruling of the court denying the motion to strike out this answer can be sustained. The answer of the witness was wholly and entirely irresponsible and foreign to the question asked. The rule that, where a portion of the testimony is unobjectionable, the party moving to strike out must designate with precision the particular portion challenged, relied on by plaintiff's counsel, of course, has no application where the whole answer is subject to the objection made. Counsel for plaintiff makes a futile attempt to show that a portion of the answer here, namely, "I was told by J. H. Lind," was responsive. But these words cannot be thus separated from the remainder of the answer, for to so separate them would be to make them express something not within the meaning of any part of the answer. No part of the answer as given, when considered as a whole, stated that the witness had received any information on the matters concerning which he had testified on direct examination from J. H. Lind. The answer of the witness cannot thus be mutilated and distorted from its original meaning. It was an answer expressive of a single thought, absolutely foreign to any matter embraced in the question asked by

counsel for defendant. It is not material that the so-called answer was given to a question asked by counsel for defendant on cross-examination. "While the rule may be somewhat stringent as to concluding a party by the answers of his own witnesses in general response to a question, or binding him by irrelevant answers to irrelevant questions, still it never has been held, or should be, that a party is bound by the irresponsible answers of his adversary's witnesses, and we cannot understand why it should seriously be contended for." *Estate of McKenna*, 143 Cal. 580, 587, 77 Pac. 461, 463. It is idle to urge that the answer was entirely harmless. There is by no warrant in the record for any such conclusion on our part. It was by no means a self-evident proposition, as suggested by counsel for plaintiff, that the accident was due to the failure to use a socket wrench instead of a spanner or stationary wrench. The claim of plaintiff's counsel that there was testimony to the same effect given by defendant's witnesses is not well founded. It is impossible for us to say what weight and influence this improper evidence of plaintiff had on the minds of the jury in determining the question of defendant's liability. The error of the trial court must be held prejudicial. *Short v. Frink* (Cal. Sup.) 90 Pac. 202, and cases there cited. The trial court, at the request of plaintiff, gave to the jury a number of instructions, in each of which the court explicitly directed them to find a verdict for plaintiff, or explicitly declared plaintiff to be entitled to a verdict, in the event that they found certain things specified therein to be true. Any such instruction should, of course, embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict. See *Killelea v. California, etc., Co.*, 140 Cal. 604, 74 Pac. 157. The following are fair samples of these instructions:

Plaintiff's instruction No. 8: "I instruct you, gentlemen, that the parties have in their pleadings here admitted that it was the defendant corporation's duty, and its own personal duty, to furnish and supply a fit engine, keep it in repair, and to supply a sufficient number of wrenches, and to discard old ones, and to supply new and fit ones to each kind, and to test and inspect said wrenches, and to put each in safe condition before use. Now, I instruct you that if you find that the company and that Maguire, its foreman, failed to furnish or supply a suitable, fit, and proper wrench on March 13, 1903, and that the said Mills was obliged to use the wrench he actually did use to turn the engine nut, and that Stanley Sterne was injured by the flying off of the said wrench from the engine nut, he, Stanley Sterne, and his fellow servants not being guilty of contributory negligence, but acting in the scope of his duty as directed by said Maguire (if said Maguire gave any directions), then I instruct you, gen-

flemen of the jury, that you must return a verdict here into this court in favor of the plaintiff and against the defendant corporation herein."

Plaintiff's instruction No. 9, so far as material: " * * * If you find that the defendant and Maguire, its foreman, failed to furnish a suitable wrench for Mr. Mills to use in tightening the engine nut on March 13, 1903, and that, owing to the unfitness of the wrench that was used by Mills at the time, the injury was caused to plaintiff, without any contributory negligence on plaintiff's part or on the part of any of his fellow servants, then I instruct you that the injury was caused by the defendant's fault and neglect of duty, and that the verdict of this jury should be brought in here in favor of Stanley Sterne, the plaintiff, and against the corporation defendant."

It is unnecessary to further consider these instructions than to point out that they were erroneous, in that they made the question of defendant's negligence to turn on the conclusion of the jury as to whether or not the spanner or stationary wrench furnished and used was in fact a suitable wrench for the work as it was then being done with the machinery in motion, without regard to whether or not there had been any want of ordinary care on the part of defendant, or its personal representative Maguire, in failing to furnish a socket wrench. It was essential to the existence of negligence on the part of the defendant in the matter, not only that the appliance was in fact not a safe appliance for the work, but also that the defendant or its representative Maguire knew, or ought in the exercise of reasonable care for the safety of its employes to have known, that the wrenches furnished were not safe and sufficient. See *Malone v. Hawley*, 46 Cal. 409. The obligation of an employer in such matters is simply to use reasonable care, that degree of care, as was said by Judge Lurton in a decision of the United States Circuit Court of Appeals, "which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work." *Westinghouse, etc., Co. v. Heimlich*, 127 Fed. 94, 62 C. C. A. 92. See, also, *Dolan v. Sierra Ry. Co.*, 135 Cal. 436, 67 Pac. 686. As we have already intimated, there is nothing in the condition of the pleadings in this case to enhance this obligation. Even if it was made to appear here that a socket wrench would have been a safer appliance to use under the conditions of the particular work in hand, there was ample evidence to justify a conclusion that there was in the failure to furnish a socket wrench no want of reasonable care on the part of defendant, or its representative, Maguire—that a reasonably careful man, as solicitous for the safety of his employes as he would be for his own safety, would have considered the wrenches furnished entirely safe and adequate for all work

to be done by the employes—that such wrenches so furnished were such as experience sanctioned as reasonably safe. This element was entirely omitted from these instructions, and the trial jurors were thus explicitly instructed that if, from the evidence given on the trial, they believed that the wrenches furnished were not in fact "suitable, fit and proper," they must find defendant guilty of negligence. Because of our conclusion that the judgment and order must be reversed for the error first discussed, it is unnecessary to determine whether error in these instructions can properly be held to have been without prejudice to defendant's cause in view of other instructions given by the court relative to the same subject, and we have discussed the matter solely for the purposes of a new trial.

It is unnecessary to discuss any of the other points presented.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing upon the ground that the error of the superior court was, in view of all the evidence in the case, without prejudice. The answer of plaintiff which the court refused to strike out meant nothing more than that a socket wrench would not have slipped, and, as to that, there was no controversy. One of the defendant's witnesses testified to the same effect.

154 Cal. 108

TANDY v. WAESCH et al. (L. A. 2,038.)
(Supreme Court of California. Aug. 5, 1908.)

1. PARTIES—PERSONS WHO MAY SUE—TRUSTEES OF EXPRESS TRUST.

Under Code Civ. Proc. § 367, requiring every action to be prosecuted in the name of the real party in interest, except as provided in section 369, authorizing a trustee of an express trust to sue, and declaring that a person in whose name a contract is made for the benefit of another is a trustee of an express trust, one making in his own name for the benefit of another a contract for the purchase of real estate may sue for the part of the price paid on the vendor failing to convey clear title as required by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 11.]

2. VENDOR AND PURCHASER—DEFECTS IN TITLE—RESCISSION BY PURCHASER.

A vendor contracted to sell real estate and convey a title "free and clear of all incumbrances." There were building restrictions on the land, and the land was subject to the reserved right of way for and the right to construct and maintain pipes and ditches for irrigation purposes. *Held*, that the vendor could not convey a title clear of all incumbrances, and the purchaser might rescind and recover the part of the price paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 199, 200.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. E. Tandy against J. W. Waesch and others. From a judgment for plaintiff, defendant J. W. Waesch appeals. Affirmed.

R. L. Horton, for appellant. Oscar C. Mueller and William M. Hiatt, for respondent.

HENSHAW, J. Plaintiff sued to recover the sum of \$1,000 paid on account of the purchase price of a piece of land under contract with defendant, whereby defendant agreed to convey the land by a title free and clear of all incumbrances. He averred that defendant's title was incumbered by restrictions, reservations, and covenants as follows: "It is hereby covenanted and agreed, by and between the parties hereto, and it is part of the consideration of this conveyance, that no main building shall be erected or suffered to remain upon the premises hereby conveyed that is not reasonably worth \$1,000 for one story or \$1,500 for two stories, and said main building shall be erected before any other building on said property. There is hereby expressly reserved and excepted from the operation of this deed to the parties of the first part, their successors, heirs and assigns forever, the right of way for, and the right to construct, lay down and maintain pipes, ditches, and zanjas for irrigation purposes upon, through, and across the parks, streets, and avenues in said city of Redondo Beach, said several rights of way and exceptions to be made of such sizes, quantities, and dimensions as may be reasonably required for the several and respective uses for which the same are severally reserved." It was alleged that a reasonable time had been given to remove these incumbrances, and that they had not been removed, and, indeed, upon the trial, it was conceded that they were still in existence. Defendant pleaded by answer and cross-complaint, calling in as defendants to his cross-complaint, beside the plaintiff Tandy, W. M. Garland and E. T. Ames. Trial was had, judgment passed for plaintiff Tandy, and, from that judgment and the order of the court denying defendant's motion for a new trial, he appeals.

His principal contention upon appeal seems to be that as it was disclosed and known to him that Tandy was acting as agent, and that the defendant Garland was principal, the action should have been brought by Garland, and cannot be maintained in the name of Tandy. Tandy, however, was a proper party plaintiff. To the general rule laid down in section 367, Code Civ. Proc., that every action must be prosecuted in the name of the real party in interest, there are certain exceptions specified in section 369, Code Civ. Proc. That section authorizes the trustee of an express trust to sue without joining the beneficiary,

and declares that a person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. The contract having been made in Tandy's name for the benefit of Garland, Tandy thus became the trustee of an express trust and entitled to maintain the action. See *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723; *Giselman v. Starr*, 106 Cal. 657, 40 Pac. 8; *Los Robles Water Co. v. Stoneman*, 146 Cal. 204, 79 Pac. 880; *Anglo-Cal. Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077; *Pom. Code Rem. (4th Ed.)* §§ 103, 105; *Bliss on Code Pleadings*, § 57.

The restrictions, reservations, and covenants constituted incumbrances upon the title of defendant, which, not being removed, justified plaintiff in seeking a recovery of his partial payment under defendant's contract to convey to him a title "free and clear of all incumbrances." Indeed, this proposition is not seriously disputed; but, if it were, it finds abundant support. *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855; *Whelan v. Rosser*, 1 Cal. App. 701, 82 Pac. 1082; *Goldstein v. Hensley*, 4 Cal. App. 444, 88 Pac. 507; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303; *Ayling v. Kramer*, 133 Mass. 12; *Brewster on Conveyancing*, § 201; *Warvelle on Vendors*, § 312.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: **LORIGAN, J.; SHAW, J.**

154 Cal. 103

WHITE v. HORTON et al. (L. A. 2,077.)

(Supreme Court of California. Aug. 4, 1908.)

1. **HOMESTEAD — INCUMBRANCE—MORTGAGE—EXTENT OF INCUMBRANCE.**

Where a homestead is mortgaged, or is declared upon land subject to mortgage, it is not the exemption which is mortgaged, but the whole property, and the homestead exemption still exists subject only to reduction to satisfy the mortgage.

2. **SAME—LIABILITIES ENFORCEABLE AGAINST HOMESTEAD—JUDGMENTS.**

Civ. Code, § 1254, provides that, if a homestead exceeds in value the amount of the exemption and cannot be divided, the court must direct its sale under execution. Section 1256 provides, when the sale is made, the balance above the homestead exemption must be applied to the execution. Defendant mortgaged land, and thereafter made a declaration of homestead upon it. M. recovered a judgment against defendant for \$4,000, and, her judgment not being satisfied, appraisers valued the homestead at \$10,000, but reported that it could not be divided without injury to the whole. Plaintiff brought foreclosure, and his judgment decreed satisfaction of the mortgage out of the proceeds of a sale and that M.'s judgment be satisfied out of the remainder. *Held*, that the proceeds of the sale should have been disposed of, first, to satisfy the mortgage, and then the homestead fund should be set aside, and any remainder paid to the judgment creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 174.]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Florence C. White against George C. Horton and others to satisfy a judgment against defendants' homestead. From a decree ordering the property sold and directing its disposition, the owners appeal. Reversed, with directions to the trial court to enter judgment as directed.

Borden & Carhart, for appellants. Hahn & Hahn and Walter Holsinger, for respondent.

HENSHAW, J. The appellants Horton, to secure the payment of a promissory note, had executed a mortgage upon a lot of land in the county of Los Angeles. Subsequent to the execution and recordation of this mortgage, the husband made a declaration of homestead upon the mortgaged property for the benefit of himself and family. Thereafter the defendant and respondent Ednah J. Menner recovered a judgment against the defendant George C. Horton for the sum of \$4,000, with interest and costs. The note secured by mortgage becoming overdue and being unpaid, an action to foreclose was commenced by plaintiff. While this action was pending the judgment creditor, Ednah J. Menner, under the provisions of sections 1245 to 1259 of the Civil Code, caused appraisers to be appointed to value the homestead; her judgment not having been satisfied. The appraisers placed a valuation upon the homestead exceeding \$10,000, but further reported that the property could not be divided without injury to the whole thereof. Thereupon proceedings were taken whereby the matter was certified to the court in which the foreclosure action was pending, under stipulation that upon sale of the mortgaged premises the claims of Menner under her judgment should be considered and determined. The court in giving judgment in the foreclosure proceedings decreed a sale of the property, and out of the funds derived from the sale awarded the mortgagee the amount due upon the mortgage, with interest and costs. Next out of the funds it decreed that the judgment of Ednah J. Menner should be satisfied, and that any funds remaining should be paid over to the owners of the property. No question arises as to the regularity of any of the proceedings, and the single proposition propounded is as to the correctness of the court's disposition and distribution of the funds arising from the sale of the homestead.

By appellants it is contended that, upon sale of the homestead, they were entitled to \$5,000, which was wholly exempt from execution sale, attachment, or any other form of legal seizure, saving that, if the value of the residue of the property was not sufficient to pay the mortgage debt, recourse could be had against the \$5,000 to make good any deficiency. Since here there has been a sale of the homestead and the court is dealing with money in hand, it matters not whether it be said that the family is entitled to the \$5,000 as a homestead exemption fund, which

fund may be subject to reduction to satisfy the mortgage debt, or whether it be said that the mortgage shall first be satisfied, and that the owners of the homestead shall have the next \$5,000 as an exempt fund. However stated, the actual result will always be the same, and in either case, under appellants' contention, the judgment creditor has no lien or claim upon the homestead property, or upon the fruits of its sale, until after the demands of the mortgagee have been fully satisfied, and \$5,000 have been exempted and set apart for the use of the family. Upon behalf of respondent it is contended that sections 1237 et seq. of the Civil Code entitle the family to an exemption of but \$5,000; that whether they mortgage property at a time when it is impressed with a homestead, or whether, as here, they mortgage property upon which a homestead is subsequently declared, the result is the same, and that result is that they have mortgaged the homestead exemption, as distinguished from the homestead itself; that in satisfying that mortgage, where the rights of other creditors are involved, resort shall first be had to the exemption, and that \$5,000 shall first be applied in satisfaction of the mortgage debt. No authority is cited in support of the declaration that a mortgage upon a homestead is a mortgage to be first satisfied out of the exempt \$5,000 which the law allows. Indeed, considering the policy of the law, which most strongly favors homesteads, this statement upon its face does violence to that policy. A case like the present, where the homestead has been converted into money, and where the question, as here, turns upon the order of the distribution of the fund, has not previously come before this court; but similar cases involving the disposition of homestead lands have repeatedly been presented to the court, and in every instance the conclusion has been contrary to the contention which the respondent urges. One of the early cases was that of *McLaughlin v. Hart*, 46 Cal. 638. Hart and his wife executed a mortgage to plaintiff to secure the payment of a promissory note. Subsequently Hart, to secure his own debts, executed other mortgages upon the land, in which his wife did not join, to defendants Pierce, Shedder, and Piquet. Hart and his wife had filed a declaration of homestead covering 50 acres of land mortgaged to plaintiff. The subsequent mortgages to Pierce, Shedder, and Piquet did not affect the homestead. Defendants Pierce, Shedder, and Piquet filed a cross-complaint, asking to have their mortgages foreclosed, and urging that plaintiff should first be compelled to resort in satisfaction of his mortgage to the homestead property, under the application of the equitable doctrine that where one creditor has several securities to which he can resort, and another creditor has a lien on but one of those securities, the latter may compel the former to exhaust the securities upon

which he, the latter, has no lien. But by its decree the trial court exempted the homestead from sale unless it should be found necessary to have recourse to it to satisfy the mortgage of plaintiff, and denied to the defendants any right to compel a sale of the homestead, to the end that the funds might be first applied in extinguishment of plaintiff's mortgage debt. This court upheld the judgment of the trial court, saying: "The liens of the junior mortgagees upon the outside lands were created by him alone and without her (the wife's) consent, and to hold that these latter mortgagees may, for their own benefit, compel a sale of the homestead to satisfy the McLaughlin mortgage, would be in effect to create a lien in favor of the junior mortgagees upon the homestead of Mrs. Hart without her consent." Treating this case in terms of money instead of land, the same doctrine is invoked by appellants, and the same answer must be made as was made in that case. The Menner debt is a debt of the husband, and not of the wife, incurred after a homestead had been placed upon the property. To hold that the mortgagee must first exhaust the homestead fund of \$5,000 would be, in effect, to create a lien in favor of the judgment creditor upon the homestead of Mrs. Hart without her consent, and deprive her of her homestead exemption for a debt not her own, and for the payment of which she had in no way bound the homestead property.

So, again, in *Barrett v. Sims*, 59 Cal. 615, Sims had executed a mortgage upon the property to defendant Clarke. Subsequently he executed a deed to defendant Beckman of the property, reserving therefrom a strip 25 rods wide, upon which he filed a declaration of homestead. Sims being indebted to plaintiff, the latter commenced an action, sued out a writ of attachment, and levied upon the right, title, and interest of the defendant Sims in the land. He alleged that Sims' deed to Beckman was without consideration, and that Sims had declared the homestead to delay and defraud his creditors; that he did not know the amount due on the mortgage executed by Sims to Clarke, nor what part should be paid out of the homestead, nor what part should be paid out of the land conveyed to Beckman, but he prayed that all the land should be declared subject to sale under his judgment, that the amount of the claim of the mortgagee, Clarke, be determined, and that Clarke in seeking satisfaction of his claim be required first to exhaust the homestead property upon which he, plaintiff, had no lien. This court, reviewing the subject of homesteads and homestead exemptions, concluded: "Inasmuch as the conveyance to Beckman is a valid conveyance, and plaintiff has an ample remedy at law to enforce his judgment against the excess, if any, in value of the homestead beyond five

thousand dollars (subject to the rights of the mortgagee), he has no standing in a court of equity, and the bill should be dismissed." Here, again, is distinct recognition of the fact that where a homestead is mortgaged, or is declared upon land subject to a mortgage, it is not the exemption which is mortgaged but the whole property, and there is a further recognition of the position contended for by appellants that the homestead exemption still exists and is to be recognized, subject always and only to reduction in amount to satisfy the just demand of the mortgagee.

But, turning from the consideration of these analogous cases, all doubts and difficulties are resolved if appellants' rights are viewed in the light of the code provisions. So viewing them, the incidental fact that the homestead was sold under foreclosure proceedings may be eliminated as not pertinent. The condition, then, confronting the judgment creditor who had taken steps to subject the homestead to sale under the provisions of the Civil Code, was that the appraisers had found that the homestead could not be divided, and that it was of the value of about \$11,000. If, then, the judgment creditor had proceeded, as she had an undoubted right to proceed, and caused the property to be sold (Civ. Code, § 1254), the purchaser at such sale would have acquired the property subject to the lien of plaintiff's \$4,000 mortgage. By reason of this mortgage, which, of course, would not be affected by these proceedings, the land on sale would bring \$7,000. What disposition would and should be made of that \$7,000? The Code furnishes a ready and complete answer. "If the sale is made, the proceeds thereof to the amount of the homestead exemption must be paid to the claimant, and the balance applied to the satisfaction of the execution." Civ. Code, § 1256. To summarize: The land under this sale would still be subject to the mortgage so that the mortgagee would retain his security unimpaired. The first \$5,000 resulting from the sale would be paid as the homestead exemption fund to those entitled to it, the balance only, amounting, in the instance we have cited, to \$2,000, would be available to meet the demands of the judgment creditor.

It follows from the foregoing that the court by its decree should have apportioned the funds arising from the sale of the homestead as follows: First, to the satisfaction of the claim of the mortgagee; second, \$5,000 to appellants Horton as their homestead exemption fund, and the residue to the judgment creditor Menner.

The judgment is reversed, with directions to the trial court to enter judgment in conformity with the foregoing.

We concur: BEATTY, C. J.; LORIGAN, J.

8 Cal. App. 434

RISDON v. PREWETT et al. (TERRY, Intervener). (Civ. 468.)

(Court of Appeals, Third District, California. June 24, 1908.)

COURTS—APPELLATE COURTS—JURISDICTION.

Const. art. 6, § 4, gives the District Courts of Appeal appellate jurisdiction in certain enumerated proceedings, and in such other special proceedings as may be provided by law, except cases in which appellate jurisdiction is given to the Supreme Court. Code Civ. Proc. § 52, provides that the Supreme Court shall have appellate jurisdiction "(4) in all special proceedings." *Held*, that an action to determine on reference by the Surveyor General the rights of the respective parties to purchase certain school land from the state was a special proceeding, and appealable directly to the Supreme Court.

Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Proceeding by Herbert T. Risdon against N. C. Prewett and another; W. I. Terry intervening. From a judgment for intervener, plaintiff appeals. Case transferred to Supreme Court.

W. A. Gett and Braynard & Kimball, for appellant. W. D. Tillotson (C. H. Dunn, of counsel), for respondents.

CHIPMAN, P. J. This is an action to determine, upon reference by the surveyor general, the rights of the respective parties to purchase from the state certain school land. The appeal is taken directly to this court. Respondent moves the court to dismiss the appeal upon certain grounds.

By section 4, art. 6, Const., the District Court of Appeal is given appellate jurisdiction in certain enumerated proceedings, "and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the Supreme Court.) * * *" Section 52, Code Civ. Proc., provides as follows: "The Supreme Court shall have appellate jurisdiction: * * * (4) In all special proceedings." The action is a special proceeding, and the appeal should have been taken to the Supreme Court. Obviously, as the District Court of Appeal has not jurisdiction, it cannot determine the pending motion.

Agreeably to the provisions of section 4, art. 6, Const., the cause is transferred to the Supreme Court.

We concur: **HART, J.; BURNETT, J.**

RISDON v. STEYNER (TERRY, Intervener). (Civ. 469.)

(Court of Appeal, Third District, California. June 24, 1908.)

Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Action by Ruth C. Risdon against George W. Steyner; W. I. Terry intervening. Judgment for intervener, and plaintiff appeals. Case transferred to the Supreme Court.

W. A. Gett and Braynard & Kimball, for appellant. W. D. Tillotson (C. H. Dunn, of counsel), for respondent.

PER CURIAM. This is an action of the same nature as that in *Risdon v. Prewett et al.* (No. 468) supra. For the reasons therein expressed, it is ordered that this cause be transferred to the Supreme Court.

8 Cal. App. 466

PEOPLE v. FINERTY. (Cr. 133.)

(Court of Appeal, First District, California. June 30, 1908.)

CRIMINAL LAW—APPEAL—NOTICE—SERVICES—STATUTES.

Pen. Code, § 1240, declaring that an appeal is taken by filing with the clerk of court in which the judgment or order appealed from is filed, a notice stating the appeal from the same, and serving a copy on the attorneys of the adverse party, is mandatory, so that a notice of appeal in a criminal case not shown to have been served on the attorney for the respondent is wholly ineffectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2723.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Harry Finerty was convicted of robbery, and he appeals. Affirmed.

Hinds & Ingersoll, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was by information charged with robbery jointly with one Charles Washburn. He was tried separately, convicted, and sentenced to 50 years in the penitentiary. This appeal is from the judgment and from an order denying his motion for a new trial.

The record herein does not show that the notice of appeal was served on the attorney for the respondent; and, as no effort has been made to show that there was in fact service, we must conclude that it was not made, and the appeal must therefore be dismissed. Section 1240 of the Penal Code is as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed a notice stating the appeal from the same, and serving a copy thereof upon the attorneys for the adverse party." This provision is mandatory, and is necessary to confer jurisdiction.

In the case of *People v. Brown*, 148 Cal. 743, 84 Pac. 204, this precise question arose, and the court refused to consider the appeal. The court there said: "In *People v. Colon*, 119 Cal. 668, 51 Pac. 1082, it was held that the proceeding specified in section 1240 must be taken to confer upon this court jurisdiction to hear and determine the appeal. *People v. Colon* quotes from *People v. Bell*, 70

Cal. 33, 11 Pac. 327, where it is said: "The transcript herein does not show that notice of appeal was served on any one. The law requires that it shall be served on the attorneys of the adverse party (Pen. Code, § 1240), and the transcript on appeal must show it." *People v. Clark*, 49 Cal. 455; *People v. Phillips*, 45 Cal. 44. This not being the case, the appeal cannot be considered." Notwithstanding this defect, considering the nature of the case, we have examined with care the points urged by appellant, and after such examination we are convinced that the record does not disclose any prejudicial error. The case seems to have been fairly tried, and the judgment should not be disturbed.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 362

WINCHESTER v. BECKER. (Civ. 496.)

(Court of Appeal, Second District, California.
June 11, 1908.)

1. APPEAL AND ERROR—SCOPE OF REVIEW—ORDER GRANTING NEW TRIAL "SOLELY UPON ERRORS OF LAW."

Upon an appeal from an order granting a new trial "solely upon errors of law," the appellate court is limited in its review to errors appearing in the record exclusive of the sufficiency of conflicting evidence to justify the decision.

2. SAME—REVIEW—FAILURE TO FIND ON MATERIAL ISSUE.

Plaintiff ceded her property to real estate agents for \$5,150 or \$5,000 net to her. Subsequently G., representing himself to be in the agents' employ, called upon plaintiff, and she accepted his offer of \$5,000 net for the property, believing that she was dealing with the agents. In an action by plaintiff to rescind the contract of sale, she alleged, and there was evidence to prove, that G. was not connected with the real estate firm, but was acting solely for the purchaser and at his instance, but the court made no finding upon that issue. *Held*, that the issue was a material one, since, if G. was authorized to act for plaintiff's agents and the price of \$5,000 net was accepted, the agents could have under their contract no claim for commission, but, if G. was acting solely for the purchaser who was purchasing at a price which would leave her still liable to her agents for their commission, G. was guilty of fraudulent conduct for which defendant as principal was responsible, and, the court having failed to find thereon, its decision was against law and reviewable on appeal from an order granting a new trial.

3. SAME—FINDINGS—SUFFICIENCY OF EVIDENCE TO SUPPORT.

If there is no evidence upon an issue which is essential to the judgment, a finding upon such issue is an error of law, and hence, on appeal from an order granting a new trial solely on errors of law, the court may look into the bill of exceptions to see if a finding upon a material issue has any support from the evidence.

4. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — UNFAIR OR OPPRESSIVE CONTRACTS.

A court will not lend its aid to enforce a contract which is in any way unfair or savors of oppression.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 153.]

5. VENDOR AND PURCHASER — PURCHASER'S RIGHT TO POSSESSION.

A contract reciting that the owner of premises had received of a person \$100 as a deposit on the purchase price, \$2,500 balance to be paid upon the delivery of an unlimited certificate of title, does not confer a right of possession upon the person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 394.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Jennie M. Winchester against A. E. Becker, in which defendant filed a cross-complaint. There was a judgment for defendant, and, from an order granting a new trial "solely upon errors of law," defendant appeals. Affirmed.

John W. Lane and G. P. Adams, for appellant. J. L. Murphey, for respondent.

ALLEN, P. J. Appeal by defendant as cross-complainant from an order granting a new trial. The action was brought by plaintiff for the rescission of a real estate contract and in ejectment. The defendant answered and filed a cross-complaint, praying for a specific performance of the contract sought to be rescinded. The trial court found in favor of the defendant, and gave judgment against plaintiff and in defendant's favor upon the cross-complaint. Notice of intention to move for a new trial upon nearly all of the statutory grounds was duly given by plaintiff upon the hearing of which the court granted the same, but "solely upon errors of law." The rule is established that, upon an appeal from such an order granting a new trial, the appellate court is limited in its review to errors appearing in the record exclusive of the sufficiency of conflicting evidence to justify the decision. The written contract which plaintiff sought to rescind, and which, upon the other hand, defendant sought to specifically enforce, appears in the pleadings and findings in the words and figures following: "Los Angeles, June 10, '05. Received of A. E. Becker the sum of \$100.00 as deposit on lot 2 of the Osborne tract. Balance of \$2,500.00 to be paid upon the delivery of an unlimited certificate of title. Jennie M. Winchester." It may be inferred from the record that upon the trial of the action all parties proceeded upon the theory that it was competent to alter the terms of such a contract by parol proof; for no objection thereto appears which was so made as to afford the trial court an opportunity to pass upon the question. From the evidence introduced the court finds that it was understood and agreed upon by the parties that, in addition to the \$2,600 in cash mentioned in the contract to be paid for the property, the defendant was to assume a mortgage of \$2,400, a lien on said premises, through which the consideration was increased to \$5,000, instead of \$2,600, as specified in the contract, which price of \$5,000 the court finds to be the fair value of the premises. Treating this

modified contract as the true agreement, the court finds that it was executed under the circumstances following: Plaintiff, being the owner of said premises and desirous of selling the same for \$5,300, on June 5, 1905, executed to a real estate firm a writing, whereby she made said firm her exclusive agents for the sale of said premises at said price for 30 days, or until such time as she revoked the authority in writing, agreeing that if during the time of said agency they should sell said premises, or introduce a buyer who should purchase at an acceptable price, plaintiff would pay the regular commissions to said agents. That shortly thereafter the real estate firm took defendant to the property and showed the same to him, giving the price at \$5,300; and defendant refused to buy at that price, but offered \$4,800. This offer being communicated by the real estate firm to the plaintiff, she declined it, but said to them that she would accept \$5,150 or \$5,000 net to her. Thereafter one Golden, on behalf of the defendant, called upon plaintiff, and represented that he was in the employ of plaintiff's agents, which representation was without defendant's knowledge, and plaintiff, believing that she was dealing with her agents, agreed to accept his offer made on behalf of defendant to pay \$5,000 net for the premises, and executed the receipt and contract hereinbefore set out.

It is further found that pursuant to said agreement defendant took possession, and has ever since been in the lawful possession of said premises; that on June 15th plaintiff gave notice of rescission, and tendered back the \$100 paid and demanded possession. It is averred in the complaint, and repeated by plaintiff in the answer to the cross-complaint, that Golden, when he made the representation that he was in the employ of the real estate firm, was not so employed; that such representation was false and known by him to be false. The court makes no finding upon this matter. We think plaintiff was entitled to a finding upon this issue; for if, in fact, Golden was not connected with plaintiff's agents, but was acting solely for the purchaser, it changes the situation of the parties. If Golden had authority from the agents to act, and the price of \$5,000 was accepted, such agents, under their contract of employment, could have no claim against plaintiff for commission. On the contrary, if Golden was, as alleged by plaintiff, acting solely for a purchaser who had been introduced into the transaction by the agents, and who was secretly making the purchase at a price less than plaintiff understood she was to receive, or at a price which, if accepted, would still leave her liable to her agents for their commission, then Golden was guilty of fraudulent conduct for which the defendant as his principal was responsible. This finding plaintiff was entitled to have, if any evidence ap-

pears in the record upon which such finding could be based. Examining the bill of exceptions, we find it clearly established, without contradiction, that Golden was not connected with the real estate firm, but, on the contrary, was acting solely for the purchaser and at his instance and request. If there is a failure to find upon a material issue, "the decision is against law and may be reviewed on appeal from an order granting or refusing a new trial." *Adams v. Helbing*, 107 Cal. 301, 40 Pac. 422. Were it to be assumed that the finding made by the trial court, "that there was no deception or fraud on the part of the defendant, and plaintiff has not suffered any damage," is equivalent to a finding that Golden was acting for plaintiff's agents, and that they were concluded by his statements and negotiations, we may still look into the bill of exceptions to see if such finding has any support from the evidence; for, "if there is no evidence upon an issue which is essential to the judgment, a finding upon such issue is an error of law." *Domico v. Casassa*, 101 Cal. 414, 35 Pac. 1024. The record, as before stated, contains no evidence supporting a finding that the agents of plaintiff were connected in any wise with Golden, or concluded by any contract or representation made by him.

It is insisted by appellant that conceding the falsity of Golden's statements, and that plaintiff relied thereon in the transaction, still no damage resulted to plaintiff, and she cannot complain. We are unable to appreciate the force of this suggestion. If plaintiff was induced by a false statement to make a contract through which she became liable to her agents for \$150 commission, for which she would not have been liable if the representations had been true, she certainly was damaged to that extent. Her liability to the agents was created by the sale to one introduced by them, and it is no answer to say that, because such liability has not been enforced before the trial, it therefore ceases to exist. "The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression." *Agard v. Valencia*, 39 Cal. 302.

There is still another error of law apparent in the record. The court finds that pursuant to the contract set out defendant took possession of the premises and has ever since been in the lawful possession thereof. This finding is susceptible of no construction other than that the right of possession was conferred by the contract set out. The converse of this has been determined in *Winchester v. Becker*, 4 Cal. App. 382, 88 Pac. 296.

We are of opinion that errors of law appear in the record justifying the action of the trial court granting the order for a new trial; and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

WINCHESTER v. BECKER. (Civ. 497.)
(Court of Appeal, Second District, California.
June 11, 1908.)

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Jennie W. Winchester against A. E. Becker. From a judgment for defendant upon a cross-complaint, plaintiff appeals. Reversed and remanded.

J. L. Murphey, for appellant. J. W. Lane and G. P. Adams, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendant upon a cross-complaint.

The trial court, after rendition of the judgment appealed from, made its order granting a new trial. This order is affirmed in *Winchester v. Becker* (Civ. No. 496) 97 Pac. 74, this day filed. The effect of such order granting a new trial being to vacate the judgment appealed from herein, such judgment, for that reason, and for errors appearing in the record, is here ordered reversed and cause remanded for further proceedings.

We concur: **SHAW, J.; TAGGART, J.**

8 Cal. App. 487

OLSEN v. LEVY. (Civ. 465.)
(Court of Appeal, First District, California.
July 2, 1908.)

1. **MUNICIPAL CORPORATIONS—USE OF STREET AS HIGHWAY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RIDING BICYCLE IN CROWDED STREET.**

One who had been pushing a bicycle along the side of a crowded city street partially obstructed by debris was not guilty of negligence in mounting the bicycle where the road was clear which would preclude his recovery for an injury from an automobile which came suddenly from behind a car, and collided with him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1515.]

2. **EVIDENCE—COMPETENCY—SPEED OF AUTOMOBILE SHORTLY BEFORE ACCIDENT.**

Where a witness noticed the speed of an automobile when about 100 feet from the place where it collided with a bicyclist, his testimony that it was then going at a lively gait was not incompetent on the question of the speed of the automobile at the place of collision.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Personal injury action by Hans Olsen against Morris Levy. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Devoto & Richardson, for appellant. Arthur H. Barendt, for respondent.

KERRIGAN, J. This action was brought to recover damages for injuries received by plaintiff, caused by the alleged negligence and carelessness of the defendant while operating an automobile owned by him. In accordance with the verdict of the jury, a judgment for \$300 was entered in favor of the

plaintiff. The appeal is from an order denying defendant's motion for a new trial.

Appellant (defendant) contends that the respondent was guilty of contributory negligence which was the proximate cause of the accident, the alleged negligence consisting in riding his bicycle on Market street, San Francisco, while the street was greatly obstructed by debris. The record shows that at the time of the accident the north and south sides of Market street, between East and Third streets, were impassable by reason of being covered with debris from buildings destroyed by the fire of April 18, 1906; that the roadway of Market street available for use was then greatly narrowed. The respondent testified as follows: "On account of the number of people, cars, and teams on the street, it was impossible for me to ride on my bicycle, so I was compelled to walk up. I continued to walk up the north side of the street to about 20 feet from where the accident happened. I saw the road clear, got on my bicycle, and continued going up Market street, when all of a sudden an automobile came out of the track from behind the car, and ran into me. * * * The crowd was so great that it was impossible for me to ride on my bicycle up Market street until about 20 feet from where the accident happened. I then got on the bicycle because I thought I could safely do so. It was not possible to travel fast on the street on account of the vast concourse of people and the cars." In this view of the record, we are at a loss to see that respondent has been guilty of any conduct which would preclude him from recovering in this action.

Appellant next contends that the court erroneously refused to strike out the answer of P. A. Ray, a witness called by respondent, as to the rate of speed the automobile operated by appellant was going just prior to the accident. The following proceedings were had with reference to that testimony: "Q. What first attracted your attention to the defendant? A. He was going down Market street at a lively gait. I knew it was a reckless way. I saw several make lively escapes, two young fellows particularly. Mr. Devoto: I move to strike that out as incompetent, irrelevant, and immaterial. The Court: Did you see when the machine struck the plaintiff? A. Yes. Q. How far distant did the other accident take place? A. Less than 100 feet. The Court: Motion denied. Mr. Devoto: We take an exception." Appellant argues that this testimony showed the speed of the automobile before the accident, but did not tend to prove the rate of speed at the time of the accident. To state the point is to answer it. We fail to perceive any merit in this position.

The court did not err in the giving or refusing of any of the instructions.

The order is affirmed.

We concur: **COOPER, P. J.; HALL, J.**

8 Cal. App. 420

Ex parte HEACOCK. (Cr. 75.)

(Court of Appeal, Third District, California.
June 23, 1908.)

1. WORDS AND PHRASES "PROBABLE."

The term "probable" has been defined to mean "having more evidence for than against," supported by evidence which inclines the mind to believe, but leaves some room for doubt.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5617-5618; vol. 8, p. 7764.]

2. CRIMINAL LAW — WARRANT FOR COMMITMENT—"PROBABLE CAUSE."

The expression "probable cause," as used in the federal Constitution, referring to the issuance of warrants, means that there is a probability that a crime has been committed by the person named in the warrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 493.]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765.]

3. HABEAS CORPUS — RIGHT TO DISCHARGE—PERSON ACCUSED OF MURDER — PROBABLE CAUSE.

Pen. Code, § 1487, subd. 7, provides that, where a person has been committed on a criminal charge without reasonable or probable cause, it is ground for his discharge. Petitioner was held to answer to a charge of murder. It appeared that deceased met his death in a house occupied by him and by petitioner and his wife at some time between 7 o'clock and 9 o'clock p. m. Deceased had been working that day, and had made some purchases at a store about 7 o'clock, and on his way to his lodging house took two drinks of beer at a saloon, and bought a small can of beer and took it away with him. He was found dead about 9 o'clock, lying on his face, in a room on the ground floor which opened through a door into a hall in which was a stairway leading to the second story. When the body was first seen by a neighbor who went into the room where it lay, petitioner stated that deceased had fallen downstairs, and hit his head on the lounge. There was some evidence tending to show that it was not reasonably probable that deceased met his death by the accident to which petitioner attributed it, and that petitioner was in some way connected with the death. *Held* that, though perhaps insufficient to warrant conviction, probable cause was sufficiently established to justify the holding of petitioner to answer the charge made against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 19.]

Petition by Jesse Heacock for a writ of habeas corpus. Writ discharged, and prisoner remanded.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Asst. Atty. Gen., for the People. Louis Gonsalves, Weldon & Held, Thomas, Pemberton & Thomas, and C. E. McLaughlin, for petitioner.

CHIPMAN, P. J. The petition shows that petitioner is held by the sheriff of Mendocino county by virtue of "a commitment and an order and warrant of commitment made by a justice of the peace of Ten Mile River township, in said county, purporting upon its face to hold this petitioner to answer upon the charge of murder." It is averred that petitioner "has been committed on said criminal

charge without reasonable or probable cause * * * which will more fully appear from a complete transcript of the evidence and the testimony taken at the examination before said justice of the peace as a committing magistrate, which is hereunto annexed, hereby referred to and made a part hereof." It is made by statute a ground of discharge "where a party has been committed on a criminal charge without reasonable or probable cause." Pen. Code, § 1487, subd. 7; Ex parte Sternes, 82 Cal. 245, 23 Pac. 38. The term "probable" has been defined to mean "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." *Bain v. State*, 74 Ala. 38 (citing *Webst. Dict.*). The meaning of the expression "probable cause" as used in the federal Constitution, referring to the issuance of warrants, is that there is a probability that a crime has been committed by the person named in the warrant. The facts which are stated upon oath before the court or magistrate must induce a reasonable probability that all the acts have been done which constitute the offense charged. *U. S. v. Bollman*, 24 Fed. Cas. 1189, 1192, No. 14,622.

There was evidence that deceased met his death in a dwelling house occupied by him and by defendant and his wife at some time between 7 o'clock and 9 o'clock p. m. of May 4, 1908. The deceased was a laborer in a lumber camp and had been working that day. He made some purchases at a store about 7 o'clock, and on his way to his lodging house took two drinks of beer at a saloon and bought a small can of beer and took it away with him. He was next, about 9 o'clock, found dead, lying on his face, in a room on the ground floor which opened by a door into a hall in which was a stairway leading to the second story. When the body of deceased was first seen by a neighbor who went into the room where it lay, defendant stated that deceased "had fallen downstairs, and hit his head on the lounge." There was evidence of facts and circumstances surrounding the occurrence, brought out at the preliminary hearing, which we think were of sufficient probative force to justify the magistrate in holding defendant to answer the charge made against him. There was some evidence tending to show that it was not reasonably probable that deceased met his death by the accident to which defendant attributed it, and that defendant was in some way connected with the death of deceased. Though perhaps insufficient to warrant conviction, we cannot say that the evidence failed to establish probable cause.

The writ is discharged, and the prisoner remanded.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 395

DAVIS v. TREACY. (Civ. 527.)

(Court of Appeal, First District, California.
June 22, 1908. Rehearing Denied by
Supreme Court Aug. 17, 1908.)

1. MECHANICS' LIENS — NATURE OF RIGHT — STATUTORY PROVISIONS.

The right to a mechanic's lien is purely a creature of the statute, and, in order to sustain an action to foreclose such a lien, the complaint must show a substantial compliance with the requirements of the statute.

2. SAME — FORECLOSURE — STATUTORY PROVISIONS.

Code Civ. Proc. § 1187, provides that one claiming a mechanic's lien under the law must file with the county recorder "a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he is employed or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien." *Held*, that a complaint alleging that the action "is brought in support of plaintiff's lien upon said property of said defendant, which lien was filed on December 1, 1904, in the office of the recorder of the city and county of San Francisco, state of California (said city being the place where said property is situated), duly verified by oath, and setting forth the description of said property, as follows" (followed by a description of the property sought to be charged), but which does not show what the claim or lien filed with the county recorder contained save the description of the property, fails to set forth a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 509.]

3. COURTS—SUPERIOR COURTS—JURISDICTION.

A superior court has no jurisdiction of an action involving a demand exclusive of interest amounting to \$136.15, Code Civ. Proc. § 76, subd. 3, conferring upon those courts original jurisdiction in all cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to \$300.

Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action by G. C. Davis against Timothy E. Treacy. A demurrer to the complaint was sustained, and, upon plaintiff's failure to amend, judgment was rendered against him, and he appeals. Affirmed.

G. C. Davis, in pro. per. I. Danielwitz and N. H. Hurd, for respondent.

HALL, J. Appeal from judgment entered against plaintiff upon failure to amend his complaint after demurrer sustained. The complaint is at least unique. It is an attempt to set forth a cause of action to foreclose a laborer's lien for labor performed in cleaning windows the value of which is alleged to be \$35, and for time lost of the value of \$24.50 in attempting to collect plaintiff's claim of \$35 against defendant. Plaintiff also asks for attorney's fees and expenses of filing claim of lien, so that the total amount for which he asks judgment exclusive of costs is \$136.15. The demurrer was upon the grounds that the court had no jurisdiction of the subject of the action, misjoinder

of causes of action, and that the complaint stated no cause of action. The court sustained the demurrer upon the grounds of want of jurisdiction and misjoinder of causes of action.

The amount sued for is below the amount required to vest the superior court with jurisdiction by reason of the amount sued for (Code Civ. Proc. § 76), so that, unless the complaint states a cause of action to foreclose a lien under the mechanics' lien law, the court was without jurisdiction of the cause. The right to a mechanics' lien is purely a creature of the statute; and, in order to sustain an action to foreclose such lien, it is essential that the complaint shall show a substantial compliance with the requirements of the statute. *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195. Any one claiming a lien under the mechanics' lien law must file with the county recorder "a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien," etc. Code Civ. Proc. § 1187.

The only attempt to show any compliance with this provision of the statute is contained in paragraph 11 of the complaint, and is in the following words: "That this action is brought in support of plaintiff's lien upon said property of said defendant, which lien was filed on December 7, 1904, in the office of the recorder of the city and county of San Francisco, state of California (said city being the place where said property is situated), duly verified by oath, and setting forth the description of said property, as follows:" (Here follows a description of the property sought to be charged.) There is absolutely nothing in the complaint to show what plaintiff's claim or "lien," as he styles it, filed with the county recorder, contained, save the description of the property sought to be charged, or that it contained anything save such description. Following paragraph 11 of the complaint are other paragraphs containing independent substantive statements, some of which are proper statements to be contained in a claim or statement of demand filed under section 1187 of the Code of Civil Procedure, but there is no attempt to allege that any of them were contained in the claim or "lien" filed with the recorder. The complaint in this respect utterly fails to show a compliance with the provisions of section 1187 of the Code of Civil Procedure, and for this reason fails to set forth a cause of action for the foreclosure of a mechanics' or laborers' lien. The only cause of action stated is one to recover for services rendered of a value less than \$300. Of this action the superior

court had no jurisdiction, for which reason the demurrer was properly sustained.

Judgment is affirmed.

We concur: COOPER, J.; KERRIGAN, J.

8 Cal. App. 413

COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, v. WOLF, Ins. Com'r.

(Civ. No. 528.)

(Court of Appeal, First District, California. June 22, 1908.)

1. STATUTES—PENAL STATUTES—REPEAL—EFFECT.

Under the rule that the repeal of a prior penal statute or of one providing for forfeitures or penalties takes away all remedies for the violation of the law repealed committed before the repeal, unless the remedy is specifically saved, or unless there is vested some private right, the repeal of Pol. Code, pt. 3, c. 3, tit. 1, art. 16, relating to insurance, and the enactment of a new article 16, covering the same subject by Act March 8, 1907 (St. 1907, p. 141, c. 119), section 608 of which declares that, if any foreign insurance corporation doing business in this state shall transfer, or cause to be transferred, to the United States Circuit Court from any court of this state having jurisdiction of the subject-matter any action or special proceeding arising or growing out of any business previously transacted within the state, then the insurance commissioner shall, on receiving a certified copy of the record showing the facts hereinbefore set forth, immediately revoke the certificate of authority, authorizing such company to transact business within the state, operated to prevent past removals made prior to the taking effect of the act of 1907 by a foreign insurance company lawfully doing business within the state from constituting ground for revocation of licenses under the new act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 369, 370.]

2. INSURANCE—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE—LICENSES—REVOCATION.

St. 1907, p. 146, c. 119, § 596, provides that no insurance company shall transact business in the state without complying with all the laws of the state, and thereafter procuring from the insurance commissioner a certificate of authority which shall expire on the 1st day of July after it is issued unless sooner revoked, and must be renewed annually, and section 608 (page 155) declares that, if any foreign insurance company transfers to the United States Circuit Court any action or special proceeding arising or growing out of any business previously transacted within the state, then the insurance commissioner shall revoke its license. *Held*, that where a foreign insurance company authorized to do business within the state removed a cause to the federal court in April, 1907, after such act took effect, a revocation of the insurance company's license therefor would have been only effective to deprive the company of its right to transact business in the state until July 1, 1907.

3. SAME—RIGHT TO NEW CERTIFICATE.

That a foreign insurance company by removing a cause from the state to the federal courts has rendered itself subject to forfeiture of its license prior to July 1, 1907, when the same expired, but no action was taken toward imposing such forfeiture, the company after such date on complying with the law was entitled to a new license authorizing it to transact business within the state.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition for mandamus by the Commercial Union Assurance Company, Limited, of London, against E. Myron Wolf, insurance commissioner of the state of California. Judgment for petitioner, and defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and E. B. Power, Asst. Atty. Gen., for appellant. T. C. Coogan, William H. Orrick, and E. J. McCutchen, for respondent.

COOPER, P. J. Plaintiff, a foreign insurance company, brought this proceeding to procure a writ of mandate to compel the defendant, as state insurance commissioner, to issue to it a certificate or license authorizing it to transact its insurance business in the state of California for the year ending July 1, 1908. The facts were found by the trial court, upon which a judgment was entered, awarding plaintiff the writ as prayed for in its petition. This appeal is from the judgment upon the judgment roll without a bill of exceptions.

It appears to be conceded that the plaintiff was entitled to the writ, unless it had by certain acts forfeited its right to do business in the state of California at the time that it applied for the license or certificate. It appears that in the year 1878 the plaintiff obtained a certificate of authority, in accordance with the statute then in force, authorizing it to transact the business of insurance in the state of California, and thereupon commenced, and thereafter continued to conduct, its business of insurance in the state of California in accordance with the laws of the state. It was then provided, under article 16, c. 3, § 595, pt. 3, tit. 1, Pol. Code, as follows: "It is further enacted that if any action hereafter commenced in any district court of this state by a citizen thereof against a foreign corporation or company doing insurance business in this state and such corporation or company shall transfer or cause to be transferred such action to the United States Circuit Court, the right of such corporation or company to transact insurance business in this state shall thereupon and thereby cease and determine; and the insurance commissioner shall immediately revoke the certificate of such corporation or company authorizing it to do business in this state, and publish such revocation daily for the period of two weeks in each of some two daily newspapers, one published in the city of San Francisco, and the other in the city of Sacramento." The above quoted section remained in force and continued to be the law of this state upon the subject until February 19, 1907.

In December, 1906, an action was pending in the superior court of the city and county of San Francisco against plaintiff by one Gerahty, and upon the motion of plaintiff the said cause was transferred from the said superior court to the United States Circuit Court. By an act approved February 19,

1907, which went into effect immediately (St. 1907, p. 13, c. 20), said section 595 of the Political Code was amended to read as follows: "It is further enacted that if in any action hereafter commenced in the superior court of this state by a citizen thereof against a foreign corporation or company doing business in this state, such corporation or company shall transfer or cause to be transferred, remove or cause to be removed, such action to the United States Circuit Court, the right of such corporation or company to transact insurance business in this state shall thereupon and thereby cease and determine; and the insurance commissioner shall immediately revoke the certificate of such corporation or company authorizing it to do business in this state, and publish such revocation daily for the period of two weeks in each of some two daily papers, the one published in the city of San Francisco and the other in the city of Sacramento." In November, 1906, the Crown Distilleries Company, a corporation, commenced an action against plaintiff in the superior court of the city and county of San Francisco; and on the 7th day of March, 1907, the plaintiff caused the said action to be transferred and removed from said superior court to the United States Circuit Court. By an act approved March 8, 1907, which went into effect immediately (St. 1907, p. 141, c. 119), article 16, c. 3, pt. 3, tit. 1, Pol. Code, and each and every section thereof, were repealed, and a new article 16, covering the same subject of insurance, was enacted. In the place of the repealed section 595, this latter act contains section 608, which reads as follows: "If any foreign insurance company doing business in this state shall transfer or cause to be transferred to the United States Circuit Court, from any court of this state having jurisdiction of the subject matter, any action or special proceeding arising or growing out of any business previously transacted in this state, then the Insurance Commissioner shall have the power, and it shall be his duty, upon receiving a certified copy of the record showing the facts hereinbefore set forth to immediately revoke the certificate of authority, authorizing such company to transact insurance business in this state." This latter act provides for the issuing of certificates of authority by the insurance commissioner to all companies, corporations, and persons, such certificates to expire on the 1st day of July after their issuance, and must be "renewed annually." Section 596 thereof provides as follows: "No company shall transact any insurance business in this state without first complying with all the provisions of the laws of this state, and thereafter procuring from the insurance commissioner a certificate of authority, and continuing to comply with the laws of this state." The act, although repealing all the prior sections of the Political Code, contains a saving clause as to all causes of action that had

accrued or that had been commenced for assessments, penalties, and fines under the repealed law. After it went into effect, and on the 20th day of March, 1907, Brown Bros. Company commenced an action in the superior court of the city and county of San Francisco against this plaintiff; and thereafter, in April, 1907, plaintiff caused said action to be transferred to the United States Circuit Court.

Under the view we take of this case, it is not necessary to discuss the various constitutional objections raised as to the act of March 8, 1907; nor is it necessary to discuss the provision of section 595 of the Political Code in force at the time the first action was transferred; nor the provision of the same section as amended and in force at the time the second action was transferred. It is sufficient to say that at the time the act of March 8, 1907, went into effect the plaintiff was doing business in the state of California, and its license had not been revoked, nor was any action pending to deprive it of its right to do business in the state. No cause of action appears to have accrued against it for any penalty, assessment, or fine, and no saving clause is contained in the act for any other delinquency, or for having gone into court and asked the right which the law gave it to have pending cases removed to the United States Circuit Court. It is elementary that the repeal of a prior statute penal in its nature, or which provides for forfeitures or penalties, takes away all remedies as to violations of the law repealed committed before the repeal, unless the remedy is specifically saved or reserved, or unless there is vested some private right. We do not find in the entire act of March 8, 1907, anything showing an intent to prevent any company, corporation, or person from procuring a certificate on account of any prior delinquency. The act by its terms makes provision as to future transfers, and not as to any transfer that had already been made. Forfeitures and penalties are not favored; and, in the absence of the plain mandate of the statute, a company will not be refused permission forever to do business in the state of California, for the simple reason that under a prior statute it committed a lawful act which at the time would have justified the revocation of its license. There is nothing in the entire scope of the act which would justify such contention, or which even tends to show that the Legislature had such a thing in mind. The act provides that the insurance commissioner may revoke the certificate of authority of any company that becomes insolvent; but it provides that if, within 90 days after the receipt of the notice of revocation the company shall repair its capital stock so as to become again solvent, "the commissioner may issue a new certificate of authority in the manner and to the same effect as the original certificate of authority." It provides certain conditions and state-

ments to be made and performed by a foreign insurance company before it shall be allowed to transact business in the state; but no mention is made as to any past transgression by the company. It provides that no company shall transact any insurance business without first complying with all the provisions of the laws of this state, which means, in effect, that any company which complies with all the provisions of the laws of the state shall be entitled to a certificate of authority to do business in the state.

This brings us to the question as to the effect of the act of plaintiff in procuring the case of Brown Bros. & Co. to be transferred to the United States Circuit Court in April, 1907, after the present act went into effect. Under section 608 of the act herein quoted, it was made the duty of the insurance commissioner "upon receiving a certified copy of the record showing the facts hereinabove set forth to immediately revoke the certificate of authority." It does not appear that any certified copy of the record, showing the transfer of the action of Brown Bros. & Co., was ever received by the insurance commissioner, or that he ever revoked the certificate of authority which had prior thereto been given to plaintiff. Even if the commissioner had received a certified copy of the record, and had revoked the certificate of authority, it would only have deprived the plaintiff of the right to transact its insurance business in the state until July 1, 1907. The license or certificate of authority under the act in every case expires on the 1st day of July after its issue, and must be renewed annually. Now, we cannot by judicial construction add to section 608 any provision not contained therein. It contains a provision in the nature of a penalty or forfeiture; that is, if the foreign corporation does not submit any cause of action brought against it to the jurisdiction of the state, but has such cause transferred to another tribunal, the insurance commissioner "may revoke the certificate of authority." The act of revoking can only deprive the plaintiff of that which the commissioner had already given by issuing the certificate. The certificate is to be issued in each case only up to the 1st day of the following July. It necessarily follows that the act of revoking would take away the authority up to the 1st day of the following July. The commissioner under the act is authorized to give the certificate upon the applicant complying with the law, and it is made his duty to take away that which he gave—the certificate—as a penalty for having a cause transferred from the jurisdiction of the state courts. No other penalty is prescribed. We do not know but that the Legislature intended no other. In any event we cannot insert that which we fail to find in the statute.

It appears by the findings, which are not controverted, that "prior to the 1st day of July, 1907, plaintiff duly filed in the office

of the insurance commissioner of said state of California a copy of its articles of incorporation and charter duly certified by the proper custodian thereof, and the certificate required by subdivision 2 of section 607 of the Political Code of said state; the statement required by sections 611 and 612 of said Political Code; the designation of agent and stipulation required by section 616 of said Political Code; a good and sufficient bond in the penal sum of \$20,000 as required by section 623 of said Political Code; and also an application in due form for a certificate of authority, authorizing it to transact the business of fire and marine insurance in said state during the year ending July 1, 1908. * * * That plaintiff is not, and was not at the time of the filing of the documents hereinbefore referred to, in arrears or indebted to the state of California or to any county or city and county thereof for fees, licenses, taxes, assessments, fines, or penalties of any kind or otherwise; nor was plaintiff at any of said times, nor is it now, in default for failure to comply with any of the laws of said state regarding the government or control by said state of said plaintiff." Section 616 of the Political Code provides that the stipulation must be as follows: "The [giving name of company] does hereby stipulate and agree that in consideration of the permission granted by the state of California to it to transact insurance business in this state, that if at any time said company shall leave this state, or cease to transact business in this state, or shall be without any agent in said state upon whom any notice, proof of loss, summons or other legal process may be served, then in any action or proceeding arising out of any business or transaction which occurred in this state service of any notice provided by law, or insurance policy, or proof of loss, summons or other legal process, may be made upon the insurance commissioner, and such service upon the commissioner shall have the same force and effect as if made upon the company." We conclude that the plaintiff was entitled to the certificate, and that it was the duty of the defendant to issue it.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 378

KENNEDY v. MERICKEL. (Civ. 503.)

(Court of Appeal, Second District, California.
July 19, 1908.)

1. BROKERS — CONTRACT OF EMPLOYMENT — WRITING—STATUTES.

Civ. Code, § 1624 (6), providing that an agreement authorizing or employing a broker to purchase or sell real estate for a compensation or commission shall be invalid unless some note or memorandum thereof is in writing subscribed by the party to be charged or by his agent, does not require that there be a written contract intended by the parties as an obliga-

tion, but only that a note or memorandum in writing shall be made sufficient to show the authorization or fact of employment, subscribed by the party to be charged, it being sufficient if it shows that the broker is authorized to find a purchaser ready, willing, and able to make an exchange of property or one with whom an exchange is actually made.

2. SAME—EVIDENCE.

Where defendant conducted certain correspondence with plaintiff, looking to an exchange of property to be brought about through the acts of plaintiff and another as brokers, and in the second letter plaintiff called defendant's attention, not only to the fact that plaintiff expected commissions, but to the amount he expected to receive, and suggested that L. was entitled to a portion thereof, to which defendant replied that he expected to pay L. and plaintiff commissions provided plaintiff was working with L. in handling defendant's property, the amount of which should be governed by the laws governing in defendant city, such letters constituted a sufficient memorandum of plaintiff's contract of employment to satisfy Civ. Code, § 1624 (6), requiring some note or memorandum of a broker's employment contract in writing in order that the same should be enforceable.

3. SAME—ACTION FOR COMMISSION—PARTIES.

Where two real estate brokers represented defendant in an exchange of property but they were not employed jointly, one of them was not a necessary party to a suit by the other to recover commissions for his services.

4. APPEAL AND ERROR—APPEAL FROM JUDGMENT—SCOPE OF REVIEW—ORDER DISSOLVING ATTACHMENT.

Under Code Civ. Proc. § 956, declaring that, on an appeal from a judgment, appealable orders are excepted from the matters which the court is required to review, and section 963, declaring that an order dissolving an attachment is an appealable order, an order discharging an attachment after motion for nonsuit had been granted and before entry of judgment cannot be reviewed on appeal from the judgment alone.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by William Kennedy against W. D. Merickel. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

H. M. Barstow and Collier & Carnahan (John D. Pope, of counsel), for appellant. Purington & Adair, for respondent.

TAGGART, J. Action to recover commissions for exchange of real estate. Judgment was for defendant on a nonsuit. Plaintiff appeals from the judgment, and brings up the evidence in a bill of exceptions.

Plaintiff is a real estate broker residing in Los Angeles city, and defendant a resident of Minneapolis, Minn. The latter was the owner of real property in the last-named city of the estimated value of \$175,000, which he desired to exchange for ranch property in California. Through the efforts of plaintiff, an exchange for property in Riverside county, known as the Everest Rancho, was effected. Defendant refused to pay plaintiff for such services, and this action is brought to recover the sum of \$4,400 as a reasonable compensation for his services in bringing about the exchange of property for defendant. At the close of plaintiff's case, the court granted a motion for a nonsuit upon the grounds that the evidence failed to show

an agreement in writing authorizing or employing plaintiff to make such exchange, as required by subdivision 6, § 1624, Civ. Code, that plaintiff failed to show what his commission was according to the terms of the contract, and because one J. H. Lawton, a necessary party plaintiff, had not been made a party to the action. The rule declared by section 1624 of the Civil Code that "the following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation, or a commission"—has been frequently applied and construed. The cases doing this have generally rested upon the opinion rendered in *McCarthy v. Loupe*, 62 Cal. 299. From that opinion it appears that before the Code provision was adopted, in order that a broker might recover commissions for effecting a sale of real estate, it was necessary that he prove an express contract of employment, or, in the absence of an express contract, that he might recover upon proof of a usage regulating transactions of this kind, but that the law would never imply a contract of employment. The effect of the Code, then, was to require that the authorization or fact of employment should appear from a writing subscribed by the party to be charged (*Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130), and it has been held that usage is no longer admissible to prove this fact (*Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53). The provision that the employment or authorization shall be in writing does not require that it be by a written contract intended by the parties as an obligation. It may be merely a note or memorandum. *Lindley v. Fay*, 119 Cal. 239, 51 Pac. 333. It is not requisite that it shall be an instrument by the terms of which the agent is empowered to so bind the principal as to support an action for specific performance. *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237. It is sufficient if it shows that the broker is authorized by the principal to find a purchaser who is ready, willing, and able to exchange (*Merriman v. Wickersham*, 141 Cal. 570, 75 Pac. 180), or one with whom an exchange is actually made (*Clark v. Allen*, 125 Cal. 276, 57 Pac. 985). As said in *Cody v. Dempsey*, 86 App. Div. 335, 83 N. Y. Supp. 899, there is no definite requirement, except that the authority to act in the matter shall be evidenced by a writing. All the statute requires is written authority. While, as said in *Lambert v. Gerner*, supra, a person cannot make himself the agent of another simply by writing letters and acting as agent without the assent or consent of the latter, it does not require the citation of authorities to establish that a writing in the form of a letter, or writings in the shape of a correspondence, may be sufficient under the statute. A writing signed

by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purposes of the sale is a sufficient compliance with the statute. *Imperato v. Wasboe*, 47 Misc. Rep. 150, 93 N. Y. Supp. 489. The purpose of the statute being to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which was possible under the old rule, it is sufficient if it be shown that the party to be charged has recognized the broker as his agent by a writing subscribed by him. *Toomy v. Dunphy*, supra.

We do not think it necessary to accept the view of the New York Supreme Court in the case of *Getzelsohn v. Donnelly*, 50 Misc. Rep. 164, 98 N. Y. Supp. 213, cited by appellant, that a letter purporting on its face to be written to the plaintiff as a purchaser can be shown by parol to be intended as an employment or authorization of him as an agent in determining this question as applied to the facts of the case at bar. That it appears from the letter of October 14th that the defendant knew that plaintiff was interesting himself in some capacity in bringing about a sale of the property, and by the same letter invited plaintiff to write him again and make him a proposition, was not alone sufficient to satisfy the statute. This letter, which was introduced in evidence, was as follows: "Minneapolis, Minn., Oct. 14th, 1905. Wm. Kennedy, Los Angeles, Cal.—Dear Sir: Yours of Sept. 22nd. also Oct. 7th, at hand. I have been out of the city for the last three weeks, consequently the delay in answering. Your letter written in confidence to me I will answer in confidence. Neither one of the agents you refer to in your letter are what you call reliable people, and if I were going to make an exchange for property in your state would prefer to deal with you direct. I have had no proposition submitted to me by Mr. Lawton of St. Paul since receiving your letters. In referring you to a bank in the city here would refer you to the Northwestern National Bank. If I have to deal through an agent here think I would prefer Mr. Lawton to Tibbetts. Hoping to hear from you again with a proposition, Yours truly, W. D. Merickel. 2009 Bryant Ave. South." Neither was it sufficient when considered only in connection with the letters of September 22d and October 7th, which are mentioned in it. The negotiations between the parties up to the date of October 14th showed merely that plaintiff had sent certain propositions to defendant's agent who had failed to deliver them and that plaintiff desired to get into direct communication with the principal. There is absolutely nothing to show employment or intention to employ plaintiff in either or any of these letters. By the letter of October 14th, however, defendant invited a proposition from plaintiff, and he received it in the letter of October 19th written by

plaintiff. In this letter the latter says: "We do not represent Mr. Everest. His property comes to us through other brokers, and in the event of a deal we would be obliged to look to you for the usual commission." This position and declaration of plaintiff are brought home to defendant and emphasized in the succeeding letters of plaintiff to defendant dated, respectively, October 26th and October 27th. The transactions and negotiations mentioned in these letters disclosed a condition of affairs brought about by plaintiff which induced defendant to telegraph on November 1st, "I think if you can hold trade will leave here 15th November," and to write a letter to plaintiff to the same effect on the same day.

Little stress is to be laid upon the use of the words "your man," in defendant's letter, as affecting the question of whether or not plaintiff was conducting the negotiations on behalf of defendant. This is a well-known form of expression which is applied to the customer of a broker whether seller or purchaser, regardless of which party the broker represents. From the viewpoint of persons seeking to establish one or the other theory in the case, it would or would not indicate certain intentions, but from the disinterested standpoint of a court it would give little or no aid in solving the question before us. In response to plaintiff's second letter, under date of October 27th, calling defendant's attention, not only to the fact that plaintiff expected commissions, but the amount he expected to receive, and the suggestion that Mr. Lawton was entitled to a portion of these commissions, defendant writes: "As to the commissions in the deal, if made, will say that I expect to pay to Mr. Lawton and you, providing you are working with Mr. Lawton in handling my property, a regular commission of the amount allowed by the laws governing my city." The proposition of the Everest Rancho, as to which plaintiff advised defendant he would expect commissions, was shown by plaintiff's evidence to have been consummated through his efforts. A proposition in writing direct from Everest was procured by plaintiff at the request of defendant, and other services rendered in connection with the deal, at the written request of defendant. It is not necessary to state the language used in the correspondence, other than as above mentioned, to show that there was sufficient acknowledgment by defendant in writing of the employment of plaintiff to make the exchange to satisfy the statute and entitle the plaintiff to recover his compensation for services rendered as a broker. Much of the later correspondence related to the amount of commission to which plaintiff was entitled, and as to its division with Mr. Lawton. The plaintiff also testified to interviews with defendant relating to the same subject. It is not necessary that the writing required by the statute shall either state the amount of the commission, nor

that the employment is for a compensation. *Toomy v. Dunphy*, 86 Cal. 642, 25 Pac. 130. The complaint counts upon the reasonable value of the services. This is in accordance with the evidence. Defendant did not accept plaintiff's proposition of \$4,400, and plaintiff did not accept defendant's proposition of "the amount allowed by the laws governing my city" (Minneapolis). There was then no express contract as to compensation, and, where this is the case it is an agreement to pay what the service is reasonably worth. *Ford v. Brown*, 120 Cal. 551, 52 Pac. 817. Plaintiff and two other witnesses testified to the value of the services rendered by plaintiff. The value of the services was to be determined by the market in which the contract was made and to be performed, and the property sold—that is, Los Angeles—and the evidence was as to the worth of the services in that city.

Mr. Lawton was not a party necessary to an action by plaintiff to recover for his services. If Lawton were entitled to receive any of the commissions, it seems hardly necessary to say that plaintiff could not recover that which was due Lawton. They were not employed jointly, and plaintiff's evidence was to the effect that the value of the services rendered by him alone was the amount for which he asked judgment. The granting of the nonsuit was error and the judgment should be reversed.

Both parties discuss as if before this court on this appeal from the judgment alone an order releasing an attachment made upon the motion of defendant's counsel after the motion for a nonsuit had been granted and before the entry of the judgment in the case. An order dissolving an attachment is an appealable order (Code Civ. Proc. § 963), and upon an appeal from a judgment appealable orders are expressly excepted from the matters which this court shall review (Code Civ. Proc. § 956).

Judgment reversed and cause remanded.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 372

PEOPLE v. MORLEY et al. (Cr. 87.)

(Court of Appeal, Second District, California.
June 19, 1908. Rehearing Denied by
Supreme Court Aug. 17, 1908.)

1. INDICTMENT AND INFORMATION — DESCRIPTION OF OFFENSE—NAME.

Where the specific acts alleged in an information constituted the offense of willfully and maliciously burning personal property with intent to defraud the insurer denounced by Pen. Code, § 548, it was immaterial that the information erroneously designated the offense as arson.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 180.]

2. CRIMINAL LAW—VERDICT—INFORMATION.

Where an information charged defendants with willfully burning certain property with intent to defraud the insurer, the fraud alleged being the burning of insured property, a verdict finding defendants guilty of willfully and ma-

liciously burning the personal property named in the information, with intent to defraud the insurance company as charged in the information, sufficiently found that the property burned was insured.

3. ARSON—BURNING INSURED PROPERTY—INSURANCE BY DE FACTO CORPORATION.

In a prosecution for willfully burning personal property with intent to defraud the insurer, proof that the insurer was a de facto corporation, and acting as an insurance company, was sufficient proof of the insurer's existence as a corporation.

4. CORPORATIONS—DE FACTO CORPORATIONS—PROOF.

Where a policy insuring certain personal property against loss by fire on its face showed that the insurer was incorporated A. D. 1845, and a witness testified that he was in the employ of the Royal Insurance Company [insurer], a corporation, the evidence was sufficient to establish the de facto character of the insurance corporation.

5. ARSON—BURNING INSURED PROPERTY—ELEMENTS OF OFFENSE.

Pen. Code, § 548, declares that every person who willfully burns any property which is insured against loss or damage by fire with intent to defraud the insurer is punishable, etc. *Held*, that the offense is complete, though the policy be invalid, if defendants believed it to be valid, and burned the property with intent to collect on the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arson, § 3.]

6. SAME—CORPUS DELICTI—EVIDENCE.

In a prosecution for willfully burning certain personal property with intent to defraud the insurer, evidence *held* to sufficiently establish the corpus delicti prior to the introduction of certain confessions.

7. CRIMINAL LAW—ADMISSIONS.

In a prosecution for burning personal property with intent to defraud the insurer, inculpatory statements, made by defendant's co-defendant in his presence and not denied by him were admissible as admissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 898.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Crystobelle Morley and another were convicted of burning certain property with intent to defraud the insurer thereof, and they appeal. Affirmed.

Earl Rogers, Paul W. Schenck, W. H. Dehm, and A. C. Hurt, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendants from a conviction and an order denying a new trial.

The information filed charged the defendants jointly "of the crime of arson committed as follows": That said parties (naming them) "on the 3d day of August, 1907, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously and maliciously burn, injure, and destroy certain property, to wit, certain household furniture and other personal effects then and there in house [premises described], which was then and there the property of Henry Sanderson, and was then and there insured against loss and damage by fire by the Royal

Insurance Company of Liverpool, a corporation, with intent then and thereby to defraud, prejudice, and damage the said Royal Insurance Company of Liverpool, a corporation; contrary," etc. A demurrer to the information was overruled. A joint trial followed, which resulted in a verdict as follows: "We, the jury in the above-entitled action, find the defendants guilty of willfully and maliciously burning the personal property named in the information with intent to defraud the insurance company as charged in the information." Defendants moved in arrest of judgment, and for an order to have a judgment of acquittal entered, both of which were denied, as was a motion for a new trial.

Appellants contend that the information is defective, in that the defendants are charged with arson, while the particular facts as set out charged a crime amounting to an offense under section 548 of the Penal Code. The precise question involved in this criticism of the information has been determined by our Supreme Court in *People v. Eppinger*, 105 Cal. 38, 38 Pac. 538, wherein it is held that, when the specific acts constituting the offense with which defendants are charged are set forth in the information with sufficient clearness to show that the transaction is under a particular section of the Penal Code, the designation in the information of the offense by some other name is immaterial; and it is unnecessary here to consider whether or not the defendants have been legally committed by a magistrate, as a prerequisite to the filing of the information, for no motion to set aside the information upon that ground was made, and the same, under section 996 of the Penal Code, was therefore waived.

The appellants further contend that the court erred in denying the motion for acquittal and in arrest of judgment. These motions were based upon the claim that the verdict was insufficient to warrant the court in pronouncing judgment. It is true that the verdict is, to a degree, informal. There is no express finding that the property destroyed was, in fact, insured. But the verdict should be construed in connection with the pleadings and the information (*People v. Tilley*, 135 Cal. 62, 67 Pac. 42); and construed so as to give effect to the manifest intention of the jury (*People v. Holmes*, 118 Cal. 448, 50 Pac. 675). The information charged that the property so burned was insured by a designated corporation. The jury by the verdict finds that the property named in the information was by defendants willfully and maliciously burned with intent to defraud the insurance company, as charged in the information. The fraud upon the company as charged in the information was the burning of insured property. The verdict, when read in connection with the information, is certain in the intent to find that the property burned was insured. *People v. Millan*, 106 Cal. 323, 39 Pac. 605. It is insisted by ap-

pellants that this inference is not warranted by the proof adduced upon the trial. That the property insured belonged to defendant Sanderson is not questioned. The insufficiency of the evidence to show that it was actually insured is urged upon the ground only that parol proof of the existence of the corporation was all the evidence presented. Proof that it was a de facto corporation and acting as an insurance company is sufficient. *People v. Hughes*, 29 Cal. 260; *People v. Ah Sam*, 41 Cal. 653; *People v. Goldsworthy*, 130 Cal. 602, 62 Pac. 1074. The policy of insurance issued to and received by defendant Morley, which is in the record, and which appears never to have been by her transferred, stated upon its face that the insurance company was incorporated A. D. 1845, and a witness testified that he was in the employ of the Royal Insurance Company, a corporation. This was sufficient evidence to establish the de facto character of the insurance corporation.

If appellants by their contention that it was not shown that the burned property was insured against loss or damage by fire intend to urge that neither of the defendants could have recovered on the policy, the answer to this is that the belief of defendants that it was binding was clearly established and their intent to defraud fully proven. The crime may be complete, though the policy be invalid, if defendants believed it to be valid and committed the act with the intent to collect on the policy. The policy was not introduced in evidence to prove that accused held a binding policy, but to show the intent with which the house was burned. *McDonald v. People*, 47 Ill. 533. If the inability of the defendant to recover on the policy could be made an effective defense to a criminal prosecution, this would be available to every policy holder who burns up his property to secure the amount of the policy of insurance thereon. The fact of setting fire to the insured property by the policy holder invalidates all fire insurance policies, and would prevent a recovery in every case, if this were the rule. The policy holder would then only have to prove the act which constitutes his guilt in order to escape punishment. In the case at bar the successive steps of sale, demand of possession by Sanderson, burning of the property, and attempt to collect the insurance, all tend to establish the intent to realize by these acts. The failure of defendant Morley to assign the policy and the inability of Sanderson to collect in his own name become immaterial. A valid policy was issued, and defendants believed it continued to be a valid obligation of the company when the goods were destroyed. The effect of the law or the terms of the policy to render the policy invalid by reason of the acts of the defendants cannot shield them from punishment for the crime.

The questions of what persons are preju-

diced or what persons are benefited by the commission of a crime of this character are merely collateral ones. The guilt of the accused does not depend upon the legal obligations arising out of the policy. *United States v. Amedy*, 11 Wheat. (U. S.) 409, 6 L. Ed. 502; *State v. Tucker*, 84 Mo. 25; *People v. Hughes*, supra. This is evidenced also by the language of section 548 itself. No element of advantage to the defendant is made a part of the offense, and the person who burns insured property with the intent to defraud is guilty whether the property or possession be his or that of another. It was the duty of the trial court to construe the verdict so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language considered in connection with the pleadings and evidence. *Johnson v. Visher*, 96 Cal. 310, 31 Pac. 106. The trial court construed the verdict as a general one, and we think such construction permissible.

Appellants contend further that the corpus delicti had not been proven before alleged confessions were received in evidence, and error is claimed on account thereof. There is in the record competent evidence, which was received before any admissions or confessions were introduced, which tended to show that the destruction of the property was the work of an incendiary, and facts and circumstances pointing to defendants' connection therewith. It is unnecessary to recite all of this testimony, but it is sufficient to call attention to the fact that a few minutes after the fire was discovered, which was about 1:30 a. m., a part of the furniture was found piled together in one room; that defendant Sanderson was seen running away from the fire; that he told a witness that no one was in the house; that this defendant two hours thereafter was found with serious burns on his person some miles from the scene of the fire, and, when requested by an officer to give his name, refused to do so, made contradictory statements as to why he was in such a condition and in that locality at such an hour, resisted an officer who sought to accompany him in quest of a physician, and finally gave an assumed name when taken to the hospital. It further appears that the policy of insurance had been taken out only a few days before the fire; that one of the defendants, Mrs. Morley, who lived in the house, was found almost entirely dressed a few minutes after the fire; that certain personal effects of this defendant which had not been transferred by her to Sanderson were found in an outhouse; that both defendants made contradictory statements as to the origin of the fire. All of these, with other suspicious circumstances, tended to establish that a crime had been committed.

It is further insisted that, assuming the correctness of the ruling in admitting such

confession, as to defendant Sanderson such confession by an accomplice was insufficient to warrant his conviction. It must be remembered that all of the admissions and statements made by Mrs. Morley, codefendant of Sanderson, in relation to the fire and her connection and that of Sanderson therewith, were made in Sanderson's presence. She there stated that Sanderson applied the match, and gave a detailed account of Sanderson's connection with the fire. Sanderson denied none of these statements made by Mrs. Morley, except to deny that he knew the property was insured, and stated that the fire was caused by the explosion of a lamp. But, assuming that Sanderson's explanation as to the origin of the fire is to be taken as a denial of all of Mrs. Morley's statements in his presence, still there is independent evidence sufficiently corroborative of the statements of Mrs. Morley to warrant the jury in returning a verdict of guilty.

The instructions refused, and on account of which refusal error is claimed, all relate to the charge of arson. Such instructions were inapplicable under the information, which specified another and distinct offense and in reference to which all evidence was confined.

We perceive no error in the record prejudicial to defendants, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 355

In re DAVIS' ESTATE. (Civ. 455.)

(Court of Appeal, Third District, California.
June 8, 1908.)

1. EXCEPTIONS, BILL OF—CERTIFICATE—CONSTRUCTION.

Where the certificate to a transcript on appeal from an order fixing an administrator's compensation declared that the judge had examined the contents "of the within transcript on appeal in said matter, and find that the papers and orders therein set forth and contained are copies of the original papers and orders filed and used upon the hearing and in the various proceedings" of the estate, the certificate sufficiently showed that the papers and orders certified were in fact all the papers and orders so used.

2. EXECUTORS AND ADMINISTRATORS — COMPENSATION OF ADMINISTRATOR — DISTRIBUTION IN KIND.

Code Civ. Proc. § 1618, provides that where the property of an estate is distributed in kind, and the distribution involves no labor beyond the custody and distribution thereof, the administrator's compensation shall be computed on all the estate above \$20,000 at one-half of the rate fixed by such section. Decedent's property consisted of an undivided one-half of the estate of her brother D., then in course of administration in another county, consisting of real estate in the possession of D.'s administrator, who sold the land for partition and paid the proceeds of decedent's interest to her administrator, which was by him distributed. Held that, though decedent's administrator had inventoried such interest as real estate, he nevertheless received and accounted therefor in money, and was therefore only entitled to one-half commissions, nor was such

right affected by the fact that he was made a party to the partition suit; it not appearing that he was put to any extra trouble, or expense thereby.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Judicial accounting by the public administrator of Tulare county as administrator with the will annexed of the estate of Jane Davis, deceased. From an order fixing the administrator's compensation, he appeals. Affirmed.

Hannah & Miller and H. T. Miller, for appellant. Heller, Powers & Ehrman, Pillsbury, Madison & Suto, and Carter P. Pomeroy, for respondent.

HART, J. The facts of this case are well stated in the brief of counsel for the respondents, George W., Samuel D., Edward, and William G. French as follows: "Jane Davis died on the 19th day of September, 1904, in the state of New York. On the same day the appellant, the public administrator of Tulare county, applied in this state for letters of administration upon her estate. On December 24, 1904, appellant was appointed administrator, and on November 12, 1906, was appointed administrator with the will annexed. The estate of said decedent consisted wholly of an undivided one-half interest in the estate of her brother, Samuel Davis, deceased, then in course of administration in the courts of the city and county of San Francisco. The latter estate was distributed on November 13, 1906, and the undivided one-half thereof came into the 'possession' of appellant on the 28th day of December, 1906. On the 14th day of January following appellant filed his final account and petition for final distribution of the undivided interests of the heirs of Jane Davis. It appears that the undivided one-half interest of Jane Davis in certain real estate belonging to the estate of Samuel Davis was inventoried by appellant as real estate. Subsequently, and while in the possession of the executor of Samuel Davis, the land was sold at a partition sale, and the share of the cash proceeds belonging to the estate of Samuel Davis turned over to his executor. Upon distribution of the latter estate, one-half of the proceeds was 'distributed' to appellant as administrator of the Jane Davis estate." The appellant, in his final account, upon the theory that the estate of said Jane Davis was not "distributed in kind" (section 1618, Code Civ. Proc.), asks for commissions aggregating \$10,517.66. To this claim the respondents objected on the ground that the property of the estate "is distributed in kind and the administration of said estate involved no labor beyond the custody and distribution of the same by the said administrator," etc. The court, in its decree settling the account, having found that the estate was "being distributed in kind and involved no labor beyond the custody and distribution of the same," reduced the claim for the administrator's commissions, allowing him only the

sum of \$5,792 as compensation for his services as such administrator. The administrator was also allowed the sum of \$10,792 to be paid to his attorneys as counsel fees. The appeal is by said administrator from that portion of the decree fixing and settling his compensation.

Objection is first urged against the consideration of the record by this court upon the ground that the transcript on appeal does not contain the evidence received at the hearing and upon which the court based its finding and decree fixing the compensation of the administrator. In other words, it is contended that none of the papers, independent of those constituting the judgment roll, used at the hearing and comprising the evidence upon which the court acted in fixing and allowing the administrator's commissions, are authenticated by a bill of exceptions, as required by rule 29 of this court. 78 Pac. xii. We think the objection is untenable. In the case of *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491, the judge of the trial court merely declared, over his signature, as the judge who tried the case, that certain affidavits were used on the hearing of the motion for a new trial. The clerk of the court also certified that certain other affidavits were used upon said motion. The Supreme Court in that case, among other things, says: "A bill of exceptions, settled as directed by section 651 of the Code of Civil Procedure, would contain all the affidavits upon which the judge acted in making the order, but the indorsement by him upon certain affidavits that they were used at the hearing of the motion does not make them the record of the papers upon which the motion was heard, since it does not appeal thereby that these were all the papers used at the hearing"—citing *Shain v. Eikerenkotter*, 88 Cal. 13, 25 Pac. 966. In the case at bar the judge in his certificate declares that "I have examined the contents of the within transcript on appeal in said matter, and find that the papers and orders therein set forth and contained are copies of the original papers and orders filed and used upon the hearing and in the various proceedings of said estate." While the judge's certificate does not in so many words state that the papers and orders set forth in the transcript are all the papers and orders used in the proceeding, it is clear that by the employment of the definite article "the" as descriptive of the papers and orders thus used the judge intended to, and does, certify that said papers and orders were in fact all the papers and orders so used.

Section 1618 of the Code of Civil Procedure, *supra*, provides that "when no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows," and then follow the commissions to which such executor is entitled, graduated in amount according to certain designated sums constituting the total value of the estate. The latter part of the

same section also provides: "Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of twenty thousand dollars, at one half of the rates fixed in this section."

The controversy between the appellant and the respondents arises out of a difference of opinion as to the true meaning of the quoted part of the section of the Code of Civil Procedure to which we have just referred. The contention of the appellant is that, notwithstanding the fact that the undivided one-half interest of Jane Davis in certain realty belonging to the estate of Samuel Davis, deceased, was sold by the executor of the latter estate while it was still in his possession as such executor, and the proceeds thereof in cash turned over to appellant, as the administrator with the will annexed of the estate of Jane Davis, deceased, the distribution of the last named estate, consisting of the money so received, was not "in kind," and that, therefore, he is entitled to commissions computed upon the basis upon which compensation is allowed in estates, the property of which is not distributed in the form in which it is received into the possession of executors or administrators, and which "involves labor beyond the custody and distribution of the same." This contention is founded upon the fact that the appellant included in his inventory of the property of the estate of Jane Davis her devised interest in the real estate belonging to the Samuel Davis estate, which at the time of said inventory was yet in process of administration; it being obviously appellant's theory that in so returning such interest as a part of the estate of his testate the same, in the form of realty, constituted the amount, or a portion thereof, of the estate "accounted for by him," within the meaning of said section 1618 of the Code of Civil Procedure. We cannot agree with the contention of the appellant. We think the law plainly contemplates that an executor or administrator shall receive as his compensation for services performed as such officer commissions based upon the value of property which he has taken into his possession, and which, having been so taken into possession, has been "accounted for." *Estate of Simmons*, 43 Cal. 543; *In re Ricaud*, 70 Cal. 71, 11 Pac. 471. In the *Simmons* Case the court says: "When he [the administrator] shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value. Unless he take it into possession, he is not charged in his account with its value. He may, and doubtless would, incur a responsibility, should he fail to take it into possession when he lawfully might, if by such failure it should become ultimately lost to those entitled to its benefits; but, as affording a basis for the allowance of commissions, the value of the estate which has been taken into possession, and having

been in possession has been accounted for, is alone regarded."

In the case at bar, the evidence shows that the interest of Jane Davis in the land here referred to was, at the time of appellant's appointment as administrator, lawfully in the possession of the executor of the estate of Samuel Davis, deceased; that it became necessary that all said land should be sold by the executor of Samuel's estate in order to distribute said estate according to the disposition made thereof by the will of said Samuel; that said sale was conducted, under a decree of partition of the real property, by said executor of Samuel's estate, and that the latter estate was distributed on November 13, 1906, and that the undivided one-half thereof came into the possession of appellant on the 28th day of December, 1906; that on the 14th day of January, 1907, the appellant, as administrator, etc., of the estate of Jane Davis, deceased, filed his final account and petition for the distribution of said estate. Thus, it is to be observed, the appellant at no time during the administration of Jane Davis' estate ever had possession of her interest in the lands devised to her by Samuel Davis, and that he distributed her estate in the form in which he received possession of it. In other words, there was no change in the character of Jane Davis' estate from the time appellant as administrator took possession of it up to the time of the entry of the decree of the distribution thereof. It is therefore plainly to be seen that, within the real meaning of the language of section 1618 of the Code of Civil Procedure, the property of the estate of Jane Davis as distributed was the same in character as when the possession thereof was received by the appellant, and that the appellant bestowed upon it no labor beyond that involved in its custody and distribution. The "labor" involved in the transaction resulting in the conversion of Jane Davis' interest in the lands of Samuel's estate into cash necessarily, under the law, devolved upon the executor of the estate whence such interest came, for, as we have seen, said executor was the lawful custodian and possessor of all the estate of Samuel Davis, and of which this land constituted a part, until said estate was distributed. And, when said Samuel's estate was distributed, the interest of Jane Davis therein was distributed in the character of money, and not in that of realty. The property, therefore, "accounted for" by appellant, within a reasonable interpretation of the language of the Code section, was the money received by him from the executor of Samuel Davis' estate as the proceeds of the sale of Jane's interest in the lands.

We are unable to find any support for appellant's position in *Estate of Cudworth*, 133 Cal. 462, 65 Pac. 1041. In that case the evidence established that the executor expended labor in the management of said estate and the property thereof beyond the mere custody and distribution of the same; that the ex-

ecutor found it necessary, during the course of the administration of the estate, to surrender certain stock and bonds coming into his possession as part of the assets of the estate in exchange for new issues; and that before doing so, he was required to make, and he did make, a thorough and careful investigation of the affairs of the corporations. Besides, he collected and realized on many of the promissory notes belonging to the estate, made diligent efforts to collect notes due, gave much personal time and attention to the condition and protection of 20 or more tenements belonging to the estate, bestowed labor upon their repairs, and protected the estate against suit to quiet title brought against him in his official capacity. The administration lasted for more than two years. In the case under consideration there was, as seen, absolutely no change in the character of the property of the estate as it was received by the administrator after it came into his possession, and the estate was distributed in a little less than a month after the interests of Jane Davis in Samuel's estate were turned over to him. In short, the record discloses that there was no labor bestowed by the administrator upon the property of the estate beyond its mere custody and distribution, and that the same was distributed "in kind," or in the form in which he received possession of it.

The claim that some extra or special labor was performed by the appellant in a contest with the public administrator of Fresno county over the right to administer the estate of Jane Davis should be considered in determining the compensation of appellant is without merit. This contest involved the bestowal of no labor upon the estate. Whatever labor was performed in carrying on the contest was so performed before the appellant either obtained possession or was adjudged entitled to the possession of the estate. Nor is there anything in the claim that the fact that the appellant was, as administrator of the estate of Jane Davis, made a party to the partition suit instituted by the executor of the estate of Samuel Davis should be considered in fixing appellant's compensation. Necessarily he had to be made a party to that suit, and it does not appear that he was by reason thereof put to any extra trouble, labor, or expense.

For the reasons stated in the foregoing, the order and decree settling the final account and fixing the compensation of the administrator is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 468

Ex parte RUEF. (Cr. 154.)

(Court of Appeal, First District, California.
June 30, 1908.)

1. BAIL—RIGHT TO BAIL.

Under Const. U. S. Amend. 8, providing that excessive bail shall not be required, and Cal. Const. art. 1, § 6, providing that all persons shall

be bailable by sufficient sureties unless for capital offenses where the proof is evident or the presumption great, the admission to bail except in such capital cases is a constitutional right, which the accused can claim, and which no court or judge can properly refuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 140.]

2. SAME.

Under the federal and state Constitutions, the Legislature cannot prescribe such burdensome rules as to sureties and their right to qualify as such that a prisoner would be deprived of his constitutional right to be admitted to bail on giving sufficient sureties.

3. SAME—SURETIES—QUALIFICATION—HOUSEHOLDER OR FREEHOLDER.

Under Pen. Code, § 1279, providing that each surety on a bail bond must be a resident, householder, or freeholder within the state, it is sufficient that he is a resident of the state and is either a householder or freeholder.

4. SAME—RESIDENTS.

Under Pen. Code, § 1279, declaring that each surety on a bail bond must be a resident, householder, or a freeholder within the state, but that the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered, the court will rarely refuse a surety because he is not a resident of the county, unless there are circumstances which would reasonably excite suspicion as to him, or unless it would be difficult to investigate his financial standing in a distant location.

5. SAME—QUALIFICATION.

Pen. Code, § 1279, provides that each surety offered on a bail bond must be worth the amount specified in the undertaking exclusive of property exempt from execution, but that the court or magistrate on taking bail may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail. *Held*, that a surety was qualified if he had sufficient property, either real or personal, either in the county or elsewhere.

6. SAME—EXAMINATION OF SURETIES.

On an examination of sureties offered as bail, witnesses may be examined and the sureties placed on oath, and fully examined and cross-examined by the district attorney.

7. SAME—FRIENDS AND RELATIVES.

Under Pen. Code, § 1279, providing the qualifications of sureties to become bail, it is no objection to sureties offered that they are friends and relatives of the accused.

Appeal from Superior Court, City and County of San Francisco.

Habeas corpus in the Court of Appeal on petition of Abraham Ruef, involving a review of proceedings in the superior court to admit to bail. Writ allowed and further hearing remanded to a judge of the superior court, with directions to discharge prisoner from custody on furnishing certain bail bonds.

Henry Ach, Frank J. Murphy, and M. C. Chapman, for petitioner. W. H. Langdon and Francis J. Heney, for respondent.

PER CURIAM. It appears in this case that bail has been fixed in certain criminal proceedings pending in the superior court of the city and county of San Francisco under several indictments against defendant. It further appears that the judge of the superior court in whose department the pro-

ceedings are pending, while examining sureties offered by defendant on his various bonds, declined and refused to accept anyone as surety unless such surety was the owner of real estate equal in amount to the sum for which he desired to qualify upon such bond, and for which he was to become liable; and, further, that such judge refused to hear or consider the financial responsibility of any relative of the prisoner, or to receive any such relative on the bond, no matter what amount of property such relative might possess in his own name. It further appears that the hearing as to the qualification of the proposed sureties on the several bonds has been heretofore continued from time to time by the judge of said court against the protest and objection of the prisoner; the last hearing being continued from June 27 to July 3, 1908. It further appears that the judge of said court directed his reporter not to take down any of the proceedings or testimony on the examination of such sureties in the proceedings before him.

This is an application for a writ of habeas corpus, in order that the prisoner may be admitted to bail upon giving bonds with good and sufficient sureties as required by law. Our Constitution provides that all persons shall be bailable by sufficient sureties unless for capital offenses where the proof is evident or the presumption great. Const. Cal. art. 1, § 6. The Constitution of the United States provides that excessive bail ought not to be required. Amendment 8. The admission to bail, except in capital cases where the proof is evident or the presumption great, is a constitutional right which the accused can claim, and which no court and no judge can properly refuse. *People v. Tinder*, 19 Cal. 542, 81 Am. Dec. 77.

This brings us to the question of the qualification of bail. Under the Constitution of the United States and the Constitution of this state, the Legislature could not prescribe such burdensome rules as to sureties and their right to qualify as such that the prisoner would be deprived of his constitutional right to be admitted to bail upon giving sufficient sureties. In this state, however, the Legislature has prescribed the form of the undertaking and the qualifications of bail. Pen. Code, §§ 1278, 1279. It is the duty of the court to follow the law as it is written in all cases, under all circumstances, without fear and without regard to public clamor, with no friendships, no feelings, no prejudice, and totally without regard to personal consequences to himself. Any other course would bring the law into disrepute, take away the safeguards of liberty for which the Anglo-Saxon race has so long struggled. The judge should look to the law and the rule prescribed by the Legislature for his guidance, regardless of his own personal opinions.

The qualifications of bail are thus stated in the Penal Code:

"(1) Each of them must be a resident, householder or freeholder within the state; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered.

"(2) They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking if the whole justification be equivalent to that of sufficient bail."

Upon examination of the section, it is easily seen that each of the sureties must be a resident of the state. He must be a householder or freeholder within the state, but, if he is either, it is sufficient. He may be a householder, and not a freeholder, or he may be a freeholder, and not a householder. The court or magistrate may refuse to accept any person who is not a resident of the county where the bail is offered, but this discretion the court rarely avails itself of; and we apprehend that a court would not refuse a surety for the simple reason that he is not a resident of the county, unless there is some circumstance that would reasonably excite suspicion as to such surety, or unless it would be difficult to investigate his financial standing in a distant location. As to property qualification, the requirement is that each surety must be worth the amount specified in the undertaking exclusive of property exempt from execution. It may be real or personal property, in the county or elsewhere. Its situation may be inquired into for the purpose of testing the truth as to whether or not the surety really owns the property, and the court in all cases should be careful not to accept fictitious or worthless bail, or to accept persons as sureties who are not financially responsible. Witnesses may be examined and the sureties placed upon oath. The district attorney should be allowed to bring witnesses and examine them fully; and he should further be allowed to fully cross-examine the sureties, and all reasonable means of investigation allowed, but no unreasonable delay should be granted. Neither friends nor relatives are excluded by the statute; and the court has no power to arbitrarily refuse them for the sole reason that they are relatives or friends. In fact, it is usual and customary for the prisoner to call upon his friends and relatives in such cases. It is much more natural for those to become sureties for the prisoner than for strangers to do so. The object of bail is to secure the prisoner's attendance. In case of default of his appearance, the amount of bail is declared forfeited. It can make no difference whether the sureties are relatives or not, provided they are financially responsible.

If the bail is forfeited and the money paid, it makes no difference where it comes from. The prisoner is entitled to have his sureties examined in accordance with the law and the views herein expressed.

It is ordered that the further hearing of this writ and the further proceedings in this matter be referred to the Hon. Frank J. Murasky, one of the judges of the superior court of the city and county of San Francisco, to hear the testimony as to the qualification of the sureties, to approve the bonds if sufficient sureties are produced, and, upon sufficient sureties being produced and the bonds approved in the amounts and in the several sums heretofore fixed, that the prisoner be discharged from custody.

8 Cal. App. 352

STILES v. HERMOSA BEACH LAND & WATER CO. (Civ. 495.)

(Court of Appeal, Second District, California.
June 6, 1908.)

1. SPECIFIC PERFORMANCE—COMPLAINT—ADEQUACY OF CONSIDERATION.

Under Civ. Code, § 3391, providing that plaintiff in a suit for specific performance must allege such facts as will enable the court to decide whether the contract is such that it would not be inequitable to enforce it, a complaint to compel specific performance of a contract for the sale of land setting out the contract, but failing to state any facts from which the court could determine that the consideration was adequate, and that the contract as to defendant was just and reasonable, was fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 357, 358.]

2. PLEADING—AMENDMENT TO CONFORM WITH PROOF.

In a suit for specific performance tried June 27, 1906, the court properly permitted plaintiff to amend his complaint on July 24th following, in order to make it conform to the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 603-605.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Suit for specific performance by A. E. Stiles against the Hermosa Beach Land & Water Company. From a judgment for plaintiff and from a refusal of a new trial, defendant appeals. Reversed and remanded, with directions.

Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for appellant. Tanner, Taft & Odell, for respondent.

TAGGART, J. Action to enforce specific performance of contract to convey real estate. Defendant appeals from judgment in favor of plaintiff, and from an order denying its motion for a new trial.

The complaint alleges that on the 15th day of February, 1902, plaintiff and defendant entered into an agreement in writing (setting it out in full). From this writing it appears: That defendant agreed to sell to plaintiff certain real estate at Hermosa Beach for \$135. That plaintiff paid \$45 cash, and agreed to

pay \$45 on or before October 2, 1902, and \$45 on or before April 2, 1903, with interest at 7 per cent. on deferred payments from October 2, 1901. The deed was to be delivered upon the completion of the terms of the contract. Time is made of the essence of the contract, and upon default in payment of any installment of principal or interest, or the payment of taxes on the property (which plaintiff assumes), "the whole of said principal and interest shall be due and payable, or this agreement may be rescinded," at the option of the defendant. It is further alleged in the complaint that plaintiff paid to defendant the first payment as provided, and the second one on October 23, 1902, together with interest thereon to October 2, 1902; that on March 22, 1904, he paid the sum of \$6.30, being the interest on the last payment to February 15, 1904, and on December 14, 1905, he paid the further sum of \$7.10, being the interest on said last payment to January 1, 1906; that defendant accepted each and all of said payments without objection; that plaintiff performed all the conditions on his part to be performed, and on February 3, 1906, tendered the last payment with interest, but defendant refused to accept it, and that again on February 7th he tendered said payment and interest, and demanded a deed, which was refused. To this complaint defendant interposed a general demurrer, which was overruled. The case was tried on June 27, 1906, and by leave of the court an amendment to the complaint was filed July 24, 1906; the findings being dated August 2, 1906.

In the respect in which appellant contends in support of its demurrer that the complaint is defective the latter is not aided by the amendment. It is thoroughly settled in this state that a complaint for specific performance must, in order to make out a case good against general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant just and reasonable. It is incumbent upon the plaintiff to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it. Civ. Code, § 3391; *Herzog v. A. T. & Santa Fé R. R. Co.* (Cal.) 95 Pac. 898. Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an action of this character to show, both in the averments of his pleading and in the evidence at the trial, that he is entitled to the equitable relief which he seeks. *Windsor v. Miner*, 124 Cal. 494, 57 Pac. 386. There is no allegation that plaintiff was in possession of the premises, and no such facts are here alleged as those set out in the complaint for specific performance before the Supreme Court in *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276. The contract there under consideration was held just and fair, and not inequitable to enforce, because of the peculiar circumstances of that case. "The com-

plaint contains no allegation to the effect that there was any consideration for the contract, except by the averment that it was in writing, which fact, under our Code, imports a consideration. Nor are any of the circumstances under which the contract was entered into shown, otherwise than by the recitals found in the written contract. These cannot be regarded as averments of the pleader, at all events, beyond the covenants found in it of which specific performance is asked," says Temple, J., in *Stiles v. Cain*, 134 Cal. 171, 66 Pac. 231. This language and law are applicable to the case at bar, and the general demurrer to the complaint should have been sustained.

There was no error in permitting the plaintiff to file an amendment to the complaint for the purpose of making it conform to the proof. Indeed, it seems to be the proper rule for a trial court to require such an amendment to be made where an issue, material to the determination of the case, has been tried without being presented in the pleadings, rather than to have a mistrial result from the variance. *Hancock v. Board*, etc., 140 Cal. 554, 74 Pac. 44; *Hedstrom v. Union Trust Co.* (Cal. App.) 94 Pac. 386.

Judgment reversed, with instructions to sustain defendant's demurrer to the complaint.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 480

WEBSTER v. COMMON COUNCIL OF CITY OF SAN DIEGO et al. (Civ. 481.)

(Court of Appeal, Second District, California. July 1, 1908. Rehearing Denied by Supreme Court Aug. 27, 1908.)

MANDAMUS — RIGHT TO RELIEF — MUNICIPAL CORPORATIONS — CITY COUNCIL — ORDINANCE RATIFYING FRANCHISE.

A railway company having been granted a franchise by the state board of harbor commissioners for the bay of San Diego to erect and maintain a wharf and pier in the tide lands and waters of such bay took no steps to have an ordinance passed by the council of such city ratifying and confirming the franchise, whereupon the required number of registered electors of the city submitted a proposed ordinance for that purpose as authorized by City Charter, c. 4, § 2, which petition was regularly certified by the city clerk, but the council refused to pass the ordinance or to submit it to a vote of the people as required by the charter. *Held*, that a resident elector or taxpayer had no beneficial interest in the passage of such ordinance, and therefore had no capacity to institute proceedings for a writ of mandate against the city council to compel such action.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Application by E. Bartlett Webster for a writ of mandate against the common council of the city of San Diego and others. From a judgment vacating an alternative writ and dismissing the petition, petitioner appeals. Affirmed.

Mills & Hizar, for appellant. Geo. Puterbaugh, City Attorney, for respondents.

TAGGART, J. Appeal from a judgment denying an application for a writ of mandate. Petitioner is a resident elector, property owner, and taxpayer in the city of San Diego. Respondents are members of the common council of said city, which city is organized under a freeholders' charter containing a provision for the enactment of ordinances by direct vote of the electors of the city. The South Park & East Side Railway Company, a corporation, was granted a franchise to erect and maintain a wharf and pier in the tide lands and waters of San Diego Bay by the board of state harbor commissioners for the bay of San Diego under the provisions of section 2606 of the Political Code; the said pier or wharf so provided to be erected being within the limits of the city of San Diego. The record does not disclose that the corporation holding such franchise ever asked or requested or demanded of that city, or of respondents, that an ordinance ratifying and confirming said franchise should be enacted, but certain persons by a petition signed by the requisite number of registered electors of said city submitted to said common council a proposed ordinance for that purpose, as provided by section 2 of chapter 4 of the charter of that city. This petition was regularly certified by the city clerk, but the common council failed and refused to pass the ordinance so submitted within 20 days after its sufficiency had been certified by the city clerk as required by the charter in such cases, and refused to call a special, or any, election at which said ordinance could be submitted to "a vote of the people." Application was thereupon made by plaintiff and appellant to the superior court of San Diego county for a writ of mandate to compel such submission. An alternative writ was issued, but upon a hearing on the petition, and answer and demurrer to said answer, judgment was entered vacating said alternative writ and dismissing the petition.

We see no reason for disturbing the judgment of the trial court, nor is it necessary to consider any of the matters alleged in the answer or the issues of law raised thereon by the demurrer thereto in reaching this conclusion. A case could not well be presented which would more effectually illustrate the necessity for the rule requiring the application for the writ to be by "the party beneficially interested." Code Civ. Proc. § 1086. On the face of this petition the "South Park & East Side Railway Company" is the only party as to whom the law could imply a beneficial interest. For aught that appears here, it has abandoned all the privileges granted it by the harbor commissioners, and has no intention of complying with the terms of it if confirmed by ordinance of the city. It must be presumed that this is the case from its failure to ask for a confirming ordinance. If we were to assume that petitioner here, as a resident elector or taxpayer, is a competent person to ask the common council to put in

action the election machinery of the city for the purpose of passing an ordinance by direct vote, it would be idle for the court to grant his petition in the face of an abandonment of the franchise from the harbor commissioners by the grantee of the franchise. This, however, is not a case in which the taxpayer, resident, or elector as such can be said to be a party beneficially interested. A taxpayer is said to be so interested in a matter which affects, or may affect directly, his assessment or taxes (*Hyatt v. Allen*, 54 Cal. 353), or, being a resident elector having minor children of an age to attend school, is affected by the location of a schoolhouse. (*Eby v. Trustees*, 87 Cal. 173, 25 Pac. 240). Again, as a property owner he is beneficially interested in the disincorporation of a municipality in which he is a resident elector and taxpayer. (*Fredrick v. San Luis Obispo*, 118 Cal. 391, 50 Pac. 661. The reason for his being considered a party beneficially interested in all these cases is clear, and it is equally clear that no such reason exists in the case at bar.

Neither does the petitioner here bring himself within the class considered by this court in *Good v. Common Council*, 5 Cal. App. 265, 90 Pac. 44, nor within the reason there given in sustaining the petitioner's right to be considered a party beneficially interested. Petitioner there was one of the persons who demanded of the common council that it call an election to protect a right granted by the charter to the electors of the city. He was one of the signers of the petition to inaugurate a proceeding, the primary purpose of which was to carry out the wishes of the electors, and they asked that the action be taken upon their behalf, and not on behalf of some corporation or third person. Petitioner here was not only not beneficially interested in the franchise which he is seeking to have confirmed by ordinance, but he does not even allege that he was one of the petitioners seeking to accomplish the passage of the ordinance by a direct vote.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 344

MILLER et al. v. SCOBLE. (Civ. 386.)

(Court of Appeal, Third District, California.
June 4, 1908.)

1. APPEAL AND ERROR—FINDINGS—REVIEW—WEIGHT OF EVIDENCE.

Where there was evidence on which to base the trial court's findings that assessment work had been done on certain mining claims in good faith, such finding would not be set aside on appeal because based on alleged improbable and contradictory evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

2. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY AND PROBABLE EFFECT.

An order denying a new trial for newly discovered evidence will be reversed if it appears

that the newly discovered evidence is such as must, if proved on a new trial, change the result, and proper diligence has been shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 210-214, 226.]

3. SAME—SURPRISE—FALSE SWEARING.

Where, in an action to quiet title to adjoining mining claims, the only issue was whether the assessment work had been done by plaintiffs on the claims, and plaintiffs establish a prima facie case showing that the requisite amount of work had been done, defendant could not claim that he was surprised by such testimony in that it was false, so as to entitle him to a new trial; it being defendant's duty to have witnesses present at the trial to prove the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 193.]

4. SAME — CONTINUANCE — FAILURE TO ASK — EXCUSE.

Where defendant was surprised at plaintiffs' evidence as to the doing of certain assessment work on mining claims in controversy, it was no excuse for defendant's failure to ask a continuance in order to procure proof to the contrary that he expected the judge of the court to visit the mine before rendering his decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 195-198.]

5. SAME—CUMULATIVE EVIDENCE.

A new trial for newly discovered evidence will not be granted where the new evidence is largely cumulative, and is not such as to probably change the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 218-220.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Marietta Miller as trustee and others against R. J. Scoble. Judgment for plaintiffs, and, from an order denying defendant's motion for a new trial, he appeals. Affirmed.

F. R. Whitcomb, Wm. M. Sims, and J. B. Curtin, for appellant. F. P. Otis, for respondents.

BURNETT, J. The action was brought to quiet title to two adjoining mining claims. Plaintiffs had judgment, and defendant appealed from the order denying his motion for a new trial. Appellant relocated the claims on January 1, 1905, and he contends that the annual labor required by law was not done on either of said claims by plaintiffs for the year 1904, and also that by virtue of his affidavits of newly discovered evidence a new trial should have been granted.

1. In the opening brief appellant inveighs caustically against the testimony of plaintiffs' witnesses, asserting that it is entirely unworthy of credence, and insufficient to justify the finding of the court that the work was done in 1904. But the fact remains, as the transcript shows, that two witnesses, Heldman and Miller, testified that the \$200 worth of work was done by them and one Curtis. They give the number of days that they were employed, the price per day of their labor, and they describe how and where the work was done. It is true that they do not entirely agree as to some of the details,

and Heldman is less certain as to the exact time of the employment than Miller, but it cannot be disputed that their testimony supports the finding of the court, and even admitting, as we do, that a very strong counter showing was made by defendant, we are powerless to disturb said finding under the well-established rule of conflicting evidence unless the testimony for plaintiffs is so improbable that we must reject it as not entitled to belief. This rule is admitted by appellant, but he stoutly insists that the conduct of said witnesses as sworn to is inherently improbable, as "it violates every principle of human action." The assertion is made in view of their statement that they sank a shaft in quartz rock to the depth of 20 or 25 feet and had three benches upon which to throw the rock, that they threw it up 8 feet upon one bench and then upon another, and at last to the top, from which point they moved it several feet to an old dump pile. Appellant says "they were there simply to do assessment work, and were not called upon to enter upon any such a stupendous and hazardous undertaking as the one they describe, without appliances in the way of blacksmith utensils, wheelbarrows, and other articles necessary to do such work." But we cannot say that they were required to have all the approved appliances, nor that because they appear to have worked somewhat stupidly and not to the best advantage they did not do the work as they claim. The considerations suggested were proper to be addressed to the trial judge as affecting the credibility of the witnesses. No doubt they were not overlooked by the court below, but it was found, in view of all the circumstances, that the necessary work was done in good faith; and we cannot hold otherwise without invading the province of the trial judge. It is fair to say that the explanation by witness Miller of the manner in which the work was done mollifies somewhat the sting of appellant's criticism.

2. In his closing brief it is virtually admitted by appellant that the evidence is sufficient to support the said finding of the court, but it is claimed that "the principle of law that this court will not disturb the decision of the lower court has no bearing, for in this case appellant relies principally on his motion for a new trial upon accident and surprise, which ordinary prudence could not have guarded against and upon newly discovered evidence material for defendant, which he could not with reasonable diligence have discovered and produced at the trial." It is conceded that much must be left to the discretion of the trial court in the determination of the sufficiency of the showing made. The rule is, as stated by the authorities, that it is usually to be presumed that the discretion of the court has been properly exercised, yet when it appears that the newly discovered evidence is such as must, if

proved upon a new trial, change the result, and proper diligence has been shown, an order denying the new trial must be reversed. The "accident and surprise" were occasioned by the testimony of the witnesses for plaintiffs that the assessment work for 1904 was done in sinking a certain shaft, digging a certain cut, and running a certain drift and making a winze therein, whereas, it is asserted, no such shaft, cut, drift, or winze was ever dug or made, and "that in the nature of things defendant was greatly surprised at such bald, open, false swearing as to matters which had no existence whatever in fact; that plaintiffs in their affidavits of assessment work filed for record did not state where in particular they claimed to have done their assessment work on said mines for the year 1904, simply swearing, generally, that they had done the work so that the defendant could in no way glean therefrom where or at what places plaintiffs claimed to have worked."

But it is conceded that the only issue before the court was whether the assessment work was done by plaintiffs on said claims, and common prudence would require defendant to be prepared to show that said work was not done on any part thereof. In fact, as appellant admits, plaintiffs made out a prima facie case by introducing in evidence the said affidavits of assessment work, and the burden was then cast upon defendant to show that the requisite amount of labor was not done upon any portion of the claim, and he does not excuse his failure to use diligence in producing all the witnesses that he deemed necessary to convince the court of the merit of his contention. Again, considering the case from appellant's standpoint in view of the said affidavits, he should not have been surprised at the "bald, open and false swearing" of plaintiffs' witnesses, but should rather have anticipated it and been fully prepared to overcome its effect. Moreover, when the surprise did occur, appellant should have asked for a continuance in order that he might induce other witnesses to visit the mine and testify at the trial upon the point suggested. The only excuse offered in his affidavit for his failure to do so is that he believed and relied upon his belief that the judge of the court would visit said mine before rendering his decision in the cause. In other words, the appellant chose to rely upon the visit to the mine of the judge to produce conviction rather than upon the testimony of other witnesses, and he must now abide by his choice. But the judge did not visit the mine, and it is claimed that appellant was thereby surprised, and should therefore have a new trial that he may present additional evidence. It is a sufficient answer to say that from the statements contained in the counter affidavits presented upon the hearing of said motion the court was justified in concluding that appellant had no

reason to believe that such visit would be made, and, besides, it is apparent that a personal inspection of the premises by the trial judge cannot be deemed equivalent to the testimony of witnesses, and therefore the expectation of such visit cannot afford any legal excuse for defendant's remissness in making no effort to secure, before the submission of the cause, the additional evidence. Again, an examination of the transcript discloses that the proposed evidence is substantially cumulative. Witness Curtis and others who were familiar with the situation testified that the work done by plaintiffs did not meet the requirement of the statute. Besides, it cannot be held that the result would probably be different if the additional evidence were introduced. As a matter of fact, the affidavits of the proposed witnesses were received, and, after considering them and the counter affidavits, the only person in a position to determine with any degree of accuracy whether the decision would likely be changed in the event of another trial has settled the question in the negative by denying the motion.

We have deemed it unnecessary to cite authorities in support of the somewhat elementary principles announced, and notwithstanding the earnest, and, indeed, vehement asseveration by appellant of the gross injustice of the decision, the record does not warrant us in substituting our judgment of the evidence for that of the trial court, and we are led to the conclusion that the responsibility exercised by the other tribunal in determining the issue is not subject to revision.

The order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 448

MUNGER'S LAUNDRY CO. v. RANKIN.
(Civ. 501.)

(Court of Appeal, Second District, California.
June 26, 1908.)

APPEAL AND ERROR—TERMINATION OF CONTROVERSY—MOOT CASE.

Where, in an action to enforce a provision in an employment contract requiring the employé to refrain from soliciting customers for a rival company within six months after termination of his employment, an appeal from a judgment dismissing the action was not taken until after the six months had expired, and no claim for damages was made, the appeal presented only a moot case, and should be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Suit by Munger's Laundry Company against N. A. Rankin. From a judgment dismissing the action, plaintiff appeals. Appeal dismissed.

M. K. Young, for appellant. G. L. Whitman, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment dismissing an action.

Plaintiff sought in this action to enjoin defendant, who was a former employé, from soliciting work for a rival company within certain prescribed territory for a period of six months after the term of his employment with plaintiff, basing such right upon a written agreement of defendant by which, in consideration of \$6, he agreed in his original contract of employment not to engage in such business of soliciting for a rival company within such territory for the time mentioned. The contract of employment between plaintiff and defendant was terminated on March 21, 1906, and the six months within which he had agreed not to engage in business within such territory expired September 21, 1906. The action was brought in June. The demurrer to the complaint was sustained by the court, and the judgment appealed from entered July 20, 1906. The notice of appeal was given in December following.

It will be observed that at the date of the appeal, and at all times since September 21, 1906, defendant was at liberty to continue his work, even assuming the validity of the contract with plaintiff. No claim of damages was made, and the only question involved was the right to enjoin the defendant from his work between the date of employment and September 21st. The appeal before this court, therefore, seeks to determine an abstract question which does not arise upon any existing facts or rights, and is, in consequence, a moot case. *Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273. Were the judgment erroneous, and by reason thereof subject to reversal, plaintiff does not now possess, and has not since September 21, 1906, possessed any rights under the allegations of his complaint entitling him to relief, and the determination of the question involved is of no material consequence to appellant.

The appeal is, therefore, dismissed in conformity with the action of the Supreme Court in the case of *Kinney v. Newlin et al.* (L. A. No. 681) entered October 11, 1900 (no opinion filed), and in *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 472
FISHER v. FRANK. (Civ. 453.)

(Court of Appeal, First District, California.
July 1, 1908. Rehearing Denied by
Supreme Court Aug. 27, 1908.)

1. BILLS AND NOTES—DRAFTS—ACCEPTANCE—EFFECT.

Where a draft required that, on the receipt of the F. Fisher prunes by the drawee, he pay to the order of K. \$2,538.12 as payment in full for receipts 3 and 6, value received, acceptance of the draft by the drawee was an agreement by him to pay the amount stated therein on receipt of the Fisher prunes represented by the two receipts.

2. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

Findings of fact on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

3. SAME—PRESUMPTIONS.

Where the trial court heard the evidence and passed on a motion for new trial, all presumptions will be indulged in favor of the correctness of the court's findings and conclusions.

4. BILLS AND NOTES—ACCEPTED DRAFT—ACTION—DEFENSES.

Where an accepted draft recited that, on the receipt of the F. Fisher prunes by the drawee, he was to pay to the order of K. \$2,538.12, as payment in full for receipts 3 and 6, plaintiff was entitled to recover the balance due on the draft on proof that the prunes referred to in the receipts mentioned had been delivered; the disposition of the balance of Fisher's crop of prunes being immaterial.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Fiacro Fisher against George Frank. From a judgment for plaintiff, and from a refusal of a new trial, defendant appeals. Affirmed.

Will M. Beggs, for appellant. W. C. Kennedy, for respondent.

COOPER, P. J. This action was brought to recover upon a draft drawn in favor of W. C. Kennedy, accepted by defendant, and duly indorsed to plaintiff. The draft with its indorsements is as follows:

"San Jose, Cal. Sept. 16th, 1904.

"On receipt of the F. Fisher prunes by you pay to the order of W. C. Kennedy two thousand five hundred and thirty-eight and $\frac{12}{100}$ dollars as payment in full for receipts Nos. 3 and 6, value received, and charge the same to account of

H. C. Newby.

"To George Frank & Co., San Jose, Cal. No. 4.

"Accepted, George Frank & Co.

"Nov. 2d, 1904. Recd. \$800.

"Jany. 19, '05. Recd. \$300. Pay to Fiacro Fisher. W. C. Kennedy."

Judgment was prayed for the balance of \$1,438.12 remaining due upon the draft after deducting the payments that had been made thereon. The case was tried before the court, and findings filed, upon which judgment was ordered entered in favor of plaintiff. Defendant made a motion for a new trial, which was denied. This appeal is from the judgment and the order denying a new trial.

It is claimed that the court erred in denying defendant's motion for a nonsuit, and, further, that the evidence does not support the finding of the court in regard to the delivery of the prunes, which finding is as follows: "That all the Fisher prunes referred to in said draft or contract, and mentioned in receipts 3 and 6 therein referred to, were in pursuance of agreement with H. C. Newby duly delivered to H. C. Newby at Coyote station, and were cured and dried by him, and were then by him duly shipped to and received by said George Frank; and that the whole of said prunes were so received by him on

and before August 17, 1905." As each of the alleged errors goes to the sufficiency of the evidence, and involves the question as to the construction of the draft, we will discuss them together.

Plaintiff had sold the prunes represented by receipts Nos. 3 and 6 to H. C. Newby. Receipt No. 3 was to the effect that Newby had received from plaintiff 145,198 pounds of green prunes at the price of \$23 per ton. Receipt No. 6 was to the effect that Newby had received 110,291 pounds of green prunes at \$23 per ton. The amount due plaintiff for the prunes represented by both receipts was \$2,938.12, but, as \$400 had been paid to him before the bill of exchange was drawn or accepted, it was drawn for the balance of \$2,538.12. The acceptance of the draft by defendant was in effect an agreement upon his part to pay the amount stated therein upon the receipt of the Fisher prunes represented by the two receipts. There is evidence to sustain the finding of the court that the prunes represented by the receipts were delivered to and received by defendant. It would serve no useful purpose to quote the evidence. Conceding that there was some conflict, we cannot disturb the finding upon this ground. The trial court heard the evidence, and passed upon the motion for a new trial. All presumptions are in favor of the correctness of its findings and conclusions.

It is urged by the appellant that the court failed to find upon the issue raised by appellant's answer, to the effect that the Fisher prunes—that is, the entire crop of the Fisher prunes—were not delivered to defendant. We are of opinion that the finding of the court in regard to the prunes represented by the draft, which referred to receipts 3 and 6, was all the finding that was necessary. If the prunes represented by said receipts were delivered—and there is evidence to show that they were, and the court found that they were—then, as before said, the defendant became responsible for the amount of the draft which he had accepted. It became immaterial as to any other portion of the crop of prunes raised by Fisher, and the findings covered the issues before the court.

We do not think there is any error in the respects claimed by appellant, and the judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

the fact that plaintiff's land had not actually received that quantity at the time mentioned and thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 270-275.]

2. TRIAL — TRIAL BY COURT — PROVINCE OF COURT—RECONCILING TESTIMONY.

It is the province of the trial court to determine the meaning and effect of uncertain and ambiguous evidence, and to reconcile apparent contradictions and inconsistencies, if reasonably possible.

3. WATERS AND WATER COURSES—PIPE LINES —ACTIONS TO ESTABLISH RIGHTS — EVIDENCE.

In an action to establish plaintiff's right to use a pipe line for carrying water and his right to a certain quantity of water each month, the evidence *held* to support the finding of the trial court that plaintiff had a right to carry 40 inches of water for four days each month through the pipe line.

4. TRIAL—TRIAL BY COURT—FINDINGS—CONFORMITY TO ISSUES.

In an action to establish plaintiff's right to use a pipe line extending across defendant's land for the purpose of carrying water, the complaint alleged that plaintiff was the owner of a two-ninths interest in such pipe line, and the answer alleged that defendant was the absolute owner of that part of the pipe line. The findings stated that defendant had no right in the pipe line except to use it for carrying water to irrigate his own land. *Held*, that the facts found were not in issue; the material issue being as to defendant's ownership of the two-ninths interest which plaintiff claimed, not his ownership of the entire line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 935.]

5. APPEAL AND ERROR—REVIEW — HARMLESS ERROR.

Where a finding by the trial court was immaterial, and not within the issues, even if such finding was erroneous, it was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4234-4239.]

6. JUDGMENT — CONCLUSIVENESS — MATTERS CONCLUDED—MATTERS NOT IN ISSUE.

In an action to establish plaintiff's right to the use of a pipe line, where a finding, which was immaterial under the issues, that defendant had no interest in the part of the pipe line not claimed by plaintiff, was not carried into the judgment, it would not be binding upon defendant in a subsequent action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1263.]

7. WATERS AND WATER COURSES—IRRIGATION —ACTION TO DETERMINE RIGHTS—FINDINGS —CONSTRUCTION.

In an action to establish plaintiff's interest in a pipe line extending across defendant's land and his right to use the line for carrying water, a finding that plaintiff had used the property adversely for five years, accompanied by a finding of all the facts necessary to constitute a title by prescription, is a good finding of an interest in the pipe line to the extent of the adverse use, without an additional express finding of ownership, and a statement in the findings that plaintiff is not the owner of the pipe line will be construed as meaning that he had not received any legal title thereto by conveyance, and that his title was by prescriptive right.

8. ADVERSE POSSESSION—REQUISITES — CONTINUITY—SUCCESSIVE POSSESSIONS — PRIVILEGE.

In an action to establish plaintiff's interest in a water pipe line, where plaintiff's predecessor, though he had conveyed the premises in trust to secure a debt, still remained in full possession and use of the property without interference by the trustees, and owned the entire

154 Cal. 131

COLLINS v. GRAY. (L. A. 2,024.)

(Supreme Court of California. Aug. 10, 1908.
Rehearing Denied Sept. 8, 1908.)

1. PLEADING—ANSWER—ADMISSIONS.

A complaint alleged that plaintiff was the owner of a tract of land, together with 6.2 inches of water from the water system of a water company, which entitled him to use that quantity of water for irrigation under the rules of the company, that, by the customary method of distribution, the owner takes the water to which he is entitled at monthly intervals in his turn for a fixed period, and the customary run of water for plaintiff's premises was 40 inches for 4 days in each month. These allegations were admitted, except that defendant denied that the customary run of water for plaintiff was 40 inches for 4 days or any number of days in each month, but averred, on the contrary, that on May 29, 1898, it did not exceed 15 inches for 2 days each month, and each year had gradually increased. *Held*, that plaintiff's right to receive 40 inches for four days each month was admitted; defendant's denial extending only to

beneficial interest in the land, plaintiff was in privity with him, and was entitled to take his title to the pipe line acquired by adverse use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 215-217.]

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by A. P. Collins against C. R. Gray. From an order denying defendant's motion for a new trial, he appeals. Order affirmed.

Chas. R. Gray, in pro. per. Purington & Adair, for respondent.

SHAW, J. This is an appeal from an order denying the defendant's motion for a new trial. An appeal from the judgment was also taken, and the judgment was affirmed by the District Court of Appeal for the second district. *Collins v. Gray*, 3 Cal. App. 723, 86 Pac. 983. The object of the action was to establish the plaintiff's right to the use of a pipe line extending through the defendant's land for the purpose of carrying water therein to the land of the plaintiff. It is contended upon this appeal that certain of the findings are not supported by sufficient evidence.

The complaint alleges that the plaintiff is the owner of a certain tract of land containing 30 acres, together with 6.2 inches of water, continuous flow, from the water system of the Riverside Highland Water Company, which entitles plaintiff to the use of that quantity of water for irrigating said land, in such manner, under such conditions, and at such times as should be fixed by the rules of the company and the custom of the water users under that system; that by the customary method of distribution the water to which land under the system is entitled is cumulated so that, instead of using the flow continuously, each owner takes the water to which he is entitled at regular monthly intervals in turn for a fixed period; that the customary run of water for the plaintiff's premises was 40 inches for 4 days in each month during the irrigating season, and that the premises had been irrigated in that manner from the said water system for the last 10 years or more. These allegations are all admitted by the pleadings, except that the defendant denies that the customary cumulated flow of water to plaintiff has been, or is, 40 inches of water for 4 days, or any other number of days, each month, and avers that, on the contrary, on May 29, 1898, and for some time prior thereto, the customary flow of water to plaintiff through said pipe line did not exceed 15 inches of water for 2 days each month during the irrigating season, and that each year since that date the flow to said premises through said pipe line has gradually increased. Under this state of the pleadings the fact of plaintiff's ownership of the right to receive 40 inches of water for 4 days each month during the irrigating season is admitted. The denial extends only to the fact that the plaintiff's land had not actual-

ly received that quantity of water or any quantity in excess of 15 inches during the time stated, from and after May 29, 1898, and some time prior thereto. It admits that for the last 10 years or more plaintiff has received some water through the pipe line, and that his land has been irrigated by that means.

The complaint further alleges that the plaintiff is the owner of an undivided two-ninths interest in the pipe line across the defendant's land, and that he and his grantors have used said pipe line openly, notoriously, peaceably, exclusively, and uninterruptedly under a claim of right and title thereto, and adversely to the defendant and the whole world, and with defendant's knowledge, for more than five years last past, for conveying water to plaintiff's land during each irrigating season for the time in each month that the water was, as before stated, apportioned to said land by the water company. These allegations are denied. The court in its findings states that the plaintiff was not the owner of an undivided two-ninths interest in the pipe line, but the findings also declare that he has a claim and interest in the pipe line for the purpose of conveying water thereto for irrigating said land, and that he and his predecessors in interest have used said pipe line openly, notoriously, peaceably, exclusively, and uninterruptedly, under a claim of right and title thereto, adversely to defendant and the whole world, and with defendant's knowledge and acquiescence, but without his consent or permission, for more than five years last past, for conveying water to plaintiff's land for such time each month as the water was apportioned thereto as stated in the complaint. It is claimed that this finding is not sustained by the evidence.

It is conceded that the evidence sufficiently shows that the plaintiff and his grantors had been using the pipe line to carry water to plaintiff's land for at least 10 years prior to the beginning of the action, and that this use had been adverse under such circumstances as to give plaintiff a prescriptive right to use the pipe for carrying some water to his land. The precise claim of defendant is that the evidence does not sustain the finding that his right extended to the carrying of 40 inches for 4 days each month, but would only support a finding of some smaller quantity. It appears from the testimony of Mr. Wheeler, plaintiff's grantor, that he had been using the pipe line to carry water to this land for irrigation, under claim of right, adversely to defendant, with his knowledge and against his will, from 1893 up to the time Wheeler sold the land to plaintiff a few days before the action was begun, a period of 10 years. As to the quantity of water, he said: "At the time I sold to Collins I had 62 shares of the capital stock of the Riverside Highland Water Company. I don't know how many inches of water that called for. That water

has been used 10 years by me." The admissions in the pleadings, in connection with the testimony of the secretary of the company, show that 62 shares of stock entitled the holder to a continuous flow of 62/10 inches of water, that this water had been delivered in cumulated amounts for a fixed period each month and not in a continuous flow, and was equal to 186 inches for 1 day each month, or, by computation, 40.65 inches for 4 days each month. The testimony of Wheeler, therefore, appears to be that for 10 years next before the action was begun he had used that quantity of water on the land through the pipe in question. On his cross-examination it appeared that in 1893 the land did not need much water, that in 1894 he used more, and that at the time of the trial it needed more than it ever did. The evidence of the defendant tends to prove that Wheeler owned but 31 shares of the water stock prior to 1902, one year before the action was begun. From these facts he argues that prior to 1902 Wheeler could not have used more than the equivalent of 20 inches for 4 days, or 40 inches for 2 days, each month, and that the finding of an adverse use of the pipe for more than 5 years to carry 40 inches 4 days a month is unsupported. The evidence may appear somewhat uncertain and ambiguous on this precise point. But it appears that the pipe was of ample size to carry all the water required by those using it. It does not seem to have been a matter of any importance to defendant to see whether the plaintiff, while he was using it, carried 40 inches therein or less than that quantity. Upon the trial the attention of the court and of the witnesses was not specifically called to the question of the exact quantity of water carried in the pipe line by Wheeler during the period of adverse use. It is the province of the trial court to determine the meaning and effect of uncertain and ambiguous evidence, and to reconcile apparent contradictions and inconsistencies, if reasonably possible. Under the circumstances we think the evidence sufficiently supports the finding in question.

The findings state that the defendant had no property or right in the pipe except to use it for carrying water to irrigate his own land during the period for which he was entitled to receive the water. It is claimed that this finding is unsupported by the evidence. No issue of this character was tendered by the complaint. The answer alleged that defendant was the absolute owner of the part of the pipe line extending through his own land. The material issue was not with regard to his ownership or the entire interest in the pipe line, but with regard to his ownership of the two-ninths interest therein which plaintiff claimed. As to this the court made a definite and precise finding. The additional finding that the defendant had no interest in the part of the line not claimed by the plaintiff was wholly immaterial, and, even if erroneous, it could not constitute error preju-

dicial to the defendant. *Klockenbaum v. Pierson*, 22 Cal. 163; *Dougherty v. Coffin*, 63 Cal. 456, 10 Pac. 672; *Sherman v. Sandell*, 106 Cal. 375, 39 Pac. 797. The finding as to his lack of interest was not carried into the judgment, and, being immaterial to the issues, it would not be binding upon the defendant in any subsequent action. *Fulton v. Hanlow*, 20 Cal. 483; *Lillis v. Emigrant D. Co.*, 95 Cal. 559, 30 Pac. 1108; *Mitchell v. Insley*, 33 Kan. 657, 7 Pac. 201; *Auld v. Smith*, 23 Kan. 69; *House v. Lockwood*, 137 N. Y. 268, 33 N. E. 595; 23 Cyc. 1309; 1 *Freeman on Judgments*, § 271; 2 *Black on Judgments*, § 687.

The finding that the plaintiff has used the property adversely for five years, accompanied, as it is, with a finding of all the facts necessary to constitute a title by prescription, is a good finding of an interest in the pipe line to the extent of the adverse use, without the additional express finding of ownership. The findings are to be harmonized if possible, and, with that end in view, we think the statement therein that the plaintiff is not the owner of the pipe line is to be construed as a declaration that he had not received any legal title thereto by conveyance and that the finding as to the prescriptive right should be given full effect as a finding of title acquired in that manner.

It is further claimed that the plaintiff is not entitled to the benefit of the adverse use made by his predecessor, Wheeler. This claim is founded upon certain evidence showing that Wheeler, before this use began, had conveyed the premises to other persons in trust to secure a debt owing by him, and that this trust continued until the plaintiff, shortly before the suit was begun, purchased both Wheeler's interest and that of the trustees. There is no merit in this contention. It appears clearly that Wheeler, although he had conveyed the premises as security, still remained in full possession and use of the property without interference by the trustees, and that during all that time he owned the entire beneficial interest in the land. Under these circumstances his successor would be in privity with him, and would be entitled to take his title to the pipe line acquired by adverse use.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

154 Cal. 119

SIXTH DIST. AGR. ASS'N v. WRIGHT et al. (L. A. 2,028.)

(Supreme Court of California. Aug. 8, 1908.)

1. AGRICULTURE — AGRICULTURAL ASSOCIATIONS—ORGANIZATION—PROCEEDINGS—CONVEYANCES—MISNOMER.

Act April 15, 1880 (St. 1880, p. 62, c. 69), divided the state into agricultural districts, and authorized the formation therein of agricultural associations, such association to be known by the name of "_____ Agricultural Association." The property in controversy was conveyed to an association in the Sixth agricultural district,

designated in the deed as "6th Dist. Agricultural Association." Thereafter, a question having arisen as to the legality of the formation of the association, it was reorganized under the name of "Agricultural District Number Six," and a new deed of the property was executed to "District Agricultural Association Number Six of California." *Held*, that the slight difference in the name given the association in the two proceedings was immaterial, as the words "Sixth District," to precede the words "Agricultural Association" would be supplied, under the statute and the misnomer of the grantee in the second deed was not fatal, as the misnomer of a corporation will not invalidate a conveyance to it, if it appears that it was the corporation intended.

2. STATES — STATE INSTITUTIONS — AGRICULTURAL ASSOCIATIONS.

An agricultural association incorporated under Act April 15, 1880 (St. 1880, p. 62, c. 69), substantially re-enacted by St. 1891, p. 138, c. 126, dividing the state into agricultural districts, authorizing the organization in each district of such an association, its real estate to be used for the purpose of holding exhibitions of live stock, etc., with a view to the improvement of industries in the district, providing for a district board of agriculture appointed by the Governor, and declaring such association when formed to be a state institution, and that such board shall have exclusive control of the association in the name of the state, is a public agency of the state, charged with the performance of a part of the functions of the state government.

3. SAME — DISPOSAL OF PUBLIC PROPERTY — GIFT BY LEGISLATURE.

Act April 15, 1880 (St. 1880, p. 62, c. 69), divided the state into agricultural districts, and authorized the organization in each district of an agricultural association, its real estate to be used for the purpose of holding exhibitions of live stock, etc., provided for a district board of agriculture appointed by the Governor, and declared such associations, when formed, to be state institutions, and that such board should have exclusive control of the association in the name of the state, which was substantially re-enacted by St. 1891, p. 138, c. 126. Act Feb. 18, 1895 (St. 1895, p. 14, c. 8), added to the former act section 10½, providing that such associations which had theretofore issued alleged certificates of capital stock which had been accepted by the members in lieu of certificates of membership might elect to have a capital stock, and issue certificates of stock in the same manner as private corporations, and thereafter such association should be possessed of all rights and powers as if it had been originally created a corporation with a capital stock, including the right to control the property of the association, etc., but should not sell any portion of its real estate necessary for the permanent use of the association, and, where it accepts state aid, the funds shall be held under the control of the district board of agriculture. Const. art. 4, § 31, prohibits the Legislature from making any gift of public money or thing of value to any individual or corporation. *Held*, that the amendment of 1895 authorized the formation within the association, constituting a public corporation, of a private corporation, and transferred thereto without consideration the property of the agricultural association to be managed for its own use and benefit, with power to declare dividends from the profits, and was an attempted gift of public property, which was void.

4. LIMITATION OF ACTIONS — LIMITATION AS AGAINST STATE — AGRICULTURAL ASSOCIATIONS.

Property held in trust by a district agricultural association being property held by a state institution or public agency for a public use, the statute of limitations does not run against an action to recover such property and it is immaterial whether the record title to such property be held by the state at large, or by a

county or other official body, if the property is set apart or reserved for public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 39.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Sixth District Agricultural Association against E. T. Wright and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Judgment modified, and affirmed as modified, and order affirmed.

J. S. Chapman, Ward Chapman, J. W. McKinley, H. W. O'Melveny and John D. Works, for appellants. Scarborough & Bowen and Hunsaker & Britt, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying the defendants' motion for a new trial. The action was one by plaintiff, alleging itself to be an agricultural association under the laws of the state of California, providing for the formation of agricultural districts and for the organization of agricultural associations therein, and for the management and control of the same by the state, against E. T. Wright and others, who, it was alleged, for the purpose of converting the same to their own use, had taken possession of all plaintiff's land and other property, and retain and use the same for their own profit and gain, to compel the defendants to account for and pay over and deliver all said property, and for a decree adjudging the defendants to be without interest in any of said property. The defendants claimed that plaintiff never was an agricultural association or corporation organized under any law, has no legal capacity to sue or hold property, and never owned any of the property described in the complaint. They further claimed that what they style "District Agricultural Association No. 6" is a corporation duly organized under the laws of the state, that it owns the property in suit, and that the directors elected by the stockholders thereof are entitled to the possession, management, and control of such property; all of the defendants except defendant Lynch being so-called directors elected by such stockholders. The findings of the trial court were in accord with plaintiff's allegations, and judgment was in favor of plaintiff for the possession of the real property, and for \$5,584 on account of moneys received by defendants as rents, issues, and profits of such real property found by the court to be in their possession at the time of judgment herein.

It is essential to an understanding of the questions involved that a statement of what we deem to be the material facts should be made. The real property in controversy, situated in Los Angeles county, was originally the property of the Southern District Agricultural Society, a private corporation, and was subject to a mortgage executed by it to

one W. W. O'Melveny. This mortgage was foreclosed, the decree of foreclosure being entered November 12, 1879, and the property was sold under the decree to one Isaac N. Moore for \$9,191.70, who received a sheriff's deed therefor on August 9, 1880. In the meantime, early in 1880, it had been attempted to form an agricultural association under the provisions of the act of April 15, 1880 (St. 1880 [Official Ed.] p. 621, c. 69; Bancroft Ed. p. 238), for Agricultural District No. 6, created by said act and comprising the counties of Los Angeles, San Diego, San Bernardino, Santa Barbara, Ventura, and Inyo, and in May, 1880, notice was given to the Governor of the state by one George Rice, purporting to act as "Sect.," "by order of the committee," that such association had been formed, and requesting the appointment by him of the members of the district board of agriculture for said district to manage and control said association. Such appointments were thereupon made by the Governor, and the appointees duly qualified and organized, and assumed control of the affairs of such purported association. Even since then directors of said district have been appointed by the Governor of the state as the time of the old directors expired or vacancies otherwise occurred, and the directors in office have at all times managed and controlled the affairs of the agricultural association thereof except in so far as is hereinafter stated. Except for the written notice aforesaid to the Governor, and what are styled "Articles of Association 6 District Agricultural Association" signed only by William Niles as chairman, and filed in the office of the Secretary of State on May 20, 1880, there was no record evidence of the formation of the association at this time, but there was parol evidence sufficient to sustain a conclusion that 50 or more persons representing a majority of the counties of the district had at a meeting held for that purpose ordered the formation of the association. In the same year there was subscribed some \$13,000 by persons desirous of re-establishing an agricultural association and devoting the property of the old Southern District Agricultural Society to the purposes thereof. It does not appear to be controverted that by aid of the money thus subscribed, and by direction of the subscribers, the title to the property in controversy was conveyed in the year 1884 by said Isaac N. Moore to W. J. Broderick, William Ferguson, and E. L. Mayberry, in trust, to convey to the Sixth District Agricultural Association upon the following trusts: "That is to say, the said land shall be held in perpetuity as a place for holding agricultural exhibitions or fairs, and shall be managed and controlled by the said association for that purpose, and also for the purpose, so far as consistent therewith, of renting or otherwise managing the said property so as to raise a revenue for meeting the expenses of holding such exhibitions or fairs,

and, especially, so far as consistent with the above purposes, for the purpose of holding exhibitions of horses, cattle, and other stock, and of the agricultural, horticultural, viticultural, mechanical, manufacturing and domestic products of Agricultural District Number Six, with a view to the improvement of all the industries in the same"—being the purposes for which associations existing under the act of April 15, 1880, are expressly declared by said act to hold real estate acquired by them. The deed to such trustees, Broderick et al., provided that the conveyance to said agricultural association should be made only if the same be found to be a legally constituted association, capable of taking and holding real estate upon such trusts, and if this were not found to be the case, or if it declined to take the property on said trusts, the land should be conveyed on the same trusts to a corporation or association to be formed for said agricultural district under the laws of this state for the same purposes. On May 7, 1885, the trustees executed such a conveyance to the "6th Dist. Agricultural Association." In the year 1888, some question having arisen as to the legality of the proceedings for the formation of such association, pursuant to a call of the directors of the district, then reduced by amendment to the statute to Los Angeles, San Bernardino, and Ventura counties, acting as directors of the association, a meeting was held on March 13th for the purpose of reorganizing and forming an agricultural association for the district under the act of April 15, 1880. The proceedings had were in entire compliance with the provision of said act. Articles of association were there signed by more than the requisite number of persons from the various counties included in the district. The only respect in which these articles appear erroneous is in the statement of the name of the association, which is declared to be "Agricultural District Number Six," the act of April 15, 1880, itself prescribing the name of all associations formed thereunder as "—— Agricultural Association." This organization having been perfected, on May 29, 1888, a new deed of the said property on the same trusts was executed by said Broderick et al., as trustees, to "District Agricultural Association Number Six of California," and on January 27, 1890, another deed of the same property on the same trusts was executed by the said trustees to "Agricultural District Number Six of the State of California"; it being recited in the first of these deeds that it was given to correct and to confirm the deed of May 7, 1885, to the Sixth District Agricultural Association, and in the second that it was given for the purpose of ratifying and confirming two prior deeds whereby said trustees "pretended to convey to said second parties" said premises. The record establishes beyond a shadow of a doubt that the sole object of all these proceedings was to perfect the organi-

zation of a then existing agricultural association for such district, and to perfect the title of such association to the real property in controversy. From the time of these proceedings until the year 1897, the property was managed and controlled by the directors of "Agricultural District Number Six," appointed by the Governor of the state, in accord with the provisions of the act of 1880, and a subsequent act to the same effect (St. 1891, p. 138, c. 126), which, although reducing District 6 so as to restrict it to Los Angeles county alone, continued in force agricultural districts theretofore established, and made them agricultural associations under said act.

By act approved February 18, 1895 (St. 1895, p. 14, c. 8), the Legislature added a new section, numbered 10½, to said act of 1891, providing substantially as follows: Every such association which has heretofore issued certificates alleged to be certificates of the capital stock of such association, which have been accepted by the members thereof in lieu of certificates of membership, may elect to have a capital stock and may issue certificates of stock therefor in the same manner as private corporations. To effect such change, a meeting of the holders of the alleged certificates might be called by certain notice, such holders of the same to have one vote for each share of stock appearing in their names on the books of the association. At such meeting, should the holders of a majority of the shares of such alleged capital stock vote in favor of having a capital stock, and fix the amount thereof and the number of shares into which it shall be divided, then such corporation shall issue certificates of capital stock to the holders of such alleged capital stock, in the same proportion as such alleged stock appears in the names of such holders, respectively, upon the books of such association. A copy of the proceedings must be filed with the Secretary of State and the clerk of the county where such association has its principal place of business. "Thereafter such association shall be possessed of all rights and powers, and shall be subject to all the obligations and restrictions, as if it had been originally created a corporation with a capital stock, including the right to elect a board of directors authorized to exercise such control of all the property of such association" as provided in the Civil Code relating to corporations, provided that the association shall have no authority to sell any portion of its real estate which may be necessary for the permanent use of such association for the purposes of the act, and provided that, where aid is accepted by the association by vote of its elected board of directors for the purpose of holding an annual district fair, such fair shall be held under the control and management of the district board of agriculture of such district; "but said district board of agriculture shall have

no other authority, control, or management of or over the property of such association, and the authority which it may exercise over such property shall continue only during the time occupied in holding the said district fair, which time shall not extend over more than one week annually." A similar provision was incorporated in the general agricultural district act of March 31, 1897 (St. 1897, p. 304, c. 224), which also continued in force agricultural associations theretofore established, and made them associations under said act. The agricultural association in District 6 was of the class described in this amendment. The evidence very clearly shows that, beginning with the year 1881, it issued alleged certificates of shares of stock to various persons who subscribed money for the purpose of re-establishing an agricultural association, in proportion to the amount subscribed, and kept a stock book showing the stock issued and transfers thereof from time to time. In January, 1897, acting under this amendment, the then holders of the shares of stock evidenced by the original certificates issued in 1881, held a meeting after due notice, and, in strict accord with the provisions thereof, determined that "District Agricultural Association No. Six" elected to have a capital stock, the amount thereof to be \$12,600, divided into 126 shares of the par value of \$100 each, and assigned the same to holders of the alleged capital stock, in the same proportion as such alleged stock appeared in the names of such stockholders on the books of the association. The proceedings were in full accord with the requirements of said amendment, and copies of the record thereof were filed in the offices of the Secretary of State and the county clerk of Los Angeles county. Thereupon the stockholders elected a board of directors, and, upon the theory that the amendment was valid, the directors of Agricultural District No. 6 appointed by the Governor, a majority of whom were also stockholders and elected directors of such association, delivered to the elected board of directors all the property of the association, including the land in controversy. The directors so elected, and their successors in office, also elected by the stockholders, have ever since had possession of such property, managing and controlling the same and all proceeds thereof for the benefit of the stockholders, except during the time of the annual fairs given with state aid, for which times the portion of the land used for fair purposes was leased to the district board of agriculture appointed by the Governor, the stockholders' board receiving as rental therefor, for the benefit of the stockholders, all receipts from gates and any and all privileges. In the latter part of 1903 and in the early part of 1904 there were on the board of directors of the agricultural district for the first time a majority who were not stockholders of said association, and on or about July 25, 1904, this board, acting for

plaintiff, demanded of defendants the possession of all said property, and an accounting of the affairs thereof, which was refused. Thereupon this action was commenced.

Upon the foregoing facts, it appears to us that the important question in the case is as to the validity of the amendment of 1895, carried into the act of 1897, purporting to authorize the issuance of capital stock by such an association, and the control and management of the property thereof by the stockholders for their own benefit through their elected board of directors. The plaintiff is undoubtedly an agricultural association organized under the act of April 15, 1880, and is the owner of the real property in controversy for the purposes defined in said act and also in the conveyance thereof made to it. It is immaterial in this connection whether or not the proceedings had in the year 1880 were effectual to create an association under the act, or whether or not, if no such association was then legally formed, plaintiff was nevertheless a *de facto* association. Undoubtedly, if the proceedings then had were ineffectual for any purpose, the proceedings had in the year 1888 were effectual to create such an association under the act of April 15, 1880. In either case it acquired the property in controversy. If it existed prior to the proceedings or 1888, it took the title under the first deed made by the trustees, that of May 7, 1885. If it did not come into existence until the proceedings of 1888 were had, it took under the deeds made by said trustees in the years 1888 and 1890. The slight difference in the name given to the association in the two proceedings and the two sets of deeds is of no moment. The act of April 15, 1880, contemplated a single association for each agricultural district, which should be a public corporation or state agency to carry on one of the objects committed to the state government by the State Constitution. *People, etc., v. San Joaquin, etc., Ass'n*, 151 Cal. 797, 91 Pac. 740. It expressly declared that any association so formed should be known and designated by the name of "—— Agricultural Association," leaving a blank for the insertion of a number or name which should distinguish it from the associations of other districts, and the same is true of the subsequent acts on the same subject. Any association formed under that act necessarily assumed the name so far as it was then declared by the act, and those forming the association had no power to provide otherwise. In the absence of other special designation by those forming or composing the association to precede the words "Agricultural Association" to distinguish it from the associations of other agricultural districts, we have no doubt that the words "Sixth District" would be supplied by law by reason of the provisions of the act, and that by such name and style the said association existed, with power to sue and be sued and to purchase, hold, and lease real es-

tate for the purposes defined in said act. Section 12 of said act. So far as the second set of deeds is concerned, the misnomer of the grantee was not fatal. The general rule is that misnomer of a corporation will not invalidate a grant or conveyance to or by it, if it appears from the instrument itself, or is shown by such evidence as is admissible upon the question, that it was the corporation intended. *Clark & Marshall on Private Corporations*, § 52. There can be no doubt upon the record before us that these conveyances were to the agricultural association for this district, and that any and all proceedings subsequently had by or on behalf of the association styled "Agricultural District Number Six" or the members or so-called stockholders thereof were had by or on behalf of the same association.

It appears to necessarily follow that the right of defendants to hold and manage the property is dependent upon the validity of the amendment of 1895, before referred to. If such amendment is invalid, the management of the association is in the hands of the district board of agriculture, which, under the provisions of the act, has "the exclusive control and management of such institutions for and in the name of the state," and has "the possession and care of all the property of the association."

It is claimed that this amendment was in violation of several constitutional provisions. Learned counsel for defendants have not attempted to reply to the argument of plaintiff's counsel in this behalf, except in regard to the claim that the amendatory act is invalid for the reason that it is in violation of the constitutional provision that every act shall embrace but one subject which shall be expressed in its title. It is unnecessary to discuss this objection in view of our conclusion that the amendment is clearly unconstitutional for another reason.

There can be no question as to the status of any such association, and the character of the property held by it, at the time of the enactment of this amendment. This matter was exhaustively discussed and decided in a very recent case. *People, etc., v. San Joaquin, etc., Ass'n, supra*. It was, as expressly declared by the acts of both 1880 and 1891, a "state institution"—a public agency of the state, which was within the exclusive management and control of the state and charged with the performance of a part of the functions of state government—a public corporation formed for the government of a portion of the state in the matter of the improvement of the material industries therein. Its property was public property dedicated to the purposes of such public corporation, and accepted therefor by the state. There was nothing in the law relative to any such association which authorized it to have a capital stock or to issue certificates of stock, as is fully recognized in the amendment of 1895, or which contemplated a retention of

any interest in or control of any portion of such property by the persons forming such association or dedicating money or other property to its purposes.

It is provided in section 31 of article 4 of the Constitution that the Legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever," except as prescribed in section 22 of the same article, which section has no application here. It appears to us, in view of the facts already stated, that the amendment of 1895 is clearly in conflict with this provision. The plain practical effect thereof was to authorize the formation within the association constituting a public corporation by persons having no interest in the property of the association, of a private corporation, and the transfer, without consideration, of all the property of the association to this private corporation to be managed and disposed of by it for its own use and benefit, in the same manner that property of private corporations is ordinarily managed and disposed of, subject only to the limitation that it should have no authority to sell any portion of the real estate which may be necessary for the permanent use of the association for the purpose of the act, which we take to be the real property necessary for the purposes of holding annual exhibitions of horses, etc., and also subject to the limitation that, if it elect to receive aid from the state for any such annual exhibition, it must allow such exhibition to continue for not exceeding one week annually, to be held under the control and management of the state, through its district board of agriculture. If it elected not to receive such aid from the state, it was apparently given authority to exclude the state officers from all management and control even for the week of the annual fair, and to hold the same at all times for its own use and benefit. In the case at bar, it assumed the right, while accepting such state aid, to receive for its own benefit the profits of such annual fairs, and also the right to declare dividends for the benefit of its stockholders, and we are not warranted in holding that in either of these cases was it exceeding the powers attempted to be conferred by the amendment. Certainly the power to declare dividends from the surplus profits of the corporation was one of the powers so attempted to be conferred. To our minds the amendment is a clear case of an attempted gift of public property, and therefore void.

All of the defendants, except the defendant John C. Lynch, pleaded that the action was barred by certain sections of the Code of Civil Procedure. As we have seen, however, the property was held in trust by a state institution or public agency for a public use, which public use has not been discontinued or abandoned by any lawful act of

public authority. As to such property, it is well settled that the statute of limitations has no application. As heretofore said: "It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved to the public use, and the public use for which it is appropriated is immaterial." See *People, etc., v. Kerber* (Cal.) 93 Pac. 878, and cases there cited.

The judgment against the defendants for the sum of \$5,584 was based upon the finding that said defendants "had in their hands of the money received and collected by them as the rents, issues, and profits of said real property, over and above all expenditures made by them for the care and maintenance thereof, the sum of \$5,584." This finding is, of course, a sufficient support for the judgment in regard thereto. It does not appear to be urged in the brief of learned counsel for defendants that this finding is not supported by the evidence, except in so far as defendant John C. Lynch is concerned. It did clearly appear that whatever amount was so on hand was in the hands and under the control of the so-called private directors elected by the stockholders. Lynch, while as a stockholder asserting the claims of the stockholders and the elected board of directors, denied in his answer that he was a director, and the evidence showed without conflict that, although Lynch was originally such a director, he had ceased to be such, and at the time this proceeding was instituted was only a holder of some of the stock which had been issued. The evidence, therefore, does not warrant this finding as to Lynch. It is admitted by the brief of defendants that the other defendants were directors elected by the stockholders, and as such were in possession of all property claimed by the so-called Agricultural District No. 6. Under the views we have declared, the material findings of the trial court are sustained by the evidence, except in so far as defendant Lynch is found to be in possession with his codefendants of the sum of \$5,584 belonging to plaintiff.

In so far as the judgment is against defendant John C. Lynch for \$5,584 or any part thereof, it is reversed, Lynch to recover such costs of appeal as he has personally incurred. In all other respects the judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(154 Cal. 145)

MANSFIELD v. DISTRICT AGR. ASS'N NO. 6 (FERGUSON, Intervener). (L. A. 2,051.)
(Supreme Court of California. Aug. 10, 1908.)

1. TRUSTS—DISPOSAL OF TRUST PROPERTY—TRANSFER WITHOUT "SALE"—AUTHORITY—"DISPOSE OF."

Land was conveyed to a district agricultural association in trust as a place for holding agricultural exhibitions, a part thereof to be sold or disposed of to the best advantage for the purpose of improving the agricultural grounds and for meeting the expenses of the trust, including the expenses of litigation. The trustees of the association thereafter deeded part of the latter tract to B. in payment of legal services rendered the association and of services to be rendered in future. *Held*, that the power of disposition of the tract was not limited to a sale for cash, and even giving the word "sale" the definition of Civ. Code § 1721, as an exchange of property for a money consideration, the association was also authorized to "dispose" of the property which would empower it to transfer the property itself in payment of legal expenses.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2114-2118.]

2. SALES—NATURE AND ELEMENTS.

While the word "sale," in transactions relating to personal property, usually has reference to a money consideration, yet it will be given a broader significance when the meaning of the law or of a private contract demands it, and the much more generally accepted definition of a sale is an exchange of an interest in real or personal property for money or its equivalent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1.

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

3. TRUSTS—DISPOSAL OF TRUST PROPERTY—SALE—DISCRETION OF TRUSTEE.

Where the board of an agricultural association was authorized to dispose of land held in trust by it to meet expenses of litigation, in the absence of fraud or gross abuse of discretion, the board is the exclusive judge of the necessity for such disposal, and its discretion will not be controlled.

4. APPEAL AND ERROR — PRESENTATION OF GROUNDS OF REVIEW—FINDING OF TRIAL COURT.

A finding of the trial court that the title of a grantee was derived from a deed of trust, and not from a decree of court, which is not assailed either by appellant or respondent, is final on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. M. Mansfield against the District Agricultural Association No. 6, in which William Ferguson intervened. From a judgment for one of the defendants, plaintiff appeals. Judgment directed for plaintiff.

Hunsaker & Britt and Scarborough & Bowen, for appellant. J. W. McKinley and H. W. O'Melveny, for respondents.

HENSHAW, J. This was an action brought to quiet title to three one-acre lots, designated "T," "U," and "V," of the agricultural park tract in the county of Los Angeles. William Ferguson intervened, but the findings and judgment of the court were against the intervener, and he has not appealed.

The court found that defendant District Agricultural Association No. 6 had no title to the land in controversy; that title was in the Sixth District Agricultural Association; that the Sixth District Agricultural Association had conveyed the land in controversy to plaintiff's grantor, W. M. Bowen, but that its deeds were void because made in violation of the terms of the trust under which the Sixth District Agricultural Association took and held title to the land. Whether or not the deeds of the Sixth District Agricultural Association to W. M. Bowen were void is the sole question presented for consideration upon this appeal.

The history of District Agricultural Association No. 6 and of the Sixth District Agricultural Association has recently been discussed by this court in Sixth District Agricultural Association v. E. T. Wright et al., 97 Pac. 144, filed August 8, 1908. With this reference to that case there is need here to say no more than that the Sixth District Agricultural Association took certain lands under a deed of trust. The lands were, first, a described tract, designed to be used for "holding agricultural exhibitions or fairs"; and, second, certain one-acre lots designated under the letters of the alphabet from A to Y, inclusive. The deed of trust declared that these lands were conveyed to the Sixth District Agricultural Association, "to have and to hold all and singular the premises and appurtenances unto the party of the second part, and its successors forever; in trust, nevertheless, for the following uses and purposes, to wit: that is to say: that the said land first hereinbefore described shall be held in perpetuity as a place for holding agricultural exhibitions or fairs, and shall be managed and controlled by the party of the second part for that purpose; * * * and that the lands secondly hereinbefore described, to wit: the 1-acre lots, shall be sold or disposed of by the party of the 2d part to the best advantage for the purpose of beautifying and improving the said Agricultural Park grounds, and for the purpose of meeting the expenses of this trust, including the expenses of litigation." The court finds that the ownership of all the real property in the foregoing deed described became vested in the Sixth District Agricultural Association "for the purposes, subject to the uses and upon the trusts in said deed set forth." The deed of the Sixth District Agricultural Association to Bowen was executed in pursuance of a resolution of the board of directors of the association, which resolution recited that W. M. Bowen, as attorney for the board, had rendered valuable services during the last two years in protecting the rights of the board, had advised the board upon many important legal matters; that he had received no compensation for his services, and that the board had no ready money with which to compensate him; that the board had contemplated the selling of certain of its one-acre lots, and it

directed conveyance to the said Bowen of lots T, U, and V on account of the services performed and to be performed in the future in looking after the suits now pending and all other suits that the board may direct and deem advisable to bring in the future, and any and all other legal matters that may arise from time to time in connection with its property.

It may not be disputed, and indeed is not disputed, that the estate which the Sixth District Agricultural Association took under the deed of trust was limited by the terms of the grant, as the court found. Not that only, but the trust itself was one which the Sixth District Agricultural Association, as a municipal or quasi-municipal corporation, had the power to accept and execute. But was the court correct in holding that the power of disposition of the one-acre lots was limited to a "sale for cash"? Clearly not. By the very terms of the trust, these lots were to be sold or disposed of by the association to the best advantage, for the purpose of meeting the expenses of the trust, including the expenses of litigation. By this language, giving to the word "sale" its narrowest application, that of an exchange of property for a money consideration (Civ. Code § 1721), still the association was not restricted in its disposition of the property to sales alone; for it was equally empowered to "dispose" of the property to its best advantage. It may not be said under the rule of *noscitur a sociis* that to "dispose of" the property in this connection means to sell it, for this renders the phrase superfluous and meaningless. The grantors clearly intended to confer upon the association the power to sell or otherwise to dispose of the property. Though the word "sell" itself in transactions touching personal property usually has reference to a pecuniary or money consideration, yet courts have never hesitated to give the word a broader significance, when the meaning of the law or of a private contract seemed to call for it, and the much more generally accepted definition of a sale is the exchange of an interest in real or personal property for money or its equivalent. Webster's Unabridged Dictionary and Standard Dictionary; *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32; *Howard v. Harris*, 8 Allen (Mass.) 297; *Western Massachusetts Insurance Co. v. Riker*, 10 Mich. 279; *Spiegle v. Meredith*, 4 Biss. 120, Fed. Cas. No. 13,227; *Stokes v. Stokes*, 66 Miss. 456, 6 South. 155; *Thurmond v. Faith*, 69 Ga. 833; *Hughes v. Washington*, 72 Ill. 84; *Davis v. Middleton*, 14 Cal. 540. In *Stokes v. Stokes*, supra, the executor took a devise in trust, with power to sell any of the lands when advisable for support of the testatrix's children. The executor made a deed to one Stokes of the land in controversy, reciting as a consideration the discharge of a debt due Stokes for money loaned by him to the testatrix and used by her for

the support of herself and family. The children sought to have that conveyance set aside. Their bill was dismissed; it being held the discharge of this debt by deed came within the power of sale conferred. In *Hughes v. Washington*, supra, the will conferred power upon the executor "to sell any property * * * in such manner, and on such terms as may seem best for the interest of my children." The executor here conveyed a part of the land to an attorney for services rendered on behalf of the estate, and the court said, upholding the transfer: "If the executor had sold a definite piece of the Cook county lands, and obtained money, and used it in the defense of the suit, appellees would not have complained. In lieu of this the executor contracted to give Hughes one-third of the lands for the services. Practically it could make no difference whether the executor sold a portion of the lands to a stranger, and used the money to defend against the suit, or gave directly a part to the one employed to defend." In *Thurmond v. Faith*, supra, the language of the trust was precisely that here employed. It was made lawful for the legal guardian of the parties "to sell and dispose of said lots or parcels of land" whenever in the discretion of such guardian the same shall be necessary for the support, maintenance, and education of the parties of the second part. The guardian exchanged the lands of the minors for other lands. The court said, in answering the objection that this exchange was not a sale: "Had the power of the guardian been limited to the sale of the land only, there might have been some force in the point; but it must be noted that the guardian is clothed with the power to sell and dispose of, which, as therein, included not only the power to sell, but the power of disposition, such as was made by the guardian. Indeed, the transaction was simply a sale with payment in land instead of money." Under an act empowering them to sell at public sale, or to lease the property which was conveyed to them, and "apply the proceeds of such sale or lease to the liquidation of the floating debt of said city," the commissioners of the funded debt of San Francisco sold a piece of land and took in payment therefor 3 per cent. scrip, which was a part of the floating debt. It was there argued that they could sell only for money, but it was held that the sale as indicated was within their power. *Davis v. Middleton*, 14 Cal. 540. In *Roberts v. Northern Pacific Railroad Company*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873, the Supreme Court of the United States say: "It is indeed urged that the country authorities could only sell its land for money. We do not accede to this proposition. If they possess the power to sell for money, we are pointed to no express provision of law that restricts them from selling for money's worth. * * * The amount, as well as the nature of the consid-

eration received by the county in exchange for its lands, if it had the power to sell them, was a matter that concerned the county only." As the association in this case was not even restricted to selling, but could otherwise dispose of the lands for its best interests, and as one of the very designated purposes for which such disposition could be made was to meet "expenses of litigation," clearly the Sixth District Agricultural Association, as owner of the lots in question, was acting not in violation of, but within the express terms, of its power and trust in conveying the land as it did. No question of fraud is here presented, nor even that of a gross abuse of discretion, and, in the absence of such a showing, as was said by this court in *Ellis v. Commissioners of Funded Debt*, 38 Cal. 629: "The commissioners are the exclusive judges of the necessity for such sale or lease until the trust is finally closed, and their action in this respect cannot be impugned nor their discretion controlled by the city or its grantee, except on the ground of fraud or a gross abuse of discretion by the trustees."

The argument of respondent that the title of the Sixth District Agricultural Association is derived from the decree of the court, rather than from the deed of trust, and that the deed to Bowen does violence to that decree, may not here be considered. The finding of the court is that the title and the powers of the association are derived from the deed of trust, and, neither appellant nor respondent assailing this finding, it is a finality so far as this appeal is concerned.

It follows herefrom that a new trial is not necessary, but that upon the findings made by the trial court judgment should have been given for plaintiff. It is ordered accordingly.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

154 Cal. 111

HOFFMAN-MARKS CO. v. SPIRES et al.
(L. A. 1,990.)

(Supreme Court of California. Aug. 8, 1908.)

1. MECHANIC'S LIENS — RIGHT TO LIEN — ABANDONMENT BY CONTRACTOR.

Under a building contract the price was to be paid in six payments, the first five to be made at certain stages of the work, and the last payment 35 days after acceptance. The contractors received the first three payments, when they abandoned the contract, and the owner completed the building, as he was authorized to do by the contract. The owner paid a sum in completing the work, together with the payments made, greater than the contract price. Code Civ. Proc. § 1200, provides that, if the contractor abandons the work before completion, the portion of the price applicable to liens shall be fixed by deducting from the value of the work and materials already done and furnished the payments then due and paid under the contract, and the remainder shall be applicable to such liens. Section 1184 requires at least 25 per cent. of the whole contract price to be paid at least 35 days

after completion of the contract. *Held*, that the payments made at the time the contract was abandoned having exceeded the value of the work and materials then done and furnished, the claimants were not entitled to a lien under section 1200.

2. SAME.

The liability of an owner who has complied with the terms of the contract is limited to the price he agreed to pay therefor, and, where the contractor abandons the undertaking, the owner is liable only for such proportion of the contract price as represents the work already done; and, where he is compelled to himself complete the building, he need not pay to the original contractor or those claiming under him that part of the contract price represented by the work left undone.

3. APPEAL AND ERROR—REVIEW—FINDINGS OF TRIAL COURT—CONFLICTING EVIDENCE—CONCLUSIVENESS.

Where there was evidence that specifications were attached to a building contract at the time of filing and were filed with it, the Supreme Court is bound by the trial court's finding that such was the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

4. MECHANICS' LIENS—RIGHT TO LIEN.

Under Code Civ. Proc. § 1200, providing that, where a contractor abandons the contract before completion, the portion of the contract price applicable to liens shall be fixed by deducting from the value of the work and materials then done and furnished the payments then due and actually paid under the contract, etc., and the remainder shall be applicable to such liens, where a building contract was abandoned and the work completed by the owner, the value of the completed building in determining the proportion of the contract price applicable to liens was properly arrived at by adding to the actual value of the work done and materials furnished at the time of abandonment the reasonable cost of completing the building.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Actions by the Hoffman-Marks Company, a corporation, and by F. O. Wyman and others, and by the Inman-Poulsen Lumber Company, a corporation, against Mary H. Spires and others to establish a mechanic's lien, and by Mary H. Spires against L. McKown and others, all of the actions being consolidated and tried together. From a judgment for defendants in the first three actions and for plaintiffs in the last action, denying the right of the claimants to liens, they appeal. Affirmed.

Borden & Carhart, Edward F. Wehrle, Percy B. Lloyd, and Percy R. Wilson, for appellants. John D. Pope, Charles Wellborn, W. D. McConnell, McNutt & Hannon, and Trustin P. Dyer, for respondents.

SLOSS, J. Three of the four actions involved in these appeals were commenced to foreclose mechanics' liens upon a lot and building in the city of Los Angeles. Mary H. Spires, the owner of the property, answered the complaints in said actions, and commenced, as plaintiff, a separate action against all of the lien claimants and the original contractors. In this action she prayed for a decree adjudging that none of the claimants was entitled to any lien against

her property, and that there was no fund in her hands for the payment of the laborers or materialmen. The four actions were consolidated and tried together.

The findings, so far as it is necessary to state them, were as follows: On September 6, 1904, L. McKown, H. M. Baird, H. Stone, and H. J. Hoover, copartners under the firm name of L. McKown & Co., entered into a contract with Mary H. Spires to build for her a house on the lot in question for the sum of \$8,183. The contract was in writing, and was before the work was commenced thereunder filed in the office of the county recorder. With said contract, and as part thereof, there were filed plans and specifications referred to in the contract and signed by the parties. The contract price was, by the terms of the contract, made payable as follows: First payment, the sum of \$1,227.45, when the second floor joists are in place. Second payment, the sum of \$1,227.45, when the roof is ready for metal covering and chimney built. Third payment, the sum of \$1,227.45, when the building is inclosed, brown coated and rough plumbed. Fourth payment, the sum of \$1,227.45, when the last coat of mortar is on, and sash and glass and cement steps are in place. Fifth payment, the sum of \$1,227.45, when building is accepted by architect and owner. Sixth payment, the sum of \$2,045.75, when 35 days have expired after acceptance by architect and owner, etc. McKown & Co. commenced to build said house and progressed to the point when said building was inclosed, brown coated, and rough plumbed. The first, second, and third payments provided for in the contract, amounting in all to \$3,632.35, were made by Mrs. Spires to McKown & Co. Thereafter McKown & Co., having failed to proceed under their contract with proper dispatch, received from Mrs. Spires on December 21, 1904, notice that unless they so proceeded she would within three days proceed to complete the work, as she was by the contract authorized to do. They (McKown & Co.) failed to proceed, and abandoned the contract, whereupon Mrs. Spires proceeded with the work and completed the building according to the provisions of the contract. At the time of the abandonment by McKown & Co. the value of the work and materials already done and furnished, including materials then actually delivered on the ground, estimated by the standard of the whole contract price, was \$3,105. The fair and reasonable expense and cost of completion of the house was \$7,581.79, and Mary H. Spires paid that sum in completing the work. It was also found that certain sums, which it is not necessary to specify, were due to respective lien claimants (appellants here) by McKown & Co. for materials and labor furnished to be used and used in said building. From these facts the court drew the conclusions of law that the lien claimants were not entitled to liens upon the premises nor

to any judgments against Mary H. Spires, but that they were entitled to judgments against the copartners constituting the firm of L. McKown & Co. for the sums found to be due to them, respectively. Mary H. Spires was declared to be entitled to a judgment that the various claimants be decreed to have no lien or liens against her premises. A judgment followed in accordance with these conclusions.

Some of the lien claimants moved for a new trial, and, their motion having been denied, they now appeal from the judgment and from the order denying their motion for a new trial. On the facts as declared in the findings, the court properly concluded that the claimants were not entitled to liens or to judgments against Mary H. Spires. It is found that a valid contract in writing had been executed and filed; that work under this contract had been abandoned by the contractor before completion; and that the payments made by the owner pursuant to the contract amounted, at the time of the abandonment, to more than the value of the work and materials then done and furnished, estimated by the standard of the whole contract price. Under the rule declared in section 1200 of the Code of Civil Procedure, there was therefore no part of the contract price applicable to the payments of liens. That section reads as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor, shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens." In *McDonald v. Hayes*, 132 Cal. 490, 495, 64 Pac. 850, this court said: "Where there is a valid contract between the owner and contractor, it is the measure of the owner's liability. *Greig v. Riordan*, 99 Cal. 319, 33 Pac. 913; *Kellogg v. Howes*, 81 Cal. 175, 177, 22 Pac. 509, 6 L. R. A. 588; *Walsh v. McMenomy*, 74 Cal. 359, 16 Pac. 17, and cases cited. But in cases where, as here, the contractor fails to perform his contract, section 1200 of the Code of Civil Procedure provides the mode of determining the owner's liability. * * *

If, upon making the computation directed by section 1200, no balance remains, there is nothing available for lien claimants, and they must look to their personal claim against the contractor.

It is argued by appellants that the final payment of at least 25 per cent. which, under the Code Civ. Proc. § 1184, must be made payable not less than 35 days after the final completion of the contract, constitutes in all cases a fund specially set apart for the satisfaction of liens, and that this fund cannot be impaired in any way. Accordingly it is contended that the amount of \$2,045.75, the sixth and last payment provided for in the contract here involved, must be applied to the satisfaction of appellants' liens, notwithstanding the fact that the contractor abandoned his contract, and the owner in completing it was compelled to expend a sum which, added to the payments already made, exceeded the whole contract price. We think the statute affords no foundation for this contention. It may, no doubt, be said in general terms that the mechanics' lien law has set apart the 35-day payment as a fund for lien claimants, and that this fund must remain intact for them, unaffected by any offsets or claims on the part of the owner. *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200. This rule has reference to cases where the contractor has substantially performed his contract, and has earned the contract price. But for the specific case of a failure by the contractor to fulfill his contract the Legislature has in section 1200 provided a different method of determining the amount payable by the owner. In every such instance the method so provided must prevail; and the section setting apart the 35-day payment as a fund for lien claimants has no application. Any other conclusion would result in imposing upon the owner the burden of paying much more than the contract price, although he had performed every stipulation of his contract.

The general constitutional principle underlying the mechanics' lien law is that the liability of an owner, who has on his part complied with all the terms of a valid contract, is limited to the price which by his contract he has agreed to pay. *Kellogg v. Howes*, 81 Cal. 179, 22 Pac. 509, 6 L. R. A. 588; *Stimson Mill Co. v. Braun*, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; *Latson v. Nelson* (Cal.) 11 P. C. L. J. 589. Where the contractor fails to perform his undertaking, the owner is made liable for such proportion of the contract price as represents the value of the work already done. When he is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay.

It is true that in the opinion in *Hampton*

v. Christensen, supra, there is some general language to the effect that the final payment cannot lawfully be depleted to the injury of the lien claimant, and in the course of the discussion the expense of completion in case of abandonment is not distinguished from other claims of the owner against the contractor which, as is held, cannot be charged against the 35-day payment. But *Hampton v. Christensen* was not a case of abandonment. The court made no reference to section 1200, and had no occasion to consider its effect. The decision is not to be understood as holding that section 1200 does not furnish ample and complete provision for cases falling within its terms. In such cases, as we have said, the balance, computed according to the method prescribed by the section, is all that the owner is required to devote to the discharge of lien claims. *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262, is cited by appellants, but is not in point, since in that case there was no valid contract, and therefore the claimants were, by the provision of section 1184 of the Code of Civil Procedure, entitled to liens for the value of the labor done and materials furnished.

Several of the findings are attacked upon the ground that they find no sufficient support in the evidence. It is contended that the evidence shows that the specifications referred to in the contract and made a part thereof were not filed with the contract, and that the contract was therefore void. *Pierce v. Birkholm*, 115 Cal. 657, 47 Pac. 681. But there was direct testimony to the effect that the specifications were attached to the contract at the time of filing, and were filed with it. Whether this testimony was true was a question for the trial court, and this court is bound by the finding that it was true.

The appellants also assail the finding that the value of the work done and materials furnished up to the time of the abandonment, estimated according to the rule laid down in Code Civ. Proc. § 1200, was \$3,105. Their contention is that the value of such work and materials was a much greater sum, and that it exceeded the amount of the payments made by the owner to McKown & Co. In their brief they quote the opinion of the judge of the trial court, showing that he reached the figure of \$3,105 by taking such proportion of the actual value of the work done and materials furnished at the time of the abandonment as the total contract price bore to the value of the building as completed. The value of the completed building was arrived at by adding to the actual value of the work done and materials furnished at the time of the abandonment the reasonable cost of completing the building. This method, assuming the items used in the computation to have been correct, was a compliance with the provision of section 1200, requiring the value of the work done and materials fur-

nished to be "estimated as near as may be by the standard of the whole contract price." *Dunlop v. Kennedy*, 102 Cal. 443, 444, 36 Pac. 765. To estimate such value, it is proper to consider not only the value of the work done at the time of abandonment, but also of that left undone, so that the whole may be compared with the contract price. The actual value of the work done at the time of abandonment, without reference to the contract, is not found by the court, but is stated in the opinion above referred to to have been \$4,500. The cost of completion (which is found to have been the fair and reasonable expense) is declared by the findings to have been \$7,580.79. It is urged by appellants that the first of these figures is smaller and the second larger than is justified by the evidence. The record is not so complete or clear on these points as might be desired, but, after a careful examination, we are satisfied that the amounts cannot be said to be so far wrong as to materially alter the situation so far as the lien claimants are concerned. That is to say, if we increase the actual value of the work done at the time of abandonment to \$5,000 (the utmost that can be contended for) and deduct from \$7,581.79, found to be the reasonable cost of completion, all items clearly appearing to have been improperly included, the value of the work done and materials furnished at the time of abandonment, measured by the standard of the whole contract price, would still be less than the payments already made to the contractors, and there would still be no balance applicable to the payment of lien claimants. With regard to the value or cost of work done by the contractors before, or by the owner after, abandonment, the only material part of the finding is that the value of the work at the time of abandonment, measured by the rule declared in section 1200, was less than the payments made, and to this extent at least the findings are sustained by the evidence.

There is no force in the attack made upon the finding that McKown & Co. abandoned the contract. The written agreement of December 29, 1904, relied on by appellants, is not inconsistent with an abandonment. On the contrary, it is in effect a concession by the contractors that such abandonment had taken place.

The witness Baird, called by appellants, was asked to explain an item in a supplemental sheet attached to the contract. An objection to the question was sustained, and appellants excepted. The contract itself is not incorporated in the statement on motion for new trial, and without it we cannot say that the supplemental writing described in the record as a portion of the contract presented such ambiguity as to authorize the admission of oral testimony to explain the terms of the writing.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

154 Cal. 137

H. RAPHAEL CO. et al. v. GROTE et al.
(L. A. 2,109.)

(Supreme Court of California. Aug. 10, 1908.)

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the H. Raphael Company, a corporation, and others, against Peter Grote and others, to establish a mechanic's lien. From a judgment for plaintiffs, a part of defendants appeal. Reversed and remanded.

John W. Kemp and Kemp & Collier, for appellants. Chas. L. Batcheller, El. E. Mellette, O. P. Widaman, A. L. & J. E. Stephen, Lawler, Allen & Van Dyke, G. C. De Garmo, and N. S. G. McCartney, for respondents.

HENSHAW, J. This is an appeal upon the judgment roll alone from a decree foreclosing certain mechanics' liens. The contract between the owner and the contractor was admittedly valid. One-half of the contract price had been paid by the owner, when, upon the contractor's failure to proceed further with the work, the owner, under a clause in the contract reserving him the right so to do, entered and supplied the necessary material and labor to finish the building. The lien claimants are those who furnished labor and material to the contractor before abandonment. They contend, and the court found with their contention, that the final payment of 25 per cent. under the terms of the contract was available and applicable to the payment of their liens. This was error. The question has recently been considered at length by this court in bank, and it is unnecessary here to repeat the reasoning. *Hoffman-Marks Co. et al. v. Mary H. Spires et al.* (L. A. No. 1,990, filed August 8, 1908) 97 Pac. 152. Section 1200 of the Code of Civil Procedure furnishes the rule in cases such as this.

A reversal thus becoming necessary, it is proper to add that upon a retrial the court should find upon the issue tendered as to the priority of the lien of the Bankers' Savings Union. The allowance of attorney's fees was also improper. *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193.

The judgment is therefore reversed and the cause remanded.

We concur: SLOSS, J.; LORIGAN, J.

154 Cal. 138

C. SCHEERER & CO., Inc., et al. v. DEMING
et al. (L. A. 1,938.)

(Supreme Court of California. Aug. 10, 1908.
Rehearing Denied Sept. 8, 1908.)

1. MECHANICS' LIENS — RIGHT TO LIEN — ABANDONMENT BY CONTRACTOR—CONSTITUTIONALITY OF STATUTE.

Construing Code Civ. Proc. § 1200, to limit the right to mechanics' liens, against the owner of a building, of persons who have furnished labor and material to the contractor, where the contractor abandons work under a valid contract, to the value of the work done and materials furnished at the time of the abandonment, in excess of what had then been paid to the contractor pursuant to the terms of the contract, does not violate the provision of the Constitution recognizing the right to mechanics' liens.

2. CONSTITUTIONAL LAW—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

A statute will not be held to invade the constitutional rights of the owner of property, where the only owner of property in the case claims under the statute, and insists on its validity, and the claim of invalidity is made by strangers, filing a brief as "friends of the court."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 39.]

3. APPEAL AND ERROR—HARMLESS ERROR.

Any error in excluding a question as calling for a conclusion is harmless, where the subject of the excluded question was fully covered by answers of the witness to other questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

4. SAME—BURDEN OF SHOWING ERROR.

One complaining of exclusion of evidence of a custom to do work in a certain way must show that the contract for doing the work in question did not provide for its being done in another way; so that, the record not showing the contract, the exclusion cannot be held error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3670, 3671.]

5. SAME—HARMLESS ERROR.

Refusal to permit a witness to give his estimate of the reasonable cost of completing a building according to plans is harmless; his answer being deducible by simple arithmetical computation from elements already testified to by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

6. EVIDENCE—OPINIONS.

Allowing a witness to testify that in his opinion one-fourth of the work on a building had been done when work was abandoned is not error, he having qualified as an expert, and stated that he was familiar with the building, as well as the plans and specifications, though he based his estimate, at least in part, on his view that, "when the brick wall is done and the roof on, we consider it is about one-quarter done"; as, while this might affect the value of his opinion, it could not render it incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2376.]

7. SAME—LAYING FOUNDATION.

Foundation is laid for the opinion of a witness as to the proportion of the work done on a building at the time of abandonment; his qualifications as an expert being admitted, by his testimony that he had examined the building a few days after the abandonment, and had examined the plans and specifications.

8. TRIAL—INTRODUCTION OF EVIDENCE—REBUTTAL.

In an action for a mechanic's lien by persons who had done work and furnished materials to the contractor, who had abandoned the work, plaintiffs, having properly introduced, as part of their case in chief, under the pleadings evidence regarding the amount and value of the work done up to the time of abandonment, were not entitled, after defendant had closed his case, to introduce further testimony on the same line in rebuttal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 151, 152.]

9. MECHANICS' LIENS—RIGHT OF MATERIALMEN—ABANDONMENT BY CONTRACTOR—COST OF COMPLETION.

Under Code Civ. Proc. § 1200, the rights of the parties, in an action for a mechanic's lien by persons who had furnished labor and material to the contractor, who had abandoned the work, being fixed by the value of the work done at the time of the abandonment, the issue of the reasonable cost of completing the building is immaterial, so that failure to find thereon is

not error, though evidence of such cost is properly considered in determining the value of work done by the contractor, measured by the rule of such section.

In Bank. Appeals from Superior Court, Los Angeles County; Waldo M. York, Judge.

Six actions by C. Scheerer & Co., Inc., W. D. Newell, Hoffman-Marks Company, Nofziger Brothers' Lumber Company, Union Lime Company, and I. H. Hill, respectively, against Henry C. Deming and Allen D. Butt, consolidated by order of court. From a judgment for defendant Butt, and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Chas. L. Batcheller, Jones & Weller, W. D. McConnell, Scarborough & Bowen, E. E. Mellette, P. B. Lloyd, and Henry C. Deming, for appellants. D. L. Horton, for respondents.

SLOSS, J. Appeals by plaintiffs in six actions to foreclose mechanics' liens. The actions were consolidated by order of the court, and judgment went in favor of the defendant Allen D. Butt, the owner of the property involved. The lien claimants appeal from the judgment, and from an order denying a new trial.

On April 14, 1904, the defendant Henry C. Deming as contractor, entered into a written contract with the defendant Butt, as owner, for the construction of a three-story and basement brick building, in accordance with certain plans and specifications. The contract price was \$24,000, payable as follows: \$2,000 when the foundation and basement walls should be up and the first-floor joists laid; \$2,900 when the first-story walls should be up, the iron work up, and the second-floor joists laid; \$2,900 when the second-story walls should be up and the third-floor joists laid; \$2,900 when the third-story walls should be up and the roof on; \$2,900 when the plastering was completed; \$2,900 when said building was completed, and \$7,500 36 days after the notice of completion should be filed. The contract was duly filed in the office of the county recorder before any work, labor, or materials were done or furnished upon said building. Deming commenced work under the contract, and continued in the construction of the building up to the 23d day of September, 1904, when he abandoned the contract, and ceased work thereunder. At that time there had been paid to him the sum of \$10,700, the first four payments mentioned in the contract. The owner took possession of the building upon its abandonment by the contractor, and completed it according to the plans and specifications, at a cost greater than the balance in his hands under the contract. The plaintiffs had respectively furnished to Deming labor and materials to be used, and which were used, in the building, to the amounts claimed in their complaints, and there remained due to them sums aggregating between

\$5,000 and \$6,000. They had duly filed their claims of lien. The foregoing facts were found by the court on the stipulation of the parties or on uncontradicted testimony. The only material issues concerning which there was any dispute at the trial were those relating to the value of the work done by the contractor up to the time of abandonment. In this regard the court found "that the value of the work and materials already done and furnished by the said Henry C. Deming under said contract, at the time of said abandonment, including the materials then actually delivered or on the ground, estimated as near as may be by the standard of the whole contract price, was and is, the said sum of \$10,700.00." Since this sum did not exceed the amount which had been paid to the contractor, pursuant to the terms of the contract, before the abandonment of the work, the necessary conclusion was the one drawn by the court, namely, that nothing was due from the owner to the contractor, or to any of the claimants who had furnished labor and materials to the contractor. This is the result of the provisions of section 1200 of the Code of Civil Procedure, which, as we have held in an opinion filed within a day or two, defines the exclusive method of determining the liability of the owner in cases where the contractor abandons work under a valid contract. *Hoffman-Marks Co. v. Spires*, 97 Pac. 152. The discussion of the question in that case fully states the reasons for the construction we have placed upon section 1200 and other code sections, and, in our opinion, sufficiently answers the contention of appellants that this construction, in so far as it limits their right of recovery, is in violation of the provision of the state Constitution recognizing the right of mechanics and others to liens. In this connection we may remark that, since the submission of this cause, there has been filed by certain counsel, as "friends of the court," a brief suggesting that the rule of section 1200 is an invasion of the constitutional rights of the owner. The brief is answered by the owner (respondent), who insists upon the validity of the section and claims its protection. On the plainest principles the point made cannot be considered. Constitutional guaranties for the protection of person or property can be invoked only by parties whose rights are injuriously affected by the alleged disregard of such guaranties. 8 Cyc. 787; *Cooley on Const. Lim.* (7th Ed.) 232; 10 Cent. Dig. Col. 1284 et seq.; see *Davidson v. Von Detten*, 139 Cal. 467, 73 Pac. 189. It would be an extraordinary thing to hold a statute void because it is asserted by strangers to impair the constitutional rights of the very party who claims under it.

While the appellants offered testimony tending to show that the value of the work done by Deming (estimated according to the rule of Code Civ. Proc. § 1200) exceeded the payments made under the contract, it is con-

ceded by them that the finding that such value was \$10,700 is supported by sufficient evidence to protect it from attack in this court. The main ground urged for reversal is that the court erred in a number of rulings admitting or excluding evidence. Forty-five assignments of error of this nature are presented by appellants in their briefs. Those which appear to us to have any importance will be discussed briefly.

(1) There was evidence to the effect that the work, up to the time of abandonment, had not been done in accordance with the plans and specifications. The brick walls were thinner, and some of the studding was of smaller sizes than specified. The contractor, Deming, was called by plaintiffs as a witness, and was asked: "State whether or not these changes were made of your own volition, or whether Mr. Butt or Mr. Haley (the architect) had anything to do with them?" An objection to the question, "as calling for the conclusion of the witness," was sustained. If this ruling was error, it was harmless. The witness had testified to the changes that were made. He had stated that he had been instructed by Mr. Butt and Mr. Haley to make the changes in the thickness of the brick walls. He answered, without objection, the question, "How did the other changes you speak of happen to be made?" and, in answering it, referred in detail to a large number of changes made, as he said, at the direction of Mr. Butt. He further stated that he could not remember whether there were any other changes. It appears, therefore, that the subject of the excluded question was fully covered by testimony which the witness was allowed to give. The same reasoning applies to nine assignments of error, in addition to the one under discussion. In each instance the question objected to called for statements from the witness as to whether or not the changes had been made by him with the knowledge or under the direction of Butt.

(2) After the introduction of testimony showing that, in sheathing a light-court, the contractor had used lumber which had previously been used for concrete work, a witness was asked whether "it is usual in building to use lumber that was first used for curbing and concrete work." Respondent's objection to the question was sustained. It cannot be said that this ruling was erroneous. A custom to do work in a particular way, if relevant under any circumstances could certainly not prevail as against a contrary provision of the contract. The record does not contain any copy of either contract or specifications; and, in their absence the appellants, upon whom is the burden to show error, have not presented us with the data upon which to determine the materiality of the question.

(3) It is urged that the plaintiffs' witness Smith should have been permitted to give

his estimate of the reasonable cost of completing the building according to the plans and specifications. He had, however, testified that to complete the building would cost one-half of the cost of the portion already done, and had given a figure at which, in his opinion, the entire building could, at the time of abandonment have been completed according to the plans and specifications. From these elements the answer to the main question was deducible by simple arithmetical computation.

(4) There was no error in permitting the witness McNally to testify that in his opinion one-fourth of the work had been done at the time of the abandonment. He had duly qualified as an expert, and had stated that he was familiar with the building, as well as the plans and specifications. The fact that he based his estimate, at least in part, upon his view that, "when the brick wall is done and the roof on, we consider it is about one-quarter done" might affect the value of his opinion, but could not render it incompetent. The objection that no foundation was laid for the testimony of witness Childs is not maintainable, in view of the facts that his qualifications as an expert were admitted, and that he testified that he had made an examination of the building within a few days after the abandonment, and had examined the plans and specifications. Without reviewing the testimony, it may be said that the qualifications of witnesses Harrington and Haley were sufficiently shown.

(5) After defendant Butt had closed his case, the appellants offered testimony regarding the amount and value of the work done up to the time of abandonment. This was properly excluded on the ground that it was not rebuttal. Evidence on this point had been introduced, and, under the pleadings, properly introduced, by plaintiffs as a part of their case in chief. They were not entitled to offer further testimony on the same line in rebuttal.

It is urged that the court erred in failing to find the reasonable cost of completing the building. The issue was not material. The ultimate and important fact is the value of the work done by the contractor, measured by the rule of section 1200. In determining what that value is, it is proper, as a matter of evidence, to consider the reasonable cost of completion. *Hoffman-Marks Co. v. Spires*, supra. But, under the statute the rights of the parties are fixed by the value of the work done at the time of abandonment, and the amount expended in completing the building, whether more or less than the balance of the contract price remaining in the owner's hands, would not affect those rights.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

8 Cal. App. 483

BELL v. THOMPSON. (Civ. 500.)

(Court of Appeal, Second District, California.
July 1, 1908.)

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—MATTERS SHOWN BY RECORD.

Where, so far as the record on appeal discloses the only judgment rendered against appellant was for a sum taxed as the adverse party's costs, it will be assumed that it was from this judgment that the appeal was prosecuted.

2. COSTS—TAXATION—SUFFICIENCY OF NOTICE TO ADVERSE PARTY—STATUTORY REQUIREMENTS.

Code Civ. Proc. § 1033, provides that the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party a memorandum of the items of his costs and necessary disbursements, and a party dissatisfied with the costs claimed may within five days after notice of filing of the bill of costs file a motion to have them taxed by the court, etc. *Held*, that where an unsuccessful plaintiff had actual knowledge of the filing of defendant's cost bill, a copy of which she had received and the amount of which was inserted in the judgment from which she appealed, her rights under the section were fully protected, and she could not nearly four years after the rendition of the judgment, and after it had been affirmed on her appeal, have the costs taxed by the court, because she had no written notice of the filing of the memorandum of costs.

3. SAME—WAIVER OF NOTICE OF FILING MEMORANDUM OF COSTS.

Plaintiff by appealing from the judgment wherein it was adjudicated that defendant recover from her the amount of costs specified in the memorandum, a copy of which she had received, waived written notice that the memorandum had been filed.

4. APPEAL AND ERROR—DETERMINATION—EFFECT.

The question of costs being involved in the appeal, plaintiff is estopped from further litigation of that question, since it must be presumed that all questions respecting the amount thereof or the regularity of the proceedings upon which the judgment for costs was based were included therein and litigated on the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4651.]

5. SET-OFF AND COUNTERCLAIM—AGAINST JUDGMENT—ON MOTION TO TAX COSTS.

On the hearing of a motion by the unsuccessful party for an order of court taxing the costs, the party's right to a set-off of an alleged unliquidated claim against the amount of the judgment cannot be determined.

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Teresa Bell, administratrix of Thomas Bell, against Louisa J. Thompson. From an order denying plaintiff's motion to recall and quash an execution, and for a taxing of defendant's costs, and for an order setting off the amount due plaintiff from defendant for money had and received, etc., plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. Drown, Leicester & Drown, for respondent.

SHAW, J. This is an appeal from an order denying plaintiff's motion "for an order of court recalling and quashing the execution issued in the above-entitled action to the

sheriff of the city and county of San Francisco, and against Teresa Bell as an individual, and also for an order of court taxing the costs of the defendant, and for an order of court setting off the amount due the said plaintiff from the said defendant for money had and received by said defendant for the use and benefit of said plaintiff and the estate of said Thomas Bell, deceased."

The facts, as shown by the record, are: That on June 26, 1902, judgment was rendered in said action in favor of defendant. That on June 28, 1902, there was duly served upon plaintiff's attorney a written notice of the court's decision in said action, which notice, among other things, contained the following: "Also that the defendant in said action claims her costs and disbursements expended and incurred therein, and that the defendant's bill of costs in said action has been filed, and a copy thereof is served upon you herewith. Also that judgment has been entered in said action. Dated June 28, 1902. Drown, Leicester & Drown, Attorneys for Defendant in said action." That the memorandum of costs and disbursements claimed by defendant was duly served on plaintiff's attorney on June 28, 1902, and service thereof admitted by an indorsement thereon, as follows: "Service and receipt of a copy of the within bill of costs, at San Francisco, this 28th day of June, 1902, is hereby admitted. T. Z. Blake-man, Attorney for Plaintiff." Indorsed on said memorandum of costs and disbursements is the following: "Filed, June 30, 1902. C. A. Hunt, Clerk."

The only part of the judgment brought up in the record is the concluding portion thereof, as follows: "And that the defendant Louisa J. Thompson have and recover from the plaintiff herein her costs and disbursements herein, amounting to and taxed at the sum of one hundred and ninety-five and 35/100 dollars. Dated at Santa Barbara, Cal., this 26th day of June, A. D. 1902. [Signed] W. S. Day, Judge of said Superior Court." Thereafter, on July 28, 1902, plaintiff gave notice of her intention to move the court to vacate and set aside the judgment and grant her a new trial, upon a bill of exceptions which was thereafter settled and allowed, and on December 19, 1902, the motion made thereon was denied. Whereupon plaintiff appealed from said judgment and order denying her motion for a new trial. That upon the hearing of such appeal the judgment and order were affirmed. Thereupon, on March 2, 1906, defendant caused an execution to be issued upon the judgment and against the plaintiff and placed in the hands of the sheriff to collect the amount thereof.

So far as the record discloses, the only judgment rendered against plaintiff was that for the sum of \$195.35, taxed as defendant's costs. We must, therefore, assume that it was from this judgment that plaintiff prosecuted her appeal. After a lapse of nearly

four years from the rendition of judgment, during which time appellant has prosecuted an appeal therefrom resulting in an affirmance thereof, she insists that having had no written notice of the filing on June 30, 1902, of the memorandum of costs claimed by defendant, she is now entitled to have the same taxed by the court. We are of the opinion that the rights accorded to plaintiff under the provisions of section 1033 of the Code of Civil Procedure were fully protected.

It is apparent that plaintiff had actual knowledge of the filing of the cost bill, the amount of which was inserted in the judgment from which she appealed. She does not claim to the contrary. In *Barron v. Deleval*, 58 Cal. 95, the court, in discussing the necessity of notice of the overruling of a demurrer required by section 476 of the Code of Civil Procedure, says: "The object of the notice, and the only purpose it can subserve, is to bring home to the attorney knowledge of a fact upon which he is called upon to act. But the right to a written notice, like any other civil right, may be waived * * * Civ. Code, § 3513. * * * Section 3532 declares that 'the law neither does nor requires idle acts.' * * * What purpose would a written notice of a fact of which the attorney had direct and positive knowledge have subserved?" *Mullally v. Benevolent Society*, 69 Cal. 559, 11 Pac. 215; *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551; *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Forni v. Yoell*, 99 Cal. 173, 33 Pac. 887. Having actual notice of the fact that the cost bill had been filed, plaintiff appealed from the judgment wherein it was adjudicated that defendant recover from her the amount of cost specified in this memorandum, copy of which she had received. Conceding the notice of the filing, served two days before the actual filing thereof, to have been insufficient, the facts of the case, as evidenced by plaintiff's conduct and acts, constitute a waiver of such notice. Moreover, as an appeal was had from the judgment it must be presumed that all questions respecting the amount thereof, or the regularity of the proceedings upon which the judgment for costs was based, were included therein and litigated on such appeal. Therefore appellant is estopped from further litigating a question involved in such appeal. *Van Rensselaer v. Kidd*, 5 How. Prac. (N. Y.) 242; *Guckenheimer v. Angevine*, 16 Hun (N. Y.) 453; *Pfaudler Co. v. Sargent*, 43 Hun (N. Y.) 154.

There is no merit in appellant's further contention that, in any event, she was entitled to set off against the amount of the judgment an alleged unliquidated claim against respondent. The merits of such controversy could not be determined upon the hearing of the motion.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 423

MITCHEL et al. v. GRAY. (Civ. 454.)

(Court of Appeal, Third District, California.
June 23, 1908. Rehearing Denied by
Supreme Court Aug. 20, 1908.)

1. APPEAL AND ERROR—NOTICE OF APPEAL—SUFFICIENCY—CLERICAL ERRORS.

A notice of appeal from an order, as it appeared in the transcript, stated that "plaintiffs above named do hereby appeal to the Supreme Court * * * from an order made and entered in the above-entitled cause in said above-entitled court on the 26th day of June, 1906, refusing and denying plaintiffs' motion for a new trial herein, and from the whole of said order." The minutes of the court as presented in the transcript showed that the judgment was entered on the 9th day of June, 1906, and that on June 13, 1906, a notice of motion for a new trial was served and filed; that on January 26, 1907, the motion for new trial was heard and denied; that on March 26, 1907, notice of appeal from an order "made and entered on the 26th day of June, 1906," denying a new trial, was served and filed. *Held*, that the record sufficiently showed that the appeal was intended to be from the order made on January 26, 1907; it being clear that the insertion of the word "June," in place of "January," and the figure "6," instead of "7," in designating the year in the notice of appeal, was due wholly to a clerical mistake.

2. PRINCIPAL AND AGENT—ESTABLISHMENT OF RELATION—REVOCATION—CONTRACT—CONSTRUCTION.

S., the owner of a mine, entered into an agreement with M., by which the latter was given "an option on the terms herein stated for the period of ninety days from date of this agreement" to purchase or sell the mine, and it was provided that, if M. failed to get persons interested in 90 days from date of the agreement, it should become null and void. Contemporaneously with the execution of that agreement, the parties entered into another written agreement, whereby S. agreed to pay M. 10 per cent. of all money received from any persons M. should get interested in the mine within the time mentioned in the other agreement. "Such per cent. is for payment of his effort to get parties to buy said mine." *Held*, that the agreements together constituted one transaction, and established only the relation of principal and agent between S. and M., giving M. power to sell the property within the time limited and obtain a commission, and, the agency not being coupled with an interest, S. had power to revoke it at any time before a sale had been completed thereunder, and make a sale on his own account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 55.]

3. VENDOR AND PURCHASER—OPTIONS NOT ON CONSIDERATION—POWER TO REVOKE.

Even if the first agreement be considered as amounting to an option, independently of the second agreement, it could have been withdrawn when S. made a sale; it appearing that it was not supported by a consideration, and that it had not been accepted by M., since up to the time of acceptance such a contract, unsupported by consideration, and no binding obligation having been entered into, is a nudum pactum.

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—REJECTING JURY'S ANSWERS TO QUESTIONS OF FACT IN EQUITY CASE.

Since, in an equity suit, the court has the right arbitrarily to reject the findings of a jury and adopt its own, the action of the court in submitting special questions of fact to the jury, and in rejecting or accepting the jury's answers thereto, is not prejudicial.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action to rescind a contract by Charles A. Mitchel and another against George V. Gray. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Affirmed.

Gillis & Tapscott, Jas. F. Farrahar, and Jas. D. Fairchild, for appellants. R. S. Taylor, for respondent.

HART, J. The plaintiffs brought this suit for the purpose of rescinding a certain contract by which the defendant bought from the appellant Skillen a mine known as the "Lanky Bob Quartz Mine," situated in Siskiyou county. The court, as advisory to it upon the questions of fact, called to its aid a jury, to which, upon the conclusion of the adduction of evidence and the arguments, it submitted some 40 special questions of fact, covering all the material points brought out by the evidence addressed to the principal issue tendered by the pleadings. To some of these questions the jury made affirmative answers and to the others negative. The court adopted a number of the answers and rejected the others, and made findings of its own in favor of the defendant. A decree was accordingly entered; and this appeal is by the plaintiffs from the judgment and the order denying plaintiffs a new trial.

1. Objection is urged by respondent against a consideration of the appeal from the order because, as claimed, it does not appear from the record that an appeal from the order has been taken. The notice of appeal from the order, as it appears in the transcript, stated that "the plaintiffs above named do hereby appeal to the Supreme Court * * * from an order made and entered in the above-entitled cause in said above-entitled court on the 26th day of June, 1906, refusing and denying plaintiffs' motion for a new trial herein and from the whole of said order." The minutes of the court, as presented in the transcript, show that the judgment was entered on the 9th day of June, 1906, and that on June 13, 1906, a notice of motion for a new trial was served and filed; that on January 26, 1907, the motion for a new trial was heard and denied by the court; that on March 26, 1907, notice of appeal, from an order "made and entered on the 26th day of June, 1906," denying a new trial was served and filed. There can be no doubt that the appeal from the order was intended to be from the order made on the 26th day of January, 1907, and that the statement in the notice of appeal that the appeal is from the order "made and entered on the 26th day of June, 1906," is a clerical misprision. In fact, it is so clear that it is beyond dispute that the insertion of the word "June" in place of "January" and the figure "6," instead of "7," in designating the year in the notice of appeal, was due wholly to a clerical mistake, or to what may properly be termed "absent mindedness" on the part of the party writing the notice.

2. The contention of the appellants is, and the complaint alleges that, on the 21st day of July, 1905, plaintiff Skillen, in writing, agreed to sell to plaintiff Mitchel and that the latter in said writing, agreed to purchase from the former the said "Lanky Bob" quartz mine, and that before the expiration of the time within which said sale was, by the terms of said agreement, to be consummated, the defendant, Gray, by certain "false and fraudulent representations and statements" made to plaintiff Skillen, induced the latter to sell said mine to him (Gray), and thus violate the terms of the agreement between the plaintiffs. It is further argued by appellants that if the agreement between themselves, as pleaded in the complaint, cannot be construed as an absolute sale of the mine by Skillen to Mitchel, it is at least an option, and that in that view the sale of the property to the defendant prior to the expiration of the time stipulated in said agreement was beyond the power of Skillen, and therefore said sale was void. The answer admits the making of the pleaded agreement between the plaintiffs. It is, however, alleged therein, and such is the contention of the respondent here, that said agreement was not one for the sale and purchase of the property, but that by the terms thereof Mitchel was simply invested with the power of an agent to sell the mine for Skillen upon a certain stipulated commission for his services in negotiating and consummating such sale; that prior to the time at which Mitchel sold the mine the defendant had purchased the same absolutely from Skillen, paying the latter under said contract of sale the sum of \$5,000, and had been let into the possession of said mine; that, antecedently to said sale to Gray, Skillen had notified Mitchel of his rescission and cancellation of the contract by which Mitchel became the agent of Skillen.

The principal contention of appellants arising in the form of an attack upon certain findings of the court, involves the construction of the agreements entered into between the plaintiffs relative to the mining property concerned in this controversy. The claim is that the construction of said agreements by the court below is incorrect. It will not be necessary to deal extensively with the testimony, because we regard the point concerning the legal relations between Skillen and Mitchel, as established by their written agreements, as the most serious vital one presented, and therefore, if it can be said that the construction by the court below of said agreements as to their legal effect is correct, then, under our view of the entire record, nothing remains to be done but to uphold the findings, the judgment, and the order of the court refusing appellants a new trial. The evidence discloses, and the court found that, on the 21st day of July, 1905, the plaintiff Skillen, as the owner of the Lanky Bob Quartz mining claim, entered into an agreement with plaintiff Charles A. Mitchel, by which the latter

was given, to use the language of said agreement, "an option on the terms herein stated for the period of ninety days from date of this agreement" to purchase or sell said mine; that contemporaneously with the execution of said agreement said parties entered into the following agreement in writing, the same having been written by the plaintiff Mitchel: "George G. Skillen agrees to pay Charles A. Mitchel 10 per cent. of all money received from any parties he gets interested in the Lanky Bob Mine within the time of an agreement made with this 21st day of July, 1905, said per cent. to be placed to his credit in the Siskiyou Co. Bank at time of each payment. Such per cent. is for payment of his effort to get parties to buy said mine." The court further found that there was no consideration passed for these agreements, or for either of them, if considered separately. As to these agreements between the plaintiffs, the court found as a conclusion of law "that the contracts made between Skillen and Mitchel July 21, 1905, in relation to the Lanky Bob mine, when taken together, constituted a contract of agency whereby Mitchel was given the authority within the time stated to sell the property described upon an agreed compensation of 10 per cent. of the purchase price; that such agency was not an agency coupled with an interest, and therefore revokable at any time before a sale had been completed thereunder." As we have seen, the contention of the appellants is that the foregoing construction by the court of the agreements in question is erroneous; that the first-mentioned writing constituted a contract by which Skillen agreed to sell the mine to Mitchel for a certain agreed price, said sale to be completed and closed at any time within 90 days from the date of said agreement. But we think the court was clearly right in its construction of the agreements. The two agreements were properly construed together as representing and constituting, as they certainly did, one transaction. The first writing or agreement declares that the same is an option, the life of which was to exist for the period of 90 days. But the concluding covenants thereof are as follows: "Party of first part will make deed to any party or Co. said second party shall name upon making first payment and said time of one year from date of payment. If party of second part fail to get parties interested in ninety days from date of this agreement it becomes null and void." It thus appears clear, even without the aid of the writing or agreement fixing the commission of Mitchel for the sale of the property, that said so-called "agreement of option" was not intended, nor could it have been understood to be, by the parties as having any other effect than to clothe Mitchel with the power of an agent to sell the property to other parties within the time limited by said agreement. The other or second writing, however, is, in our judgment, conclusive as to the relations

in legal effect intended to be created and in fact established between the plaintiffs by the transaction of which the writings are evidence. Said writing was made and executed at the same time that the other writing was made and signed by the parties, and obviously was intended as a part of the transaction. The testimony of Skillen reveals that it was made "right after" the agreement of "option" was made, and written by Mitchel himself, and there is no other reasonable conclusion than that its purpose was to render absolutely clear and unquestionable the nature of the relations between the parties established by and through the transaction. It itself constitutes an interpretation of the first writing, and the character of the relations of the parties concerning the property to which the transaction culminating in the writings related. Moreover, the testimony of plaintiff Skillen himself adds support to the court's construction of the agreements between the plaintiffs.

The evidence shows, and the court found, that Gray first opened negotiations for the purchase of the mine with Mitchel in the latter part of the month of September. It appears that on that occasion Mitchel stated to Gray that he (Mitchel) was endeavoring to sell the mine to certain Chicago parties, and promised Gray that, in the event said parties did not respond within 10 days, the latter would be given an opportunity to purchase the property. At the time of which we are speaking, Mitchel gave Gray permission to visit and inspect the mine. At the end of the 10 days Gray again called on Mitchel, reminding him that the 10 days had expired and proposed to buy the mine. Mitchel in reply declared that Gray could not buy the property, as the Chicago parties had telegraphed that they would take it. Thereafter Gray personally conducted negotiations with Skillen, and on the 3d of October, 1905, these two entered into a written agreement by the terms of which Gray became the purchaser of the mine for the consideration of \$12,000, of which \$5,000 was paid upon the execution of said agreement. The court found, and the evidence justifies the finding, that Skillen notified Mitchel in writing of his withdrawal and revocation of Mitchel's agency to sell the mine before Mitchel received and accepted (as the latter claimed that he did) a \$5,000 payment from the Chicago parties with whom he had been negotiating for the sale of the mine. Skillen testified, and the court found, "that before the said tender to defendant Gray [referring to the tender to Gray by Skillen before the commencement of this suit of the \$5,000 paid Skillen by Gray under their agreement of sale] plaintiff Skillen offered to pay plaintiff Mitchel the 10 per cent. commission he had agreed to pay him in case Mitchel had obtained a purchaser for said property, but plaintiff Mitchel refused to receive it." Skillen, upon this point, testified that he offered Mitchel 10 per cent. on the

sum for which he had sold the mine to Gray, or, in other words, \$200 more than Mitchel would have received as a commission under his own agreement. Counsel for appellants lay much stress upon the proposition, as purporting to prove which some evidence was offered and received, that the respondent, after failing to purchase the mine through Mitchel, proceeded to overthrow the force of and set at naught the agreement of the latter before the expiration of the time agreed upon by declaring to Skillen that the same was not legal or binding upon him, and, in short, that respondent's successful transaction with Skillen was founded upon alleged fraudulent representations on the part of the defendant. If, as we have held, the agreements made by Skillen and Mitchel established only the relations of principal and agent between them, and that the sole benefit to be derived thereunder by Mitchel was a mere commission or percentage on the maximum amount for which the property was to be sold, then clearly it becomes unimportant what the representations were, whether true or false, upon which Gray succeeded in inducing Skillen to sell him the mine, or what he might have done to accomplish his purpose to buy the property over the agreement with Mitchel. The latter could not be concerned except to the extent of the commission to which he was entitled from Skillen. If the latter had been beguiled into selling the mine to Gray by the misrepresentations and fraud of Gray, and was thereby defrauded and injured, then the matter would be one to be settled between Skillen and Gray. The Chicago parties are not complaining here, nor is there anything in the pleadings or the record indicating that they are interested in the event of this litigation.

As to the claim that the Mitchel agreement amounted to an option (and the first writing considered independently of the "commission" agreement executed at the same time could no doubt be held to be an option), it is to be said that, even viewed in that light, it was, according to the undisputed testimony of Skillen, unsupported by a consideration. When the sale was made to Gray there had been no acceptance of the alleged "option" or "offer to sell," and therefore Skillen had the right, conceding it to be an option, to withdraw it. "Up to the time of acceptance, a contract such as this, where no consideration has been parted with, no binding obligation of any kind entered into, is a nudum pactum. *Brown v. San Francisco Sav. Union*, 134 Cal. 448, 66 Pac. 592.

3. Certain rulings of the court during the course of the trial are specified as errors, but we think they are not of sufficient importance to require special notice. The contention is made that the court erred in submitting to the jury certain of the large number of special questions of fact, as to which the court asked for the judgment of the jury, and that in the rejection and acceptance of some of

the answers returned by the jury the court erred to the prejudice of appellants. We think the action of the court in the respect complained of, whether erroneous or not, is without prejudice, because immaterial. The suit here is purely one in equity, and a jury, therefore, was not allowed as of right, but only as of grace and as advisory to the court. The court had the right arbitrarily, if it so pleased, to reject the findings of the jury and adopt its own.

We find no prejudicial error in the record. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 384

MARSH v. LOTT. (Civ. 505.)

(Court of Appeal, Second District, California.
June 20, 1908.)

1. VENDOR AND PURCHASER—CONTRACTS—OPTIONS—CONSIDERATION.

If there is no sufficient consideration for an option to buy property, its revocation by the person giving it, notwithstanding a promise to the contrary is effectual to terminate any right of the other person to consummate the purchase; but, if the offer is to remain open a fixed time, and is upon a valuable consideration, equity will treat a subsequent acceptance, made within the time limited, as if no attempted revocation had been made.

2. SPECIFIC PERFORMANCE—CONSIDERATION—STATUTORY PROVISIONS.

Civ. Code, § 3391, subd. 1, making an adequate consideration for a contract a condition for the specific enforcement thereof, has reference to the consideration to be paid for the property, and has no application to the sufficiency of the consideration paid for an option to purchase the property at a stipulated price.

3. VENDOR AND PURCHASER—OPTION—NATURE OF CONTRACT.

The sale of an option is an executed contract.

4. SAME—ADEQUATE CONSIDERATION.

From the very nature of the case, no standard exists whereby to determine the adequate value of an option to purchase specific real property, and any money consideration, however small, paid and received for an option to purchase property at its adequate value, is binding upon the seller thereof for the time specified therein, and the option is irrevocable for want of adequacy of consideration.

5. WORDS AND PHRASES—"PURCHASE."

The word "purchase" implies acquisition.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 5853-5857; vol. 8, p. 7775.]

6. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—DEGREE OF CERTAINTY REQUIRED.

Where a contract is to be specifically enforced, a greater degree of certainty is required than where it is made the basis of an action at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-63.]

7. SAME—UNJUST AND UNREASONABLE CONTRACTS.

The owner of premises gave an option to purchase them for "\$100,000, payable \$30,000 cash, balance on or before four years, four and one-half per cent. net," and agreed to convey, free from incumbrance, by deed, etc. The contract was signed only by the owner. The pur-

chaser tendered \$30,000, and demanded a conveyance to him by deed. *Held* that, if the payment or tender of the \$30,000 was full performance on the purchaser's part under the contract, the contract was not a just and reasonable one, since all the owner would have as evidence of her claim to the deferred payment of \$70,000, not payable for four years, would be the contract unsigned by any one charged with the payment thereof, and without any security therefor; and hence under the express provisions of Civ. Code, § 3391, subd. 2, it could not be specifically enforced against the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 152-154.]

8. SAME.

Should the contract be interpreted to contemplate the payment of \$30,000 and the execution of a deed upon payment of the balance of \$70,000, with 4½ per cent. interest per annum, the owner meanwhile to hold possession, an action for specific performance upon tender of the \$30,000 only would be premature.

9. SAME.

Should the contract be construed to contemplate that the balance of \$70,000 was to be evidenced by a note secured by mortgage, the intention of the parties was not sufficiently incorporated in the contract, there being nothing to show in what manner the \$70,000 balance should be evidenced, nor by what means the owner's interest should be protected from default in the payment of taxes, etc., and it could not be specifically enforced under Civ. Code, § 3390, subd. 6, providing that an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, cannot be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-85.]

10. SAME—NECESSITY FOR TENDER OF PERFORMANCE—REPUDIATION OF EXECUTORY CONTRACT.

The general rule that repudiation of an executory contract by one party relieves the corresponding obligor from the necessity of tendering performance as a prerequisite to maintaining a suit to enforce specific performance is not applicable to a unilateral contract giving an option to purchase property within a certain period at a specified price, since, until the holder of the option accepts the offer contained therein, there is no mutuality and no contract obligating the giver of the option to be specifically enforced. Civ. Code, § 3386, providing that neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so with full compensation for any want of entire performance.

11. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—FINDINGS NOT SUPPORTED BY EVIDENCE.

A finding of the court, though not supported by the evidence, is harmless error where, had the finding been the other way, the result would not have been changed.

Taggart, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Robert Marsh against M. A. Lott. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Frank James and A. B. McCutchen, for appellant. J. Wiseman MacDonald, for respondent.

SHAW, J. Action for specific performance of a contract, whereby plaintiff asserts that in consideration of 25 cents he was given an option to purchase, for the sum of \$100,000, certain real estate owned by defendant. Judgment was rendered for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The contract, specific performance of which is sought, is as follows: "For and in consideration of the sum of twenty-five cents to me in hand paid, I hereby give Robt. Marsh & Co. an option to purchase, at any time up to and including June 1st, 1905, with privilege of 30 days extension, from date hereof, the following described property, to wit: South $\frac{1}{2}$ of lot 9 & all of lot 8, block 101, Bellevue Terrace tract, and all of the property owned by myself in above block, for the sum of one hundred thousand dollars, payable thirty thousand cash, balance on or before 4 years, $4\frac{1}{2}\%$ net. I agree to furnish an unlimited certificate of title showing said property to be free from all incumbrance, and to convey the same in such condition by deed of grant, bargain and sale, & pay regular commission. M. A. Lott. [Seal.] Date: Feby. 25th, 1905. Property: 90x165. Building: 6 flats—2 cottages. Rents: \$260.00." On June 1, 1905, plaintiff notified defendant in writing that he exercised the right accorded by said contract regarding the extension of time therein specified, and elected to extend the same for a period of 30 days. On June 2, 1905, defendant, by a written instrument served upon plaintiff, revoked said option, and notified him that she withdrew said property from sale. On June 29, 1905, within the extended time, plaintiff left at the residence of defendant an instrument, of which the following is a copy: "June 29, 1905. Mrs. M. A. Lott, 507 South Olive street, City. Dear Madame: Referring to your agreement with me dated February 25, 1905, by which you gave me the privilege of purchasing the south half of lot nine and the whole of lot eight, in block one hundred and one, Bellevue Terrace tract, in this city, I again tender you in gold coin of the United States the sum of \$30,000 as provided in said agreement, and demand of you performance on your part as in said agreement provided. This tender will also be made to your attorney, J. Wiseman MacDonald, Esq., as per request this morning when I tendered you \$30,000 in gold coin at your residence on said property. Yours truly, Robert Marsh & Company." The contention of appellant is that certain findings are not supported by the evidence. The findings material to a consideration of the case are as follows: The court found that the sum of 25 cents paid for the option was an inadequate and insufficient consideration for the same, and that the said option contract was not just and reasonable to defendant and no adequate consideration was paid to her for it. By finding 9 it appears that "after such revocation and with-

drawal of said option, plaintiff, under the name of Robert Marsh & Co., on the 29th day of June, 1905, in an instrument left at the defendant's house, offered to pay to the defendant the sum of \$30,000, and under the said name demanded from defendant a conveyance of the said property, but plaintiff did not at any time actually tender \$30,000, or any sum at all in cash, to the defendant, nor did he, in his, or any other name, at any time, tender or offer to defendant any note or mortgage, or other evidence of indebtedness in the amount of \$70,000, or any sum at all, either carrying interest at $4\frac{1}{2}\%$ per cent. net, or at any rate at all, nor did he, in his own name, or any other name, at any time, offer to pay defendant the balance of \$70,000, on or before four years from the date of said option, or at any time, with interest at $4\frac{1}{2}\%$ per cent. net, or with or without interest." And by finding 10 it appears that "plaintiff has not duly or at all performed all and every provision and thing on his part in said option agreement contained. He has made no tender or offer to defendant, save as is set forth in finding No. 9 hereof. Plaintiff is willing to perform the matters on the part of Robert Marsh & Co. to be performed according to the terms of the said option, and is able to pay the sum of thirty thousand dollars."

If there was no sufficient consideration for the option, then it was a mere nudum pactum, and defendant's revocation thereof, notwithstanding her promise to the contrary, was effectual in terminating any right of plaintiff to consummate the purchase. Page on Contracts, § 35; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 592. If, on the other hand, the offer was to remain open a fixed time and was made upon a valuable consideration, equity will ignore the attempted revocation, and treat a subsequent acceptance, made within the time defined in the option, exactly as if no attempted revocation had been made. Page on Contracts, § 35; *Ross v. Parks*, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. Subdivision 1 of section 3391, of the Civil Code makes an adequate consideration for the contract one of the conditions for the specific enforcement thereof. The provision, however, has reference to the consideration to be paid for the property, the right to purchase which at a stipulated price within a given time is the subject of the option. It has no application to the sufficiency of the consideration paid for the executed contract, whereby defendant transferred to plaintiff the right to elect to purchase at the stipulated price. It is not the option which it is sought to enforce, but that which, by plaintiff's acceptance of defendant's offer, has ripened into an executor-

contract, whereby, for an adequate consideration, the one agrees to buy and the other agrees to sell. "The sale of an option is an executed contract; that is to say, the lands are not sold, the contract is not executed as to them, but the option is as completely sold and transferred in presenti as a piece of personal property instantly delivered on payment of the price." *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17. From the very nature of the case no standard exists whereby to determine the adequate value of an option to purchase specific real estate. The land has a market value susceptible of ascertainment, but the value of an option upon a piece of real estate might, and often-times does, depend upon proposed or possible improvements in the particular vicinity. To illustrate: If A., having information that the erection of a gigantic department store is contemplated in a certain locality, wishes an option for a specified time to purchase property owned by B. in the vicinity of such proposed improvement, and takes the option on B.'s property at the full market price at the time, must he pay a greater sum therefor because of his knowledge and the fact of B.'s ignorance of the proposed improvement? It is not possible that B., upon learning of the proposed improvement, can, in the absence of facts constituting fraud, etc., revoke or rescind the option upon the claim that he sold and transferred the right specified therein for an inadequate consideration. In our judgment any money consideration, however small, paid and received for an option to purchase property at its adequate value is binding upon the seller thereof for the time specified therein, and is irrevocable for want of its adequacy.

The provisions of section 3391, Civ. Code, are but a codification of equitable principles that have existed from time immemorial, and the sufficiency of the price paid for an option has never been measured by its adequacy. In *Warvelle on Vendors* (2d Ed.) § 125, it is said: "If the option is given for a valuable consideration, whether adequate or not, it cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the owner, or his assigns with notice, until it expires by its own limitation." In *Mathews Slate Co. v. New Empire Slate Co.* (C. C.) 122 Fed. 972, it is said: "This court is of the opinion that if two persons enter into a contract in writing under seal, by which the one party, in consideration of \$1, the payment of which is acknowledged, agrees to sell and convey to the other party within a specified time certain lands and premises, on payment by the other party of a specified consideration, such contract is valid and binding, and ought to be and may be specifically enforced. The seller has the right to fix his price, and covenant and agree that, on receiving that price within a certain time, he will convey the premises, and, if within that time the purchaser of the option

tenders the money and demands a conveyance, he is entitled to it. To hold otherwise is to destroy the efficacy of such contracts and agreements." Mr. Freeman in his note to the case of *Mueller v. Nortmann*, 96 Am. St. Rep. 997, says: "An option given by the owner of land for a valuable consideration, whether adequate or not, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowledge thereof." See, also, *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; *Mueller v. Nortmann*, supra; *Johnston v. Trippe* (C. C.) 33 Fed. 530. It therefore follows that the purported revocation made by defendant on June 2, 1905, was ineffectual for the purpose of terminating plaintiff's right to exercise the privilege of electing to accept the offer prior to the time designated therein for its expiration.

All that plaintiff did in the way of performance is embodied in his written offer, dated June 29, 1905, hereinbefore set out. In this letter he says: "I again tender you in gold coin of the United States the sum of \$30,000 as provided in said agreement, and demand of you performance on your part as in said agreement provided. This tender will also be made to your attorney, J. Wiseman MacDonald, Esq., as per request this morning when I tendered you \$30,000 in gold coin at your residence on said property." There is no room for contending that plaintiff had made any previous tender, or that defendant had requested that a tender be made to her attorney. It is true that he called at the residence of defendant, having with him \$30,000, but he made no effort to disclose the purpose of his visit, or that he had in his possession the money wherewith to make the tender. It may be conceded, however, that the written offer made under section 2074, Code Civ. Proc., was equivalent to an actual tender of the \$30,000, for it was not accepted. At most, he tendered the \$30,000 only and demanded performance on defendant's part as in said agreement provided. By reference to said agreement, we find that she gave plaintiff an option to purchase her property. The word "purchase" implies the acquisition of (*Greer v. Blanchard*, 40 Cal. 194); so that he was given the right to acquire the property of defendant, which in this case could not be otherwise than by a deed of conveyance. It thus appears that the performance demanded from her in the written offer was just what he demanded in the prayer of his complaint, namely, a conveyance to him from her by deed of the real estate. If the payment or tender of the \$30,000 was full performance on his part, it necessarily follows that, under this view of the contract, all that defendant would have as evidence of her claim to the deferred payment of \$70,000, not payable until the expiration

of four years, would be the contract unsigned by any one charged with the payment thereof, and without any security therefor. The court found that the contract as to the defendant was not just and reasonable. Subdivision 2 of section 3391 of the Civil Code provides that a contract cannot be enforced against a party if it is not just and reasonable. *Agard v. Valencia*, 39 Cal. 292; *Sharp v. Bowie*, 142 Cal. 462, 76 Pac. 62; *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; *Cooper v. Pena*, 21 Cal. 403.

The interpretation implied in appellant's contention, that the tender of the sum of \$30,000 constituted performance on his part, renders the contract as to defendant so unjust and unreasonable that a court of equity cannot decree specific performance thereof. Counsel for appellant in his brief suggests still another view of the contract. The meaning of the contract, he says, is clear "that plaintiff was to pay defendant \$30,000, and that when he paid the balance of \$70,000, with interest at 4½ per cent. per annum, the defendant was to make her deed of conveyance to plaintiff for the property in question"; and that meanwhile defendant would have the right to possession, carrying with it, we assume, the rentals of \$260 mentioned in the contract, until the balance was paid. If this view should be accepted, it must follow, conceding the tender of \$30,000 and the balance of \$70,000 to be unpaid, that the action is premature. Defendant is presumably in possession, the \$30,000 is claimed to have been tendered, but it does not appear that the \$70,000 has either been paid or tendered. Hence, under this view, there is no ground for asking the interposition of a court of equity to enforce the execution and delivery of a deed, to which plaintiff is not entitled for the reason that he has not paid the \$70,000.

Still another interpretation of the contract, asserted in the answer and suggested by the findings, is that the \$70,000 was to be evidenced by a promissory note, but by whom signed does not appear, and payment thereof secured by first mortgage on the real estate in question. There is absolutely nothing in the contract indicating that the deferred payment should be evidenced by note, or in any manner secured by mortgage, deed of trust, or otherwise, upon any property. Doubtless the parties contemplated that payment of the amount should be secured, for defendant testifies that during the negotiations for the purchase of the opinion plaintiff said "that 5 per cent. was a large amount of interest for good security and for that amount." This is the entire evidence touching the subject. If they did contemplate that it should be secured, they failed to incorporate in the contract any provision sufficiently certain and definite to enable a court of equity to declare a specific performance of their intentions. Subdivision 6 of section 3390 of

the Civil Code provides that "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," cannot be specifically enforced. Where a contract is to be specifically enforced, a greater degree in certainty is required than where it is made the basis of an action at law. *Pomeroy on Specific Performance*, § 159; *Willard's Equity Jurisprudence*, 267; *Burnett v. Kullak*, 76 Cal. 536, 18 Pac. 401; *Jones v. Wells*, 31 Mich. 170; *Sturgis v. Galindo*, 59 Cal. 30, 43 Am. Rep. 239. If this last interpretation be accepted, it follows that plaintiff did not perform fully or tender full performance on his part, and the finding of the court upon the question of performance is fully supported by the evidence. In our judgment the only construction of which the contract is susceptible renders it manifestly unjust and unreasonable as to the defendant. Viewed from any other point, it is too uncertain, vague and indefinite as to the manner in which the \$70,000 due defendant should be evidenced, and payment thereof with interest thereon secured; nor can it be ascertained therefrom by what means defendant's interest in the real estate should be protected from default in the payment of taxes, assessments, etc.

Appellant makes the further point that, defendant having revoked the option and repudiated the contract, he was by such fact relieved from the necessity of any tender of compliance. Even if this were true, it could not avail plaintiff under the views herein expressed. We will, nevertheless, briefly advert to it. The general rule is that repudiation of an executory contract by one party relieves the corresponding obligor from the necessity of tendering performance as a prerequisite of maintaining a suit to enforce specific performance. This rule, however, is not applicable to unilateral contracts of the character under discussion. As we have seen in discussing the consideration for the option, there was no contract to repudiate. Section 3386, Civ. Code, provides: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." See, also, *Pomeroy on Specific Performance*, § 162. Until plaintiff accepted the offer, there could be no mutuality, in fact, no contract, whereby plaintiff was obligated in any way. He could only signify his acceptance in accordance with the terms of the contract, and subject to all, not part, of the conditions imposed thereby. 21 Am. & Eng. Ency. of Law, p. 930. If, by the terms of the contract, he was to pay \$30,000 and give his note for the balance, then the tender of such note and security was just as important as the ten-

der of the money. *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426. In *Hay v. Mason*, 141 Cal. 723, 75 Pac. 300, in discussing a similar question, it is said: "It is therefore evident that at no time prior to the making and tender of the deed by plaintiffs could either party have enforced specific performance of the contract." An examination of the cases cited in support of appellant's proposition discloses the fact that all of them refer to bilateral contracts, or cases wherein the party seeking to enforce the contract has performed or tendered performance in strict accordance with the terms of the contract, and thereby assumed the corresponding obligation, performance of which might then be enforced against him.

The finding that the consideration paid for the option was inadequate, while not supported by the evidence, is nevertheless harmless error, for the reason that had the court found in accordance with appellant's contention it could not, according to the view we take of the case, have changed the result.

There are other points ably presented by the learned counsel for appellant, but, as a consideration of such points discloses no reason for reversing either the judgment or order, it seems unnecessary to discuss them.

The judgment and order are affirmed.

ALLEN, P. J. I concur.

TAGGART, J. I concur in the conclusion reached and in most of the views expressed in the foregoing opinion, but I am of the opinion that there is evidence to support the finding by the trial court that the consideration for the option was inadequate. I concur specially that I may express my dissent from any portion of the leading opinion which is predicated upon there being no evidence to support this finding, and in order that I may assign my position on this question as an additional reason for affirming the judgment.

8 Cal. App. 397

TEICH v. SAN JOSE SAFE DEPOSIT BANK OF SAVINGS. (Civ. 450.)

(Court of Appeal, Third District, California. June 22, 1908.)

1. ATTORNEY AND CLIENT—STIPULATIONS—AUTHORITY OF ATTORNEY TO MAKE—EVIDENCE.

Pending a suit to establish and foreclose an equitable mortgage, the attorney for plaintiff therein wrote his client that he thought the property should be redeemed from a tax sale of the property, and that, if the client thought it wise, he, said attorney, would see H., attorney for defendants, and have a stipulation with him that it be redeemed, the party redeeming to have a lien for the redemption money. Plaintiff replied, agreeing the redemption should be made, inclosing check for amount necessary, and saying: "As to seeing H., you are the best to decide that. * * * We place the whole matter in your hands." Held, that the attorney was authorized to stipulate as to the redemption.

2. TAXATION—ACTION TO AVOID TAX DEED FOR FRAUD—RELIANCE ON STIPULATION.

A party need not have relied exclusively on a stipulation in order to be entitled to relief, on the ground of fraud, for its breach; so that where pending suit to establish and foreclose a mortgage plaintiff therein stipulated with the defendants that he would redeem the property from a tax sale to the state, he to be reimbursed if he was unsuccessful in the suit, they having relied thereon, may have relief where he did not redeem, but bought from the state, though they had asked the tax collector to inform them of any sale by the state and he had assured them that he would, but failed to do so.

3. STIPULATION—CONSTRUCTION.

A stipulation, pending a suit to establish and foreclose a mortgage, reciting that plaintiff therein was desirous of paying the taxes on the property if it be ultimately determined that he had a mortgage, and providing that he might effect a redemption from tax sales, and that, if it be decided that he had a mortgage, he should be charged with the amount which should have been assessed against his mortgage interest, and that, if it be determined that he had no mortgage, he should be reimbursed by defendants for any money paid by him to redeem from tax sales or to pay any tax, justified defendants in relying on plaintiff redeeming, and, if it be considered as only giving an option, required plaintiff on charging its purpose, and before buying from the state, instead of redeeming, to give notice, so that defendants might protect themselves.

4. TAXATION—ACTION TO AVOID TAX DEED FOR FRAUD—TENDER.

Plaintiff, in an action to establish and foreclose an equitable mortgage, having pending the action stipulated to redeem the property from tax sales, defendants, under the rule requiring one seeking equity to do equity, to be entitled to relief from plaintiff's fraud in taking title from the state, instead of redeeming, must pay the equitable mortgage arising out of a loan to redeem the property from other mortgages, though the mortgage be barred by limitations.

Appeal from Superior Court, Madera County; H. C. Gesford, Judge.

Suit by Annie E. Teich against the San Jose Safe Deposit Bank of Savings. Judgment for defendant. Plaintiff appeals. Reversed.

N. C. Caldwell, M. K. Harris, and S. L. Strather, for appellant. F. A. Fee and Frank H. Short, for respondent.

BURNETT, J. The main contention in this cause hinges upon the following stipulation: "In the Supreme Court of the State of California. San Jose Safe Deposit Bank of Savings [a corporation], Plaintiff and Respondent, v. Bank of Madera [a corporation], et al., Defendants and Appellants. Whereas, there is now pending in the Supreme Court of the state of California an action entitled San Jose Safe Deposit Bank of Savings, Plaintiff and Respondent, v. Bank of Madera, et al., Defendants and Appellants, * * * said action being prosecuted by the plaintiff for the purpose of foreclosing what is claimed by plaintiff to be an equitable mortgage upon the property described in the complaint in said action, to wit, lot four (4) block forty (40) of the town of Madera, California, and, whereas, pending the litigation concerning

said property, certain taxes have accumulated thereon, and certain tax sales have been made of said property for taxes levied and assessed for state, county, and municipal purposes, and there is now due and owing certain taxes on said property, the plaintiff in said action is desirous of paying the amount of taxes which should be levied and assessed against said mortgage interest in said property if it should ultimately be determined that plaintiff has an equitable mortgage on said property, but no assessment of said mortgage interest has ever been made or levied against the same. It is therefore stipulated by and between the plaintiff herein, and the defendants and Annie E. Teich, the owner of said property, that the plaintiff, San Jose Safe Deposit Bank of Savings, may effect a redemption of said property from any and all tax sales made of the same upon any legal and valid assessment of said property and pay and discharge any taxes now due thereon upon any valid and legal assessment thereof. And it is further stipulated that any amount of money which may be necessary for said plaintiff to pay for the purpose of effecting such redemption or of discharging any valid assessment against said property shall be reimbursed to plaintiff by the defendants in said action or by the owner of said property, to wit, Annie E. Teich, it being understood, however, that in the event that it be finally determined that the San Jose Safe Deposit Bank of Savings has an equitable mortgage on said property, that in making such reimbursement the said plaintiff shall be charged with the taxes which should have been levied and assessed against its mortgage interest therein * * * for the several years since the date of its equitable mortgage, to wit, since the 18th day of February, 1895, and, if it should be determined that plaintiff has no equitable mortgage, or any claim against the same, then the said Annie E. Teich agrees to reimburse said plaintiff for any money it may have paid out to redeem said property from any tax sales, or to pay and discharge any valid tax thereon. Any amount of money advanced by plaintiff for the purpose hereinbefore mentioned which the event of said action shall determine to be on defendant's account, or account of said owner shall draw interest from the date of such payment by it, at the rate of 3% per annum. [Signed] F. A. Fee, Attorney for Plaintiff and Respondent. M. K. Harris, Attorney for Defendants and Appellants. Dated Nov. 1903."

It seems that plaintiff received a deed to the property February 17, 1902, from her mother, Mary Dworack, her brother, Charles A. Dworack, and from the Bank of Madera, the defendants in the said action mentioned in the stipulation as pending in the Supreme Court, and which action has been decided this day by this court. Upon the 26th day of June, 1897, the property was sold to the state for delinquent taxes for the fiscal year of

1896. As the property was not redeemed, a deed was executed to the state on the 24th day of January, 1903. No taxes had been paid upon the property since 1895, and no redemption from the state had been effected by any one, and so, in pursuance of the written authorization of the State Controller dated July 11, 1904, the tax collector of Madera county, proceeding according to law, on the 6th day of August, 1904, sold the property for \$950 to defendant herein.

The plaintiff claims that by virtue of said stipulation the property is charged with a trust, and that the bank holds it for her use and benefit. The circumstances under which the said purchase was made are as follows: On August 6, 1904, Mr. Fee saw in a newspaper the notice of the sale of the property to take place at 10 o'clock that day. Some time before, he had requested the tax collector to inform him if any one made application for the sale of the property. This the tax collector promised to do, but failed to keep his promise. Mr. Fee sought Judge Ostrander, attorney for the party desiring to purchase, and asked him if he proposed to bid on the property. On receiving an affirmative answer, Mr. Fee stated that the defendant herein had trusted him implicitly in the matter, that he had assured the bank that he would not permit a sale of the property; that the whole matter had been intrusted to his care; that he would like to have the property sold provided he could buy it for his client; that if the judge would bid the amount of the tax and allow Mr. Fee to make a further bid, and become the purchaser, the latter would compensate the former for his services. This was agreed upon and Judge Ostrander loaned Mr. Fee \$950, the purchase price, and received \$250 for his services. The money was paid by the defendant and it received the said tax collector's deed dated August 6, 1904. The contention of appellant, as before intimated, is that, in consequence of its violation of said stipulation upon which plaintiff relied, defendant by its purchase of the land became the involuntary trustee of the same for the benefit of plaintiff, and that the said purchase should be considered as though made expressly for her benefit.

The particular section of the Civil Code embodying the doctrine of appellant's position is 2224, providing that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other unlawful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." The only one of these grounds upon which with any kind of plausibility plaintiff can base her claim for relief is embraced within the one relating to fraud. The different phases of recognized fraud have been considered so often that we deem it inadvisable at any length to discuss the subject in the

abstract. It is sufficient to say that, if it be anything condemned by the law, the act of defendant in said purchase constituted constructive fraud described in section 1573, subd. 1, Civ. Code, as consisting "in any breach of duty which without any actual fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him." In 1 Pomeroy's Equity Jurisprudence, § 155, the author with his usual clearness states the intent and purpose of the rule, as follows: "Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. * * * If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

The question then arises whether by failing to redeem and by purchasing the property defendant acted inequitably in an unconscientious manner to the prejudice of plaintiff, so that she is considered in equity the beneficial owner? An affirmative answer, it is conceded, requires that these propositions be established: (1) That the making of the stipulation by F. A. Fee was authorized by the defendant the San Jose Safe Deposit Bank of Savings. (2) That plaintiff relied upon said stipulation. (3) That neither plaintiff nor her agent or attorney ever received any notice that the stipulation had been disavowed or repudiated by the defendant. (4) That the plaintiff was misled by said stipulation and damaged by its violation on the part of defendant.

As to the first of these propositions, we cannot resist the conclusion that Mr. Fee was authorized by the bank to enter into the stipulation and that the finding to the contrary is therefore unsupported by the evidence. His authority did not follow from his general retainer as attorney within the purview of section 283 of the Code of Civil Procedure, but he was specially empowered to enter into the stipulation and deal with the matter according to his own judgment. October 24, 1903, Mr. Fee wrote to Mr. McLaughlin, the president and general manager of the bank, among other things, as follows: "I think this property should be redeemed as it is not at all unlikely that some one here may apply to the Controller to have the same offered for sale. * * * If you think it wise, I might see Judge Harris, counsel for the Dworacks,

and have a stipulation with him that this property be redeemed the party redeeming to have a lien for the redemption money. Whatever you desire done at this end of the line I will of course attend to. I think, however, that you will agree with me that a redemption of the property should be at once effected." On October 29th Mr. McLaughlin replied, saying: "We agree with you that the property should be redeemed; make out it will cost about \$173. * * * As to seeing Judge Harris, you are the best to decide that. * * * We send you a check for \$175 to deal with the redemption as you think best. Take no chances. We place the whole matter in your hands and appreciate your efforts. Any further costs please advise and we will remit." After receiving that letter, Mr. Fee wrote to Judge Harris, the attorney for the defendants in the said case of San Jose Safe Deposit Bank of Savings v. Bank of Madera et al., and who was the attorney in fact for Annie E. Teich. In that letter Mr. Fee says: "My client is desirous of paying any taxes it should pay by reason of its mortgage interest in said property, if it should ultimately be determined that it has such. * * * We are desirous of paying and discharging the taxes on the property, and herewith inclose a stipulation, which I think will be found agreeable to you. * * * I think you fully appreciate the fact that the taxes should be paid on this property, and, as the stipulation is fair to both sides, I hope you will see your way clear to sign the same, as my people are desirous of paying whatever they may be legally obliged to pay in the matter." We do not see how more apt words could have been chosen to authorize Mr. Fee to stipulate as to the redemption of the property. He concluded that to protect the interest of his client it would be best to enter into the stipulation, and he so informed the bank. What is the meaning of the reply: "As to seeing Judge Harris you are the best to decide that. * * * We place the whole matter in your hands"? We may not fully appreciate, of course, the significance of the language used, but it seems to us that any man of ordinary understanding would be justified in reaching the conclusion, as Mr. Fee did, that he was authorized to stipulate as to the redemption of the property. No particular formula of words was required to confer authority, and it appears as clear as noonday that the matter was left to the discretion of Mr. Fee in whom, as is shown by the correspondence, the bank had implicit confidence.

Again, the court has found that plaintiff did not rely upon said stipulation. We cannot so read the evidence. Judge Harris testified that he did rely upon it, and we think he was amply justified in doing so. It is true that he had also the additional assurance of the tax collector that he would inform him as to any sale of the property, but the tax collector failed to do so. But the promise of the latter could in no wise affect

the significance or potency of the stipulation or in a legal sense derogate from the confidence to which it was entitled from Judge Harris. The law does not require that he should have relied exclusively upon the stipulation to avail himself of the remedy sought in this action. If so, in case A. had confidence in B. and C. and relied upon their several promises, and both misled him to his disadvantage, he could recover against neither, which is not only inequitable, but absurd. We think the stipulation justified Judge Harris in believing that the defendant for its own protection desired to redeem the property; that this was its purpose in order that it should not lose the fruits of its victory in case it finally prevailed in the establishment and foreclosure of its equitable mortgage; that it was willing to agree to so redeem in consideration of plaintiff's permission for it to do so and of her promise to refund to defendant whatever might be found due according to the final decision in the foreclosure suit; and that he could safely rely upon defendant's fulfillment of its covenants, and rest in the assurance that no loss could come to plaintiff through the voluntary act of defendant. We do not understand that under the stipulation defendant had merely an option to redeem. The language used indicated its desire and intention to redeem, and, besides, if it considered that it had any choice it was its duty, when it changed its purpose, to notify plaintiff in order that she might protect herself.

As to the third proposition, it is found by the court that neither plaintiff nor her attorney received any notice that the stipulation had been repudiated or disavowed by the defendant. This finding is in favor of appellant, and, not being assailed, is, of course, not subject to review. That the plaintiff was misled by the stipulation and damaged by the act of defendant in failing to keep its agreement has sufficiently appeared in the foregoing. If plaintiff had not understood that the property would be redeemed by defendant, it seems hard to believe that she would have allowed it to be sold, although it must be conceded that she and her predecessors temerarily permitted the taxes to go by default for many years, and thereby manifested no small degree of indifference as to the legal title to the property. Looking at the record as it is presented, we think it would be inequitable to uphold the judgment of the lower court and would be establishing a dangerous precedent. It is true, no doubt, that the "forum of conscience" is a somewhat variable quantity affected more or less by the personal equation and the moral considerations to which equity so constantly looks are in a sense conventional and cannot be defined with mathematical precision, and therefore, in cases like this, the determination of the question whether a particular transaction is unconscionable and indefensible is not governed entirely by hard and fast rules,

but is committed largely to the enlightened conscience of the individual chancellor, subject, however, to the revisionary action of the appellate tribunal. We are brought somewhat reluctantly to a conclusion different from that reached in the court below, as upon the assumption that the proofs, if received, would support defendant's special defense of an equitable mortgage growing out of the loan by it of nearly \$4,000 to effect the redemption of the property from a foreclosure sale to one Return Roberts, a former mortgagee, plaintiff, in order to prevail, should be required to do more than she has offered to do. However, the court declined to receive evidence or to make any finding as to said defense and its action in that respect obviously cannot be corrected on this appeal.

It makes no difference that the mortgage is subject to the statute of limitations. Under the familiar principle that he who seeks equity must do equity, plaintiff is not entitled to have a conveyance of the property until she has refunded to defendant all that it has paid out in good faith to protect the property, including the amount loaned to Mary A. Dworack to redeem from the foreclosure sale. It might be otherwise if plaintiff were an innocent purchaser for value without notice, but, assuming the allegations of the answer to be true, any other view we consider intolerable in a court of equity. But this consideration must be relegated to another trial.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 475

BREEN v. ROY. (Civ. 467.)

(Court of Appeal, First District, California.
July 1, 1908. Rehearing Denied by Supreme
Court Aug. 27, 1908.)

1. BROKERS—CONTRACT—PERFORMANCE — ACTION FOR SERVICES.

Where brokers, having a contract which would have entitled them to recover commissions if they had found a purchaser ready, willing, and able to pay the price named in the contract, performed services thereunder in good faith, while the contract was in force, and the defendant before the contract term expired, on being permitted to cancel the contract, promised to pay for the services rendered, the broker's assignee was entitled to recover for such services in *indebitatus assumpsit*.

2. SAME—EVIDENCE—CONTRACT—ADMISSIBILITY.

Where the assignee of certain real estate brokers sued in *assumpsit* to recover compensation for the broker's services, rendered under a written contract with defendant, which defendant had canceled before the termination of the contract term, the contract was admissible in evidence.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Peter A. Breen against G. M. Roy. Judgment for defendant, and plaintiff appeals. Reversed.

Bert Schlesinger, for appellant. R. H. Countryman, for respondent.

COOPER, P. J. This action was brought to recover \$350 for services alleged to have been rendered and performed by the assignors of plaintiff for defendant, at his special instance and request. The complaint alleges that defendant promised and agreed to pay to plaintiff's assignors the said sum of \$350 for such services. The answer denies that the plaintiff's assignors ever rendered or performed any services for defendant at his special instance or request, or otherwise, or that defendant ever promised to pay \$350, or any other sum for any such services, or for any services. The case was tried before the court with a jury duly impaneled. Plaintiff, in order to prove his case, introduced without objection an agreement in writing, signed by defendant, which is as follows: "San Francisco, California, August 27, 1906. I hereby authorize Sullivan, Feder & Kahn exclusively for the term of five days from date to sell and enter into and sign a writing contract in my name and for me, for the sale and conveyance of the following described property: Situate in the city and county of San Francisco, state of California, to wit, on the north line of Geary street 141³/₁₂ feet east of Fillmore street 25 by 127⁶/₁₂ feet, with the improvements thereon in course of alteration; leased for five years from Oct. 1, 1906, at \$300 per month. Cost of alterations to be paid by purchaser. And I agree to accept the sum of fourteen thousand dollars (\$14,000.00) in U. S. gold coin, and I agree to pay Sullivan, Feder & Kahn 2¹/₂ per cent. commission on the sale price thereof.—G. M. Roy." Mr. Feder was called by plaintiff as a witness, and testified that on the 29th day of August, 1906, the defendant came into the office, and asked that no further efforts be made to sell the property under the contract, and that defendant then and there said to witness, "Dan O'Callaghan has an offer for this property. He has a deposit of \$500, and I believe that he will sell it, and therefore, if he does sell it, I will get \$500 over and above what your price calls for." While this witness was on the stand and plaintiff's counsel was further examining him, the following took place: "Q. After getting that contract what did you do? A. I immediately proceeded to find a purchaser. Mr. Schlesinger: Q. Did you and members of the firm submit it to several prospective purchasers about town? Mr. Countryman: We object to that as leading. The Court: Sustained. Mr. Schlesinger: While this contract was in force did you have any talk with Mr. Roy, any further talk? A. I did. Mr. Schlesinger: Maybe the position we assume and my statements are not quite clear. Sullivan, Feder & Kahn made for the sale of this property a five days' contract. Roy went to them and said, 'I want to withdraw the property from you people; I will

withdraw the property and pay you your commission.' That is our case. The Court: Nothing to it. Mr. Schlesinger: Now I hope—I don't think that is proper to the plaintiff at all. Your honor is in the wrong on this proposition. We have a written contract in evidence, but you let it go. We sue for services. The Court: Why don't you bring a different action then? Mr. Schlesinger: We cannot sue upon the contracts. The Court: There is no use in talking to me upon a proposition of law like that. Gentlemen of the jury, I instruct you to bring in a verdict for the defendant. Mr. Schlesinger: I protest against the judgment going for the defendant. Will your honor allow us to submit offer of proofs? Mr. Countryman: We object to these offers of proofs, and ask for judgment for the defendant. Mr. Schlesinger: We have not closed our case. The Court: You don't have to. This gentleman has proved himself out of court. Take your exceptions if you wish. Mr. Schlesinger: We certainly do take an exception. The Court: Gentlemen of the jury, select a foreman. (Mr. P. H. Flood chosen as foreman.) Now, gentlemen of the jury, I will instruct you to bring in a verdict for the defendant." The jury accordingly returned a verdict for the defendant, upon which judgment was entered. This appeal is from the judgment.

The ruling of the court was to the effect that, although the plaintiff's assignors had a contract in writing authorizing them to sell the defendant's land, and agreeing to pay them a commission therefor, the plaintiff would not be allowed to prove that his assignors performed services for defendant under the contract before it was withdrawn, nor to prove the reasonable value of such services, nor the agreement of the defendant to pay for the services. In this we are of opinion that the court was in error. The foundation of the plaintiff's claim was the written contract. Under that contract his assignors would have been entitled to recover commissions if they had found a purchaser ready, willing, and able to pay the price named in the contract. If in good faith they performed services, or expended money in endeavoring to obtain a purchaser, while the contract was in force, and the defendant under such services went to them before the time named in the contract had expired, and promised to pay for those services, and being permitted to withdraw the contract, and upon such promise the contract was withdrawn, we can see no reason, either in law or in morals, that would preclude a recovery. The performance of the contract having been prevented by the defendant, the action was brought in the form of indebitatus assumpsit, and not directly upon the contract. This might be done, as the contract was the basis upon which the cause of action arose, and was admissible in evidence. *Reynolds v. Jourdan*, 6 Cal. 106. In fact the contract was admitted in evidence without objection.

No objection was made to the form of the action. The ruling then went to the very essence of the case. In effect it held that, conceding the facts to be true which the plaintiff was attempting to prove, yet he could not recover. It is said in *Mechem* on the Law of Agency (section 620): "Thus if, after a broker employed to sell property had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching to success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts, and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance; that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission." In the case of *Lane v. Albright*, 49 Ind. 279, where the owner of the real estate sold it pending negotiations in making a sale, and prior to the expiration of the time given by the owner to the agent, and where the agent within the time given did find a purchaser, the court said: "The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by the appellant. The fact that the appellee had authorized the appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant." In *Kimmell v. Skelly*, 130 Cal. 561, 62 Pac. 1067, it is said: "The brokers here did not agree to find a purchaser, but, being employed to find one, they were agents of defendant to that end, and were legally bound to use their time and labor for the benefit of their principal; and it is the use of this time and labor that forms the consideration to support her promise to pay them the compensation mentioned in the agreement." See, further, *Toomy v. Dumphy*, 86 Cal. 639, 25 Pac. 130, *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962, and *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906. The plaintiff was entitled to prove, if he could do so, the facts claimed by him to exist. Of course, if the court had heard the evidence, and the jury had concluded that the assignors of plaintiff performed no services or earned no commissions, and that the defendant made no promise to pay as claimed by plaintiff, these would have been matters for the jury to pass upon. It was error for the court to take the case from the jury and to preclude plaintiff from introducing his testimony.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

8 Cal. App. 406

KRASILNIKOFF v. DUNDON. (Civ. 406.)

(Court of Appeal, First District, California.
June 22, 1908. Rehearing Denied by Supreme Court Aug. 20, 1908.)

1. SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.

The general rule is that damages, in case of a breach of warranty of quality of personal property sold, are to be estimated with reference to values at the time and place of delivery; but, where personal property is sold on a warranty to be used at some place other than the place of sale and delivery, and this is known to the seller, damages may be estimated with reference to values at the place where the property is to be used, and in such case the conditions existing at that place are presumed to be within the contemplation of the parties in making the contract of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1287.]

2. SAME.

Defendant agreed to make two boilers for plaintiff, according to a design originated and patented by defendant. With full knowledge that the boilers were to be sent to Siberia, and used on boats on the Amoor river, he warranted that they would generate steam of 200 pounds pressure, with a certain designated consumption of fuel. They failed to do so, and in Siberia at least were of no value. The boilers were to be tested in defendant's shop, and when satisfactory were to be taken down and delivered at the wharf in San Francisco for shipment. Plaintiff had returned to Siberia before shipment was made. Held, that plaintiff was not, as a matter of law, wanting in diligence in not discovering the breach of warranty until the boilers were attempted to be used in Siberia; and, under the rule that the time to which the warranty refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser, plaintiff was entitled to receive compensation for his damages, with reference to values in Siberia.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1287.]

3. SAME—DAMAGES—INTEREST—BREACH OF CONTRACT INVOLVING UNLIQUIDATED DAMAGES.

The damages not being certain on the face of the contract, and being ascertainable only upon evidence as to values in Siberia, interest should not be allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1293.]

4. SAME—BREACH OF WARRANTY—FRAUD—PLEADINGS—SUFFICIENCY OF FRAUD—"ACTUAL FRAUD."

In an action for breach of warranty of the quality of boilers purchased, allegations that defendant represented the boilers to be a great improvement over all other boilers, and that they were superior to all other boilers, and were able to perform the work for which they were to be made, are allegations of the statement of opinion and "puffing," and are not sufficient to sustain a judgment for interest under Civ. Code, § 3288, providing that, in an action for fraud, interest may be given in the discretion of the jury, especially where the complaint does not allege that the statements were made with intent to deceive plaintiff or induce him to enter into the contract; Civ. Code, § 1572, defining "actual fraud," in connection with the consent of parties to a contract, as an act committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 157-158.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. E. Krasilnikoff against P. F. Dundon. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Order affirmed. Judgment modified and affirmed.

Mullany, Grant & Cushing, Garrett W. McEnerney, and Cushing, Grant & Cushing, for appellant. J. N. Young, for respondent.

HALL, J. Appellant takes the position that the action is one for damages for breach of warranty as to the efficiency of two certain boilers manufactured by defendant for plaintiff. He concedes that the evidence sustains the finding of the court that there was a breach of such warranty, but insists that the evidence does not sustain the finding as to the amount of the damages. The boilers were constructed at San Francisco, under a contract which required them to be delivered at the wharf in San Francisco, but it was well understood by defendant that they were to be sent to and used at a place on the Amoor river in Siberia, 13,000 miles from San Francisco. The court found that the plaintiff had been damaged in the sum of \$7,200, the price he paid for the boilers, and gave him judgment for such sum, together with interest thereon at the legal rate from the 10th day of October, 1900.

Treating this case as an action for damages for breach of warranty as to quality of personal property, as insisted by appellant, the measure of damages is fixed by section 3313 of the Civil Code as "the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." It is thus seen that the statute does not, in terms, fix either the time or place at which the valuation is to be made. It is insisted by appellant that the damages under the contract and circumstances of this case should be fixed with reference to values at San Francisco, and not with reference to values at the place in Siberia, to which the boilers were sent and where they were to be used. There can be no doubt, we think, that, if the values in Siberia control, the evidence amply justifies the finding of the court. Plaintiff paid to the defendant as the cost of the boilers \$7,200 at San Francisco, and in addition \$3,200 freight money to get them to the place in Siberia where they were to be used. After being set up, and an attempt made to use them, it was there found that they did not comply with the warranty as to their potentiality. This probably was because the design or plan upon which they were built was wrong. Testimony was given that they were of no value and were worthless. Viewing this testimony as relating to their value in Siberia, it amply supported the finding as to damages in the sum of \$7,200.

Testimony, however, was given to the effect that changes could be made in the boilers at San Francisco at a cost of \$500, which would have corrected the defects in the boilers so that they would have complied with the warranty.

The general rule undoubtedly is that damages, in case of a breach of warranty of quality of personal property sold, are to be estimated with reference to values at the time and place of delivery. But to this rule there are exceptions. Where personal property is sold on a warranty to be used at some place other than the place of sale and delivery, and this is known to the seller, damages may be estimated with reference to values at the place where the property is to be used. In such case the conditions existing at the place where the property is to be used are presumed to be within the contemplation of the parties in making the contract of warranty. The rule is thus stated in *Sutherland on Damages* (section 671): "Where a contract is made by one to furnish to another a specific article of a designated description, to be used for a particular purpose, or for use at another place, and the destination, purpose, and use are known to him who agrees to furnish it, and the article furnished is defective for the purpose, and not according to the contract, the damages occasioned by reason of such defects, with reference to the purpose and place, are direct and recoverable. The measure is the difference between the value of the article received and of that contracted for at the place and for the purpose contemplated." In the case of *Bridge v. Wain*, 1 Starkie, 504, an action for damages for breach of warranty on goods sold in England for resale in China, it was held that damages should be assessed with reference to values in China. In *Converse v. Burrows*, 2 Minn. 229 (Gil. 191), the action was for damages for breach of warranty of the quality of pork sold and delivered at Davenport, Iowa, but for use at Ft. Ridgley, Minn. It was held that the damages were to be assessed with reference to values at the place where the pork was to be used. The court cited *Bridge v. Wain*, supra, and said, "The general rule of damages on a breach of warranty on a sale of personal property * * * is the difference between the article sold in its defective condition and the market value of the article at the place where it was to be used in the condition represented by the vendor." The same principle was applied in the case of *Thorne v. McVeagh*, 75 Ill. 81, where hams were sold in Chicago to supply a customer of the purchaser at Salt Lake City. The same rule is supported by *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065; *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309, and *Messmore v. N. Y. Shot & Lead Co.*, 40 N. Y. 422. In the case at bar the defendant agreed to make two boilers for plaintiff, according to a

design, originated and patented by defendant. With full knowledge that the boilers were to be sent to a distant point in Siberia, where they were to be set up and used to operate engines on boats on the Amoor river, he warranted that they would generate steam of 200 pounds pressure, with a certain designated consumption of fuel. The evidence shows that they utterly failed to do it, and, in Siberia at least, were of no value. Under these circumstances there can be no doubt that plaintiff in fact suffered much more damage than the cost price of the boilers in San Francisco, for in addition he paid \$3,200 freight money to get the boilers to the place where they were to be used.

Unless plaintiff was charged with the duty of ascertaining in San Francisco whether or not the warranty had been fulfilled, it would seem that the plainest principles of justice require that he should receive compensation for his damages, with reference to values in Siberia. In this connection it has been urged very earnestly by appellant that plaintiff, under the contract and the circumstances of this case, should have ascertained at San Francisco whether or not a breach of warranty had occurred, at least to the extent that, if he did not, he could only recover damages with reference to conditions and values at San Francisco. At the time the contract was made plaintiff was at San Francisco. Defendant by the contract agreed that "every endeavor shall be made to ship the boilers in May, 1898," but in fact did not have them ready for shipment until about a year later than the expected time. In the meantime plaintiff had returned to Siberia. The contract contained a provision as follows: "Boilers to be set up complete in shop, and tested to 300 lbs. cold water pressure, and all made tight, and then steam to be got up, and after all is made tight and satisfactory, take down and mark all the parts," etc. The primary purpose of this test seems to be to ascertain the tightness of the joints and strength of boilers as to bursting point. At any rate it is not at all certain that by such test the defect of the boilers as to their potentiality could have been ascertained. Indeed the defendant himself testified that the test required by the contract was made in his presence, and he discovered no defect in the boilers as to their potentiality. Yet when the test of actual use in the operation of an engine was applied in Siberia, the boilers did not meet the requirements of the warranty. After the boilers had been taken down and prepared for shipment, as required by the terms of the contract, the only reasonable opportunity of ascertaining whether or not the boilers came up to the warranty would be in Siberia. This brings this case within the doctrine of *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125, where it is said "that the time to which the warranty

refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser." Under the facts of this case we cannot say, as a matter of law, that plaintiff was wanting in diligence in not discovering the breach of warranty until after the boilers were attempted to be used in Siberia. The finding of the court that plaintiff was damaged to the amount of \$7,200 is therefore sustained by the evidence.

The court found the amount of plaintiff's damages to be \$7,200, together with legal interest thereon from October 10, 1900, for which judgment was entered accordingly. Appellant insists that, this being an action to recover unliquidated damages, no interest should have been allowed on the amount found as damages. This contention we think must be sustained. The damages in this case were not certain upon the face of the contract, and could not be made certain by calculation. They could not be determined except from evidence as to values in Siberia. The fact that the court, after hearing the evidence, fixed upon the price paid by plaintiff as the amount of the damages does not show that the damages, until so fixed, were certain or could be made certain by calculation. This case as to interest seems to be fully covered by *Hewes v. German Fruit Co.*, 106 Cal. 441, 39 Pac. 853, which was an action for damages for refusal to accept and pay for raisins; and it was held that the damages to the seller was the difference between the contract price and the value of the property, but without interest. See, also, *Brady v. Wilcoxson*, 44 Cal. 239; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 490, 1 Am. St. Rep. 75; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Ferreira v. Chabot*, 121 Cal. 233, 53 Pac. 689, 1092. Respondent urges that the judgment for interest may be sustained under section 3288 of the Civil Code, upon the theory that the complaint alleges fraud. The allegations of the complaint are not sufficient to sustain a complaint for fraud. The allegations relied on are purely as to matters of opinion, and are not sufficient to charge a fraud. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219. In *Rendell v. Scott*, supra, the allegations relied on to support a charge of fraud were that certain land was the best ranch in Ione valley, and was very rich and productive, and would produce 50 bushels of wheat to the acre, that a portion was good alfalfa land, and that another portion was rich in mineral deposits, all of which were said to be merely matters of opinion. In the case at bar the allegations pertinent to this question are that defendant represented that the boiler in question was a great improvement upon all other boilers, and was superior to all other boilers, and was able to perform the work for which

it was to be made. All of this was clearly matter of opinion and "puffing." Besides, the complaint fails to allege that any of these statements were made with intent to deceive plaintiff, or to induce him to enter into the contract. Civ. Code, § 1572. The complaint does not state a case of fraud, and the judgment for interest cannot be supported on that theory, and the judgment should be modified by reducing the same to the sum of \$7,200, as of the date of the entry of said judgment.

There are no other questions that merit discussion.

The order denying the motion for a new trial is affirmed, and the judgment is modified, as of the date of the entry thereof, to wit, March 7, 1903, so as to read as follows: "Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that C. Krasilnikoff, plaintiff, have and recover from P. F. Dundon, defendant, the sum of \$7,200, with interest thereon at the rate of 7 per cent. per annum, from this 7th day of March, 1903, until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$89"; and, as so modified, the judgment is affirmed.

Defendant recovers his costs of this appeal.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 430

PEOPLE v. EVERETT. (Cr. 72.)

(Court of Appeal, Third District, California.
June 24, 1908.)

1. CRIMINAL LAW—BILL OF EXCEPTIONS—EXTENDING TIME FOR PRESENTATION—JURISDICTIONAL REQUIREMENTS—WAIVER.

The requirements of Pen. Code, § 1174, that extension of time for presentation of bill of exceptions may be had only on affidavit and two days' written notice, if jurisdictional, as has been held, cannot be waived, as jurisdiction cannot be conferred by consent.

2. PROHIBITION—REMEDY BY APPEAL.

Prohibition is not the proper remedy to prevent settlement of a bill of exceptions, on the ground that the extension of time for presenting the same was without compliance with jurisdictional requirements; there being an adequate remedy by appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 5.]

3. CRIMINAL LAW—PRESENTING BILL OF EXCEPTIONS—RELIEF FROM DEFAULT.

Code, Civ. Proc. § 473, authorizing relief to a party from his default through mistake or inadvertence, applies where he procured extension of time, in a criminal case, for presenting bill of exceptions, without compliance with the jurisdictional requirements of an affidavit and written notice.

Petition by the people, on the relation of the district attorney of Calaveras county, for writ of prohibition against Luther Everett, to restrain settlement of bill of exceptions in the case of the people against Luther Everett. Denied.

James Keith, Dist. Atty., for the People. Solinsky & Wehe, John Hancock, Snyder & Snyder, and C. E. McLaughlin, for respondent.

BURNETT, J. This is a proceeding instituted by the district attorney of Calaveras county to secure a writ of prohibition restraining the judge of the superior court of said county from settling a bill of exceptions in the above-entitled cause. The application is based upon the ground that the said judge extended the time within which defendant might prepare and present his bill beyond the statutory period, and that "neither the defendant nor his counsel nor any person in his behalf either made, or presented, or filed, as required by section 1174 of the Penal Code, any affidavit of any kind or character with the judge of the said superior court or with the district attorney, or with any person for said judge, showing any necessity or reason for any extension of time within which to prepare and present said bill of exceptions, and that neither the defendant nor his counsel, nor any person on his behalf, notified or served upon the district attorney any notice of any kind or character at any time prior or subsequent to the securing of the order extending the time in which to prepare and present said bill of exceptions." There were three separate orders made, the first extending the time for 30, the second for 10 additional, and the third for 4 more days, and the bill was actually presented 23 days after the statutory period had expired. Section 1174 of the Penal Code provides: "The time specified in this section and section eleven hundred and seventy-one, within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk, may be extended for a reasonable period by the trial judge, or in his absence from the county or inability to act, by a justice of the Supreme Court, but only for good cause and, upon affidavit showing the necessity therefor, presented upon written notice of at least two days to the adverse party who shall have the right to file counter affidavits."

The contention of respondent is that there was a substantial compliance with the requirement of the statute in that the district attorney was present in court, and consented to the continuance, and that good cause was shown to the court, although not by affidavit, why the order should be made. It is asserted that the requirement that the district attorney be given 2 days' notice is for the protection of this official, and that the affidavit is for the benefit of the court, and that an opportunity to make a timely objection, if no advantage is taken of it, constitutes a waiver of these requirements. It was held, however, by this court in *People v. Blis*, 3 Cal. App. 309, 84 Pac. 676, and *People v. Simmons* (Cal. App.) 95 Pac. 48, that these requirements are jurisdictional. If so, they cannot be waived, and it is well settled that

jurisdiction cannot be conferred by consent. In *People v. Soto* (Cal. App.) 96 Pac. 913, Mr. Justice Taggart, of the District Court of Appeal of the Second District, expresses a somewhat different view, in which Presiding Justice Allen concurs, as follows: "The court being in session, the counsel for the respective parties being present, and the district attorney making a statement of the facts relative to the possibility of having the record of the proceedings upon the trial transcribed in time to prepare the bill, this was a statement of fact which the court was entitled to consider as a showing of cause and equivalent to the affidavit required by section 1174. The district attorney being present and consenting to the order, when there was still abundant time for the defendant to comply with the statutory provision as to service of notice, was a waiver of service of notice, and gave the court jurisdiction." My own judgment, however, yields assent rather to the views expressed in the concurring opinion of Mr. Justice Shaw. To say that in that case or in this there was a substantial compliance with the provisions of the statute is to declare, it seems to me, that the opinion of the judge as to what is necessary to give the court jurisdiction is to be substituted for the will of the Legislature, and that the latter did not mean what its plain language imports. This would be a judicial usurpation of the legislative function. The requirements are simple, within the legislative authority, are provided for a wise purpose, and they should be observed.

But it has been held that prohibition is not the proper remedy. As pointed out in the said concurring opinion in the *Soto* Case, *supra*, petitioner has an adequate remedy by appeal. *Lindley v. Superior Court*, 141 Cal.

220, 74 Pac. 765; *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815; *Hayes v. Board of Trustees, etc.* (Cal. App.) 92 Pac. 492.

Again, basing its action upon affidavits filed on behalf of defendant, the court made an order relieving him of his default, as provided in section 473 of the Code of Civil Procedure. It was held in the *Soto* Case, *supra*, that said section is applicable to proceedings of this character, and while the neglect of defendant to comply with the requirement of the statute in presenting the bill of exceptions is manifest, we cannot say it was inexcusable, or that the trial court abused its discretion in setting aside the default.

The alternative writ is dismissed, and the petition denied.

I concur: HART, J.

CHIPMAN, P. J.

I concur.

In *People v. Blis* the question as to whether prohibition is the appropriate remedy in such a case as this was not pressed nor was it seriously considered by the court. The main object of both parties was to obtain a construction of the statute for the first time brought to the attention of the appellate court.

There is a growing disposition, which should not be encouraged, to take advantage of original writs, notwithstanding that by an appeal a plain, speedy and adequate remedy is furnished.

There are no special or peculiar circumstances in the present case which should take it out of the operation of the rule governing the issuance of the writ.

154 Cal. 165

CENTRAL OIL CO. OF LOS ANGELES v.
SOUTHERN REFINING CO.

(L. A. 2,073.)

(Supreme Court of California. Aug. 17, 1908.)

1. CONTRACTS—CONSTRUCTION—BREACH—EFFECT—"VOID AND OF NO EFFECT."

Under Civ. Code, §§ 1511, 1512, 1514, declaring what acts shall excuse performance, and providing that, where performance is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if the obligation had been performed by both parties, etc., a provision in a contract for the sale and purchase of a designated quantity of oil, as ordered by the buyer from month to month, that a violation thereof shall render the agreement "void and of no effect," only means that a party, by violating the contract, loses his rights under it, but the contract remains in force to protect the rights of the other party, who may maintain an action for damages for such violation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7339-7340.]

2. SALES—CONTRACTS—CONSTRUCTION.

A contract for the sale and purchase of from 60,000 to 108,000 barrels of oil, to be delivered as ordered by the buyer, provided that not less than 5,000 nor more than 9,000 barrels shall be delivered in any month, requires the buyer to take a minimum of 5,000 barrels each month, and the buyer, ordering the maximum quantity during certain months, is not relieved from the necessity of purchasing the minimum quantity in succeeding months.

3. DAMAGES — INTEREST — LOST PROFITS — BREACH OF CONTRACT.

Under Civ. Code, § 3287, providing that one entitled to damages capable of being made certain by calculation is entitled to interest from the day the right to recover vested in him, a seller in a contract for the sale of oil to be delivered monthly, as ordered by the buyer, is entitled to interest on the profits lost by the buyer failing to take the oil in accordance with the contract, to be reckoned from the date of the filing of the complaint in an action by the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 141.]

4. SALES—VALIDITY—EXISTENCE OF SUBJECT-MATTER.

A contract for the sale and purchase of oil produced from the seller's wells, to be delivered as ordered by the buyer, provided that not less than 5,000 nor more than 9,000 barrels shall be delivered in any month during the term of the contract, which shall commence on a designated date and continue monthly for one year, is an agreement to sell and deliver in the future, and is authorized by Civ. Code, §§ 1726, 1729, 1730, 1754, providing that any property which, if in existence, may be the subject of sale, may be the subject of an agreement of sale, whether in existence or not, etc., and is not void under section 1722, declaring that the subject of sale must be property, the title to which can be immediately transferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 21.]

Department 2. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by the Central Oil Company of Los Angeles against the Southern Refining Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

McNutt & Hannon and B. M. Marble, for appellant. Percy R. Wilson and W. W. Middlecoff, for respondent.

HENSHAW, J. Plaintiff and defendant entered into a contract whereby plaintiff agreed to deliver to defendant oil produced from plaintiff's wells, as follows: "From sixty thousand (60,000) to one hundred eight thousand (108,000) barrels of forty-two (42) gallons each, to be delivered as ordered by second party (Southern Refining Company), within one year from the first day of July, 1904, provided that not less than five thousand (5,000) nor more than nine thousand (9,000) barrels shall be delivered in any month during the term of this contract.

* * * This contract shall commence with the 1st day of July, 1904, and continue monthly thereafter for the period of one year and the violation of any of the terms or conditions thereof by either party hereto shall work a forfeiture thereof, and this agreement shall thereupon become void and of no effect." Plaintiff sued for damages for breach of this contract, the breach consisting in the failure and refusal of defendant to take the oil in accordance with the terms of the contract. The court found the breach, and awarded damages based upon the difference between the contract price of the oil and the market price of oil at plaintiff's wells for the months during which defendant refused to take plaintiff's product.

Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became "void and of no effect," that this provision means that the violation terminated the contract, and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that, by a violation of the terms of the contract, the rights of the party violating it cease, and, as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for "a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all." 9 Cyc. of L. & P. p. 618. Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. Civ. Code, §§ 1511, 1512, 1514. Such has uniformly been the construction put upon language such

as this when found in contracts. *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310; *Mancius v. Sergeant*, 5 Cow. (N. Y.) 271, note; *Dana v. St. Paul Investment Co.*, 42 Minn. 196, 44 N. W. 55; *Westervelt v. Huiskamp*, 101 Iowa, 202, 70 N. W. 125; *Raymond v. Caton*, 24 Ill. 123.

The court construed the contract as requiring defendant to take a minimum of 5,000 barrels of oil each month, and refused to allow any excess over the 5,000 barrels which defendant might have taken in any month to be considered as applicable to the purchases of succeeding months. To illustrate, if defendant had used 40,000 barrels in the first six months, the minimum which it was required to use being only 30,000 barrels, the court refused to treat the excess of 10,000 barrels as covering purchases for the two succeeding months. In this we think the court was clearly right. Defendant was entitled to purchase up to the amount of 9,000 barrels every month, but the fact that it purchased 9,000 barrels for two or three or four months, when perchance the price of oil was high, would not relieve it from the necessity of purchasing 5,000 barrels for each succeeding month, when perchance the price of oil had fallen below the contract price. In making its computations the court seems to have fallen into a clerical error amounting to \$250. In other words, it found the lost profits of plaintiff to be \$6,500, when the lost profits were actually \$6,250. Respondent contends that it was entitled to interest from the date of the filing of the complaint upon the \$6,250 actual profit, and that this interest far exceeds the \$250 allowed. Respondent's contention in this respect is sound. *Civ. Code*, § 3287; *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564.

The final contention of appellant is that the sale was void under sections 1722 and 1730 of the Civil Code; it purporting to be a sale of property in esse, but the contract on its face is clearly an agreement to sell and deliver in the future. Such a contract is expressly authorized by sections 1726, 1729, 1730, and 1754 of the Civil Code. Section 1730 provides that any property which, if in existence, might be the subject of sale, may be the subject of an agreement of sale, whether in existence or not.

For which reasons the judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

154 Cal. 150

STRONG et al. v. BALDWIN et al. (L. A. 2,069.)

(Supreme Court of California. Aug. 17, 1908.)

1. WATERS AND WATER COURSES—RIPARIAN RIGHTS—CONVEYANCES.

Where a tract of land abuts on a stream and a parcel thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed may also be

conveyed; and, when that is done, the riparian right remains, and is parcel of the land.

2. SAME.

Where a tract of land abutting on a stream is partitioned in court proceedings, and appropriate provision for riparian rights is made in the decree as to the parcels allotted thereby which do not abut on the stream, the riparian rights remain and constitute a parcel of the land so allotted.

3. SAME.

An owner of land abutting on a stream conveyed parcels not abutting thereon by deeds purporting to convey with the land "the same rights to the use of water that appertained" to the land in the hands of the owner, or by deeds conveying the land "together with the water rights and privileges as pertaining to the settlement of" the grantor, etc. The lands conveyed were dependent for water on the stream. *Held*, that the deeds made the riparian rights parcel to the land conveyed, and such rights passed as such in all subsequent conveyances of the land.

4. SAME.

Where land conveyed abutted on a river, no special provision was necessary to carry the riparian rights.

5. SAME.

An owner conveyed land abutting on a river. A decree of partition allotted with each parcel of land "all riparian rights and privileges." *Held*, that parcels of land not abutting on the stream were entitled to riparian rights as parcels of the land.

6. SAME—WATER RIGHTS—ACQUISITION—PRESCRIPTIVE RIGHTS—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that owners of land had prior to a designated year acquired by prescription title to a ditch over the land of another, together with the right to conduct through it a designated quantity of water for purposes of irrigation.

7. ADVERSE POSSESSION—PAYMENT OF TAXES—NECESSITY—STATUTES.

Where a title by prescription was complete prior to the amendment of 1878 to Code Civ. Proc. § 325, making the payment of taxes an element of adverse possession, the amendment has no application.

8. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHTS—EXTINGUISHMENT.

Owners of land acquired by prescription title to an irrigation ditch through the land of a third person, with a right to conduct through it a designated quantity of water. The third person subsequently executed leases of the right to carry water through the ditch, which leases were signed by persons purporting to represent the owners of the land irrigated from the ditch, but who were not connected with the owners. The leases were for a nominal rent. Other leases were executed to and signed by persons purporting to act as water commissioners for a district for a mere nominal rent, and other leases were executed to a corporation organized for the irrigation of lands. The owners were in possession of the property at the time of the execution of all the leases. *Held*, that their prescriptive rights were not extinguished under Civ. Code, § 811, providing that a servitude is extinguished by disuse for the period prescribed for acquiring title by enjoyment, etc.

9. LANDLORD AND TENANT — ESTOPPEL OF LESSEE TO ASSERT TITLE AS AGAINST LESSOR—APPLICATION OF DOCTRINE.

An owner of realty accepting a lease thereof from a claimant thereto, while he himself is in possession, and who has not at any time received the possession from the lessor, is not estopped by the lease from asserting his title as against the lessor, and this rule applies in cases of water rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 154.]

10. EASEMENTS — ACQUISITION — PRESCRIPTION—EXTINGUISHMENT.

A title by prescription is as effectual and complete as one obtained by a conveyance, and, unless extinguished by virtue of special statutory provisions like Civ. Code, § 811, prescribing the conditions for the extinguishment of a servitude, continues until conveyed by the possessor or lost by another adverse possession for the required time.

11. WATERS AND WATER COURSES—PRESCRIPTION—RIGHTS ACQUIRED.

Owners of land acquired by prescription title to an irrigation ditch over the land of another, with a right to carry through it a specified quantity of water. The third person subsequently claimed to be the owner of the ditch, and executed leases therefor. The owners were in possession of the property at the time of the execution of the leases, and never entered into possession under the third person. *Held* that, though the effect of the leases might be to prevent the acquiring of title by prescription, they did not operate to divest a title acquired by prescription.

12. SAME—ISSUES—DECREE.

Where the real object of a suit was to obtain a decree declaring that certain parties were without any right to the waters of a stream, and persons not parties to the action owned land bordering on the stream, and the evidence was not sufficient to enable the court to determine the relative rights of the parties to the waters of the stream, the court did not err in refusing to determine the quantity of water the respective parties were entitled to use as riparian owners.

13. SAME.

Where a judgment did not purport to define the extent of the riparian rights in a stream, the question whether the allegations in the pleadings were sufficiently certain as to the extent of the riparian rights was immaterial.

14. SAME.

In a suit to obtain a decree enjoining a party from interfering with the use of an irrigation ditch, a pleading which clearly sets forth the facts constituting the basis of the claims of the parties to the waters of the stream and the right to have the same pass through the ditch is sufficient, though it is uncertain whether the parties are entitled to the waters as riparian owners or by adverse use.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Harriet W. R. Strong and another against E. J. Baldwin and another, in which E. J. Baldwin filed a cross-complaint against plaintiffs and others. From a judgment for plaintiffs and cross-defendants, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

See 137 Cal. 432, 70 Pac. 288.

Works, Lee & Works, for appellants. C. L. Batcheller, J. S. Chapman, and Ward Chapman, for respondents.

ANGELLOTTI, J. This action was instituted by Harriet W. R. Strong and Julius B. Cohn, the owners of certain parcels of land in the Rancho Paso de Bartolo Viejo, sometimes known and hereinafter designated as the "Ranchito," in Los Angeles county, against E. J. Baldwin and H. A. Unruh (who is simply an agent of said Baldwin and has no other interest in the subject-matter of the litigation), to obtain a decree enjoining them from interfering with plaintiffs in their use and

control of a certain water ditch known as the "Rincon ditch," connecting with the San Gabriel river at a point on the Rancho La Puente, which is owned by Baldwin, and extending for a distance of about a mile on said Rancho La Puente to and into said Ranchito, and used by various property owners in said Ranchito for obtaining water for irrigation and domestic purposes, and also enjoining them from interfering with plaintiffs in the diversion of the waters of said river by means of said ditch.

The theory of the complaint was that the plaintiffs and other owners of property in said Ranchito and their predecessors in title had acquired by prescription the ownership of said ditch for the purpose of diverting to their lands for irrigation purposes waters of the San Gabriel river to the full capacity of the ditch, alleged to be 600 inches of water measured under a 4-inch pressure, and the right to divert that amount of water by means of the ditch. Defendants by their answer denied the alleged ownership of plaintiffs and other owners of property in the Ranchito in either ditch or water, alleging Baldwin to be the sole owner thereof, and that any use by them of such water was had solely by and with his consent and for an annual rental. Baldwin also filed a cross-complaint against plaintiffs, and other persons, hereinafter called cross-defendants. In this he alleged his ownership of the Puente Rancho and other tracts; that the same border upon and are riparian to the San Gabriel river, and that all of the waters of said river are needed for the proper irrigation of his said land and for domestic purposes; that he is the owner of the Rincon ditch so far as the same is on the Puente Rancho; that the plaintiffs and cross-defendants, owners or claimants of real estate near the San Gabriel river but not riparian thereto, claim to be owners of said ditch and the waters diverted thereby, but have no interest therein; and that their claim is wholly without right. He asked that they be required to show by what right they claimed any such interest, and that it be decreed that he is the owner of said ditch and all the waters therein. The plaintiffs and cross-defendants answered this cross-complaint, denying that all of said water was necessary for the irrigation of his lands, and also denying Baldwin's allegations as to the ownership of said ditch and water, admitting that some of them were not owners of land riparian to the stream, but alleging that others of them were owners of such land, without stating which of them owned riparian land and which nonriparian land, and alleging that they were the owners by prescription of said ditch with a right to divert and carry through the same to their lands for purposes of irrigation the waters of the San Gabriel river to the full capacity of the ditch.

Upon a trial of the issues thus made, the superior court found that the ditch was constructed by the predecessor in title of plain-

tiffs and cross-defendants more than 40 years before the filing of the cross-complaint, and that ever since its construction it had been adversely used by them and their predecessors in title to the extent of its capacity, found to be sufficient to deliver upon their lands 400 inches of water measured under a 4-inch pressure constant flow, for the purpose of diverting to their lands for irrigation purposes the waters of said river, and that they were the owners by prescription of said ditch and the right to divert therethrough, for irrigation and domestic purposes, the waters of said river to the extent aforesaid. Judgment was given accordingly. Upon an appeal to this court by defendants and the cross-complainant, this judgment and an order denying a new trial were reversed. It was held upon the evidence then before the court that unless there was sufficient evidence to support a conclusion that the enjoyment of the easement had ripened into a title thereto by prescription prior to the year 1882, when Baldwin had become the owner of the Puente Rancho, the conclusion of the trial court could not be upheld. Passing the question whether the evidence was sufficient to sustain a conclusion that the ditch had been used prior to 1882 for a length of time sufficient to create a prescriptive right to its use, this court held that the evidence did not sustain a finding that it had been so used; "to an extent sufficient to deliver upon the lands of the respondents 400 inches of water measured under a 4-inch pressure constant flow." For this reason the judgment and order were reversed. See *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288. In view of the disposition of the case on the trial, the question of riparian rights on the part of respondents was not discussed by this court further than to point out, in speaking of a demurrer interposed by Baldwin to the answers to the cross-complaint on the grounds of uncertainty and ambiguity, that a pleading which simply denied that "all of the said parties defendant * * * are owners of tracts of land not riparian to the said stream," and alleged that "many of the said parties are the owners of land through which the said stream flows" was uncertain in not alleging which of said defendants are the owners of riparian land or the quantity of water required for any of their lands as such riparian owners, and that Baldwin was entitled to have their claims in this regard specifically stated.

Upon the going down of the remittitur, the plaintiffs and cross-defendants filed amended answers to such cross-complaint, for the purpose of conforming to this suggestion of this court. In these answers, in addition to the former allegations, the land of each was specifically described, and it was alleged that each was the owner of land riparian to the stream and entitled to riparian rights, whether their tracts actually bordered upon the stream or not, by reason of the fact further

alleged that all such land was a part of the original Ranchito through the entire length of which the river has always flowed, and that, in the segregation of said rancho, the riparian rights of said rancho were apportioned among the various tracts of land. They further averred that the waters of said river to the full extent of the capacity of the ditch were necessary for the irrigation of their lands and other lands in said Ranchito having such riparian rights, the owners of which had not been made parties.

On the second trial the trial court found in accord with these allegations of the amended answers. The specific facts found as to the riparian rights were that the whole Ranchito was riparian to San Gabriel river; that the same was the property of Pio Pico under grant from the Mexican government; that said Pico first conveyed divers tracts of said land to divers parties and in making said conveyances also conveyed with the lands proportional interests in the waters of the river belonging to said Ranchito; that he then sold all the unsold portion of the Ranchito consisting of 3,785 acres, shown by the evidence to be riparian to said river, to one B. Cohn, who acquired the same in trust for himself and defendants Broderick and Prager; and that said 3,785-acre tract was subsequently partitioned among the owners thereof in an action brought for that purpose, the decree in such action allotting, as the evidence shows, with each parcel of land "all riparian rights and privileges." The plaintiffs and cross-defendants were found to be the successors in title under said Pico. It was further found that the ditch was capable of carrying 450 inches of water measured under a 4-inch pressure, and had been adversely used by plaintiffs and cross-defendants and their successors under said deeds of Pico, and their predecessors in title, to the extent of its capacity, for the diversion of the waters of said river for the irrigation of their lands and domestic purposes, for the period of time sufficient to give them title by prescription to such ditch, with the right to take such amount of water therein for such purpose. With respect to the right of the use of the waters of the river as distinguished from the ditch itself, the court found that the use by respondents was not adverse to Baldwin, that all the parties to the action have rights to the use of the waters of San Gabriel river as riparian owners, but that the evidence before the court was not sufficient to enable the court to make findings as to the relative rights of the plaintiffs and cross-defendants on the one hand, and of Baldwin on the other. The conclusion of the trial court, as shown by the judgment, was that plaintiffs and the cross-defendants are the owners of said ditch over the land of Baldwin, with the right as riparian owners to divert the waters of the river by means thereof to the extent of 450 inches measured under a 4-inch pressure, and

to conduct the same through said ditch to their lands and the lands of their co-owners in said ditch, for irrigation and domestic purposes, subject to the limitation that the right to the use of the waters to such extent is not to be construed as a prior or paramount right to the waters of said river, or a prior or paramount right to take the same at the point of diversion, "except when such amount is not in excess of the rights of the owners of said Rincon ditch as riparian proprietors in the waters of the river." It was further expressly adjudged that all the parties, including Baldwin, are riparian owners on said river, and as such entitled to divert waters therefrom for use on their lands, "but nothing herein contained shall be construed as adjudging or determining the quantity to which either of them is entitled, or the proportion of such water which either is entitled to divert or use as against the others."

This is an appeal by defendants from the judgment thus given, and from an order denying their motion for a new trial.

1. With respect to the question of riparian rights on the part of plaintiffs and cross-defendants, the findings of the trial court that all of such parties have riparian rights in the waters of the San Gabriel river are attacked as not being supported by the evidence. As we have seen, the land of some of these parties does not border upon the stream, but it does not necessarily follow that such land is without such riparian rights. When a tract of land abuts on a stream and a portion thereof not contiguous to the stream is conveyed by the owner, the riparian right of the portion so conveyed in the stream may also be conveyed with the land, as is fully recognized in the case cited by learned counsel for appellants (*Anaheim, etc., Co. v. Fuller*, 150 Cal. 331, 88 Pac. 978), and, when so conveyed, is still a riparian right with all the attributes of such right, and is in strict technical language "parcel of the land" conveyed. The same is necessarily true where a tract of land abutting on a stream is partitioned in court proceedings among the owners thereof, and appropriate provision for riparian rights is made in the decree as to the portions allotted by the decree which do not abut on the stream. See *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905; *Verdugo, etc., Co. v. Verdugo* (Cal.) 93 Pac. 1021. This is not a case, as suggested by appellants, of attempting to make riparian lands, which are not in fact riparian, but is simply the preservation of the right which the land has at the time of the conveyance or decree. In the case at bar the land of some of these plaintiffs and cross-defendants abuts on the stream, and as to such land there is, of course, no question. As to the land of the others, we think it sufficiently appears that the riparian rights were preserved. It is clear upon the record that at least a portion of each of such parcels has always been

dependent for irrigation on the waters of said river, and has always been irrigated by means of said waters. All the original deeds of conveyance made by Pico for portions of the Rancho which do not abut on the river contained either one or the other of two provisions regarding water. For instance, the deed of Pico to William R. Standifer and A. H. Dunlap, made May 13, 1875, purported to convey with the land "the same rights to the use of water that appertained to said land in the hands of the party of the first part," and the deed from Pico to plaintiff Harriet W. R. Strong, dated October 18, 1867, conveyed 320 acres of land, "together with the water rights and privileges as pertaining to the settlement of Pico, to wit: Sixteen water shares, representing the privileges to water for sixteen times twenty acres, paying for the same as water used in said settlement." In the light of the fact that these lands were then dependent for water on this river, there cannot reasonably be any doubt that it was the intention of each of these provisions to preserve the riparian right of the land conveyed. The effect of such provision in the Pico deeds was therefore, in each case to make the riparian right "parcel of the land" conveyed, and it passed as such in all subsequent conveyances of such land. As we have seen, the 3,785-acre tract conveyed by Pico to B. Cohn, and held by him in trust for himself, Broderick, and Prager, abutted on the river, and therefore no special provision was necessary to carry the riparian right. So far as we have been able to ascertain from the records, no specific portion of this tract had been segregated by conveyance at the time of the partition decree. As already stated, that decree allotted with each parcel of land "all riparian rights and privileges," thus making the same "parcel of the land," as in the case of the conveyances from Pico. All of the plaintiffs and cross-defendants whose land does not abut on the river hold either under such deeds from Pico or under the partition decree. From what we have said, it follows that they are all riparian owners as to the San Gabriel river, even though their land does not abut thereon.

2. The findings as to the adverse use of the ditch to the extent of its capacity by plaintiffs, cross-defendants, their co-owners, and their predecessors in title, for a period of time sufficient to give them title thereto for such purpose by prescription, are also assailed on the ground of insufficiency of evidence to support them. It may be assumed that these findings can be sustained only on the theory that the enjoyment of the easement had ripened into a title by prescription prior to the year 1882. As to the ditch itself, there can be no doubt that there was sufficient evidence to sustain such a conclusion. There was substantial evidence that it was constructed as early as the year 1855, and had ever since been used for the pur-

pose of conducting water from the point of diversion to the Ranchito, then occupied by Pico and his tenants, for the irrigation of the lands thereof. The trial court found it was in fact constructed by Pico, and, while there is no direct evidence to this effect, it is fairly inferable from the location of the ditch and the purpose to which it was devoted that it was so constructed. From that time until the year 1882 the use thereof by Pico and his tenants and successors was continuous, open and notorious, with the full knowledge of the owners of the Puente Rancho, at least from the year 1861. Those interested in the Ranchito during all this time apparently claimed and treated the ditch as their own property, and there is nothing to indicate that any consent to such use on the part of the owners of the Puente Rancho was ever obtained or sought. But it is specially urged that there was no foundation in the evidence for the conclusion that a prescriptive right to conduct through said ditch 450 inches of water measured under a 4-inch pressure existed in the year 1882, shortly after Baldwin acquired the Puente Rancho. This, it will be remembered, was the matter by reason of which the former judgment was reversed; the superior court then finding an adverse use to an extent sufficient to deliver 450 inches of water on the Ranchito. Upon the second trial, additional evidence on this matter was presented. Frederick Lambourne, who was on the Puente Rancho as private tutor and manager of the ranch for 14 years, from 1861 to 1875, and who was very familiar with the ditch, had examined it after the first trial, and testified that it was the same ditch virtually, and that he could not tell that there was any difference in the size. Mr. Rowan, a civil engineer, testified that he measured the waters therein on the Ranchito on October 25, 1903, and found flowing therein 149½ inches, and that the ditch was not more than one-third full. Mr. A. H. Dunlap testified that he knew the ditch from 1873, and that the water had been conducted through it to the extent of 600 inches from 1873 down, when the water was in the river to get; that in the early spring the ditch was full of water usually, and had 600 inches of water or over, diminishing as the year advanced; that there had been no general enlargement of the ditch since 1873; that it is just about the same now as when he first knew it. Mrs. Strong testified that the ditch is not quite as large now as it was in the early 70's. In addition to this, all the testimony given on the first trial was read in evidence on the second trial, and this showed from 400 to 500 inches running in the ditch in 1896 and 1897. There was in all this sufficient support for a conclusion that the ditch had been continuously used by the occupants of the Ranchito during the portions of each year when irrigation was required and the water to be had, up to the year 1882, in conducting wa-

ter to the extent of its capacity. The findings upon this branch of the case were, therefore, not contrary to the evidence. There is nothing in the opinion on the former appeal, as we read it, that precludes us from so holding.

It appears that this ditch has never been assessed separately from the land, but that the Puente Rancho was always assessed wholly to Baldwin, and that he paid the taxes thereon. It is urged, in view of these circumstances, that under section 325, Code Civ. Proc., title by prescription could not have been acquired by plaintiffs and cross-defendants. A sufficient answer to this claim is that their title by prescription was complete prior to the amendment of section 325, Code Civ. Proc., making the payment of taxes an element of adverse possession, which amendment was enacted in 1878, and that such amendment therefore has no application. *Lucas v. Provines*, 130 Cal. 270, 62 Pac. 509. From what has been said, it appears that respondent must be held to have had a perfect title by prescription in the year 1882, which was one or two years after Baldwin acquired the Puente Rancho.

It is contended, however, that, even, if such title was so acquired by plaintiffs and cross-defendants, it has been lost by nonuse or abandonment, and also that Baldwin has regained it by adverse user of more than five years. It is admitted that there never has been any cessation in the use by respondents of either ditch or water. To the extent of the use had prior to 1882 and for all the purposes of said use they have been in possession of the ditch ever since 1882, conducting water therein for the purpose of irrigating their lands, and using the same for such irrigation. The claim of abandonment and nonuse on the part of the respondents, as well as the claim that Baldwin has regained the title by adverse possession, is based on the fact that from the year 1882 Baldwin claimed to be the owner of this ditch, and that from the year 1882 to the year 1895 so-called leases of the right to carry water through this ditch were executed by him, one signed by persons using water for irrigation on the Ranchito, and others by persons purporting to represent the owners of the land irrigated from said ditch. The first of these leases, that of 1882, was signed by T. F. Borley and W. T. O'Brien, who, so far as appears, were in no way connected with any of the parties to this action, and was for a mere nominal rent. From 1884 to 1889 such leases were executed to and signed by persons purporting to act as water commissioners of the Rincon Ranchito district, for a mere nominal rental, and for the years 1893, 1894 and 1895, all within five years of the commencement of this action, and the filing of the answers to the cross-complaint, they were executed to the Strong irrigation district, a public corporation organized in 1893 under the laws of this state

for the irrigation of the land supplied by the Rincon ditch, for the specific rental of \$700, \$500, and \$675. No conveyance of their rights in either ditch or water was ever made to such irrigation district by any of the property owners, but the district, through its officers and for the property owners, for several years managed and controlled the ditch and distributed the waters to the property owners. Leases for the other years between 1882 and 1895 were not introduced in evidence. In the year 1896 the respondents refused to pay further for the privileges, and, Baldwin interfering with their enjoyment of the ditch, this action was commenced.

It is apparent, we think, that there was in all of this no extinguishment of the right of respondents by reason of any of the provisions of section 811, Civ. Code. So far as relied on by appellants, that section is as follows: "A servitude is extinguished: * * *

(3) By the performance of any act upon either tenement by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or (4) When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." Manifestly subdivision 3 has no application whatever, and the disuse mentioned in subdivision 4 means simply the failure to use the thing itself theretofore used. There has been, as we have seen, no cessation whatever in the use by respondents of this ditch. We must, therefore, look elsewhere for a basis for the conclusion that by reason of these leases they have lost their title acquired by prescription. These instruments could not, of course, operate as a transfer of such title to Baldwin, and can be effectual only as admissions against claim of title and by way of estoppel. It is established in this state, however, that the owner of real property who accepts a lease thereof from another claimant, while he himself is in possession, and who has not at any time received the possession from the lessor, is not estopped by the lease from asserting his title as against such lessor (*Pacific Mutual, etc., Co. v. Stroup*, 63 Cal. 150; *Baldwin v. Temple*, 101 Cal. 396, 35 Pac. 1008. See, also, *Wood on Limitations* [3d Ed.] note p. 614), and this rule has been applied in the case of water rights. See *Oneta v. Restano*, 89 Cal. 63, 26 Pac. 788 and cases there cited. As before stated, it cannot be held that there ever was any change in the possession of this ditch. It was always used exclusively to convey water to the Ranchito, to be used thereon for irrigation purposes, and for that purpose was always in the possession of respondents and their predecessors, either personally or through their agents, the water commissioners and the irrigation district. The continuity of the possession was not broken by reason of the fact that the ditch was in fact used for conveying water

only during the portion of each season when the water was needed for irrigation purposes. See *Hesperia, etc., Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209. The decisions cited above are therefore applicable. As admissions against any than claim of title, the effect of the leases might be to prevent the acquirement of a title by prescription, but such admissions could not operate to divest a title already acquired. A title so acquired is as effectual and complete as one obtained by a conveyance, and, unless extinguished by virtue of some special statutory provision such as section 811, Civ. Code, continues until conveyed by the possessor or lost by another adverse possession for the required time. *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205, and cases there cited. See, also, *School District, etc., v. Benson*, 31 Me. 381, 52 Am. Dec. 618. In view of what must be held to have been a continuous actual possession of the ditch by respondents for the purpose stated, we do not see how Baldwin can be held to have regained the title by adverse possession. Respondents were the absolute owners, and in possession of the property at the time of the execution of all these leases, and never entered into possession under Baldwin, and their possession was not, under the circumstances here existing, his possession.

3. Complaint is made of the failure of the court to find and decree the quantity of water the respective parties were entitled to use as riparian owners, and especially its failure to make findings as to the relative rights in such matter of the plaintiffs and cross-defendants on the one hand, and of Baldwin on the other. The case is manifestly one where the pleading of the party complaining was not presented for the purpose of obtaining an apportionment of certain waters among the riparian owners. It was not drawn on any such theory, and does not recognize the cross-defendants as riparian owners at all. The real object was to obtain a decree declaring the other parties to be without any right whatever in such waters. It may be conceded that the allegations of the pleadings were broad enough to have permitted the determination of this matter if sufficient evidence had been presented thereon. The court was not compelled, however, to determine this question in the absence of evidence sufficient to enable it to do so. It was stipulated on the trial that, as alleged in the answers to the cross-complaint, there were as many as nine persons not parties to the action who owned land in the Ranchito bordering on the river. The extent of the riparian rights of the parties to this action could not be determined without taking into consideration the rights of these other riparian proprietors, as to which there was no evidence whatever, and concerning which there could, of course, be no binding determination in the absence of such owners. But, even if there were no such other owners,

our examination of the record has satisfied us that the evidence introduced was not sufficient to enable the court to intelligently determine the relative rights of Baldwin on the one hand, and those of the remaining parties on the other, in the waters of this river. Under such circumstances, the trial court did all that it properly could do by determining that the various parties were riparian owners and leaving the question of the proportions of the water to which each is entitled to be determined in the future. See *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Coleman v. Le Franc*, 137 Cal. 214, 69 Pac. 1011.

4. The trial court overruled demurrers interposed by Baldwin to the amended answers to his cross-complaint on the ground of uncertainty. In view of the disposition of the case by the trial court, it is apparent that it is now immaterial whether the allegations of these answers were sufficiently certain as to the extent of the riparian rights of the plaintiffs and cross-defendants in the waters of the river. The findings and judgment do not purport to define the extent of such right as to any part in the action. It was also urged that such answers were uncertain in not showing whether the pleaders claimed to be the owners or entitled to the waters of San Gabriel river as riparian owners or by adverse use. The answers clearly set forth the facts constituting the basis of the claim of the parties to these waters, which was all that was necessary. According to these allegations, they were all riparian owners, entitled as such to divert from the river water to the extent of the capacity of the Rincon ditch, and had been ever since the construction of said ditch so diverting and using such water openly, notoriously, continuously and under claim of right as against the world. There was no element of uncertainty as to the nature of the claim alleged.

5. Complaint is made that the finding that the Rancho Santa Anita, one of Baldwin's ranches, is not riparian to either the old or the new San Gabriel river, is not sustained by the evidence. This finding is important only in so far as it may bar Baldwin in any future proceeding to determine the extent of the rights of the parties in the waters of the San Gabriel river, from making any claim on account of this ranch. As we understand the evidence given upon this matter, the Santa Anita ranch borders only on the Santa Anita creek by which it is traversed, and which, after running through said ranch, runs over a portion of the San Francisquito ranch. At times of unusually high water or floods, some of the surface water runs into San Gabriel river above the point of diversion by the Pincon ditch, but ordinarily this is not the case. All of the water of the Santa Anita creek available for irrigation purposes is used on the Santa Anita and San Francisquito ranches, and there can be no question

as to the rights of the owners thereof to use so much of said water as may be necessary for the irrigation of the lands through which it flows. It could not have been the intention of the trial court to hold otherwise, and we are satisfied that the finding on this question must be construed as not foreclosing the riparian right of the owner of the Santa Anita ranch in the waters of the Santa Anita creek.

The evidence fully sustains the finding that the plaintiffs and cross-defendants never conveyed nor transferred any of their rights in either ditch or water to the Strong irrigation district. So far as that corporation controlled and managed the property, it acted merely as the agent of the owners, and had no interest in the property here involved.

In view of our conclusions upon the matters already discussed, other findings attacked by appellants are immaterial, and there is no other matter discussed by learned counsel that requires attention.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.

154 Cal. 173

In re PEABODY'S ESTATE. (L. A. 2,221.)
(Supreme Court of California. Aug. 19, 1908.)

1. WILLS — CONSTRUCTION — NATURE OF ESTATE CREATED — CHARITABLE DEVISE — "TRANSFER."

A will drawn entirely by the testatrix, who was an aged woman of education, but unused to technical legal terms, stated her purpose to devote her entire estate to founding and maintaining a temporary resting place for missionary workers, to be called "The House of Rest," and contained the following provisions: "Secondly, I do now give, devise and bequeath all my real estate [describing both real and personal property] to my executors, to be transferred by them to the Woman's Occidental Board of Missions * * * with the executive committee of the Woman's Presbyterian Mission Society of the Los Angeles Presbytery as trustees and managers thereof. * * * Ninthly, all the residue of my property * * * together with real estate which may be sold at any time, it is my wish to have invested as a permanent fund, allowing the income only to be used in aiding to meet the expenses of the House of Rest." Held that, construed in accordance with the statutory rules governing such wills, it was not the intention of the testatrix by the use of the word "transferred" to create an estate in the executors to be by them conveyed to the trustees, but that the executors should take possession and control of the property for administration under the laws of the estate, and in due course of administration should transfer it on final distribution to the trustees, and that, as so construed, the disposition was valid to the extent of one-third of the estate as limited by Civ. Code, § 1313, forbidding charitable devises to the extent of more than one-third of the estate of one leaving heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 36.]

For other definitions, see Words and Phrases, vol. 8, pp. 7064-7070, 7819.]

2. CHARITIES—VALIDITY OF TRUST — EFFECT OF PARTIAL INVALIDITY OF DEVISE.

The fact that a charitable devise or bequest is smaller than intended by a testatrix because under the statute it is limited to one-third of the estate does not render it invalid, where, under the doctrine of *cy pres*, the courts may authorize its employment to effect the general charitable purpose of the testatrix.

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Appeals from final order of distribution of the estate of Helen Peabody, deceased. Reversed.

Edwin Baxter, for appellants. Hahn & Hahn, for respondent.

SHAW, J. The record presents appeals from the final order of distribution of the estate of Helen Peabody, deceased, and also from the order denying a new trial. The sole question presented is the validity of the disposition of the property of the estate by the will of the deceased. The will purports to give the entire estate in trust for charitable uses. Section 1313 of the Civil Code provides that no such devises or bequests shall collectively exceed one-third of the estate of a decedent leaving legal heirs, and that all dispositions of property to the contrary shall be void. The appellant concedes that under this clause the disposition to charitable uses is void as to two-thirds of the property belonging to the deceased, but contends that it is valid as to the remaining one-third. The will was made on May 23, 1904, more than a year prior to the death of the testatrix, and hence the second clause of section 1313, forbidding all testamentary dispositions to charity, unless the will is executed at least thirty days before the decease of the testator, does not apply.

The serious question presented concerns the validity of the disposition under the rule settled by the decision in *Estate of Fair*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and the subsequent cases following it, to the effect that a disposition of real property to trustees, in trust to convey to another, where there are no words which can be construed to accomplish a direct disposition from the donor or testator to the other person, is void by reason of the provisions of the Civil Code prohibiting such trusts to convey. *Estate of Sanford*, 136 Cal. 98, 68 Pac. 494; *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138; *Estate of Dixon*, 143 Cal. 513, 77 Pac. 412; *Hofsas v. Cummings*, 141 Cal. 527, 75 Pac. 110; *McCurdy v. Otto*, 140 Cal. 51, 73 Pac. 748. Certain rules of interpretation applying particularly to wills and established by the authorities and by the Civil Code have an important bearing on the construction of this will. The important thing is the intention of the testator. Section 1317. This is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Section 1318. All parts of

the will are to be considered in relation to each other so as to form, if possible, a consistent whole. Section 1321. Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent, and that sense can be ascertained. Section 1324. Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. Section 1327. "A technical construction of words and phrases, although *prima facie* the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas." 1 Redp. on Wills, p. 435, § 22. See, also, *Estate of Bennett*, 134 Cal. 322, 66 Pac. 370; *Richardson v. Noyes*, 2 Mass. 60, 3 Am. Dec. 24; *Homer v. Shelton*, 43 Mass. 198; *Brimmer v. Sohler*, 55 Mass. 129; *Carr v. Green*, 2 McCord (S. C.) 84; *DeKay v. Irving*, 5 Denio (N. Y.) 654.

The parts of the will bearing upon this question are as follows:

"First. I wish to testify that my entire, though small estate is the fruitage of a little investment made in 1855, the date of my entering upon my work of thirty-three years of blessed, benevolent labor in the Western Female Seminary, Oxford, Ohio, a work which I laid down in June, 1888.

"Secondly. I do now give, devise and bequeath all my real estate [describing here both real and personal property, including one house and lot in St. Louis, Mo.] to my Executors to be transferred by them to the Woman's Occidental Board of Missions, whose headquarters are now located at 920 Sacramento St., San Francisco, Cal., with the Executive Committee of the Woman's Presbyterial Missionary Society of the Los Angeles Presbytery as trustees and managers thereof.

"Thirdly. This property to be used as a temporary resting place, not for invalids, who can be cared for better elsewhere, but for weary Christian workers, in limited circumstances from either the Home or Foreign field. * * *

"Fifthly. This Home shall be called, The House of Rest. [Here follow other provisions declaring who may be admitted as inmates of The House of Rest and the charges to be made.] * * *

"Ninthly. All the residue of my property, now in bonds, a list of which will be enclosed with this document, together with real estate which may be sold at any time it is my wish to have invested (after paying all debts) as a permanent fund, allowing the income only to be used in aiding to meet the expenses of 'The House of Rest.'"

If the provisions above quoted disclosed an intention to create an estate in the executors to be by them conveyed to the trustee,

the case would come within the rule of the Fair Case, but we do not think the testatrix intended such a consequence. The will construed in the Fair Case was drawn with great care, in language of definite technical significance, by some person skilled in law and in the use of legal technical terms, and the intention to vest the title to the real property in trustees, to be afterwards conveyed by them to the remaindermen, was so clearly and accurately expressed that no other interpretation was possible. The court in that case say (132 Cal. 530, 60 Pac. 455, 64 Pac. 1000 [84 Am. St. Rep. 70]): "It is perfectly clear, beyond even a reasonable doubt, that the testator did not intend to devise estates in remainder to persons of the named classes, but intended to devise the whole fee to his trustees, upon trusts to convey, after the expiration of a probably very long period of time, to those persons, so that the latter would receive new estates created by the conveyances." The testatrix in the case at bar wrote the entire will with her own hand. It appears therefrom that the active period of her long life had been spent in teaching in the state of Ohio, and that, although she was cultivated and refined, she was not accustomed to the use of legal terms nor familiar with their technical significance. The words which it is claimed create a trust to convey are these: "I do now give, devise and bequeath all my real estate [describing both real and personal property] to my executors to be transferred by them to the Woman's Occidental Board of Missions." In drawing our Civil Code the codifiers made free use of the word "transfer" to indicate a passing of title to property from one living person to another. Civ. Code, § 1039. It is used in this sense in many sections of the Civil Code, but it is not a word of general use in conveyancing to signify a conveyance of title to property, and outside of this state it cannot be said to have a well-defined technical legal meaning, especially when used as a verb. In ordinary language it has a very general meaning, applying either to the removal of a thing or rights from one place or person to another, the changing of the control or possession of things, or to the conveyance of title. See Webster's Dict. As the life of the testatrix was chiefly spent in teaching in the state of Ohio, it is not reasonable to suppose that she was aware of the legal technical meaning of the word "transfer" in California arising from its use in our Civil Code. Her general intention that the Woman's Occidental Board of Missions should have all her property, and that this property was to be used to establish and maintain "The House of Rest" which she contemplated, is plainly apparent from the entire will. We think, taking the will as a whole, and considering the life and character of the deceased and the circumstances surrounding its execution, that the testatrix meant nothing more by this clause than that

the executors, in their representative capacity, should take possession and control of the property for administration under the laws of this state, and in due course of administration should transfer it upon final distribution to the trustees in whom she desired that the title should vest, to be applied to the charitable use she describes. In writing the phrase "to be transferred by them" she was, as she supposed, merely describing the legal process of administration by which the property was to be transmitted to the trustee. Thus understood, the will is harmonious, no trust to convey is created, and her intended disposition is valid, except as to the two-thirds which the law withholds from charitable uses.

It is urged that the amount of the estate applicable thereto is so small that it would be inadequate for the purpose contemplated, and that the disposition is void for that reason. We do not know the value of the house and lot in St. Louis, nor whether, under the law of Missouri, the whole devise is effectual as to that property. The mere fact that one-third only of the California property can be devoted to the establishment of "The House of Rest," and that hence the establishment may be much smaller than the testatrix intended, does not make the devise invalid. The will does not declare that any particular parcel of the land devised shall constitute "The House of Rest," nor where it shall be situated. In aid of the general design it may properly be construed to authorize one-third of the proceeds of all the parcels to be used in procuring a house for that purpose. An inexpensive cottage of a few rooms would answer the purpose to the extent of its capacity. It is not claimed that the amount available will not suffice to accomplish that result. "Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law." Estate of Willey, 128 Cal. 12, 60 Pac. 471; Estate of Merchant, 143 Cal. 540, 77 Pac. 475; Fay v. Howe, 136 Cal. 602, 69 Pac. 423. As this court said in Estate of Hinckley, 58 Cal. 512: "We entertain no doubt that in the general devolution upon the courts of this state of all judicial power, with respect to charities, is included the power *cy pres*, so far as the same may be employed in directing trustees named in a will or deed to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable." Under this power the court would be authorized to direct the trustees to sell the undivided one-third interests and use the proceeds in the manner above indicated to carry out the intent of the testatrix, although not precisely in the manner she may have contemplated.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

154 Cal. 170

HUMPHRY v. PROTESTANT EPISCOPAL CHURCH, DIOCESE OF LOS ANGELES et al. (L. A. 2,050.)

(Supreme Court of California. Aug. 19, 1908.)

1. EXECUTORS AND ADMINISTRATORS—DECREE FOR DISTRIBUTION—SCOPE—PROPERTY NOT DESCRIBED.

In a proceeding for final distribution of the property of an estate, the res over which the court acquires jurisdiction is the entire remaining property of the estate, and not merely that specifically enumerated in the petition, and it is the duty of the court to distribute all to the persons entitled thereto.

2. SAME—CONSTRUCTION OF DECREE—TITLE TO REAL PROPERTY.

A decree of final distribution of an estate which distributed to plaintiff "the residue of said estate hereinafter particularly described, and any other property not now known or discovered which may belong to said estate or in which said estate may have an interest," passed title to plaintiff to lands owned by the estate, although omitted from the particular description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1307.]

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Emily A. Humphry against the Protestant Episcopal Church in the Diocese of Los Angeles and others. Judgment of dismissal, and plaintiff appeals. Reversed.

Wm. G. Griffith, for appellant. B. F. Thomas, for respondents.

HENSHAW, J. This action was brought to determine title to an undivided one-tenth interest in lot No. 11 of the Oceanside tract, in the county of Santa Barbara. The facts as to the title, over which facts there is no dispute, are the following: Lot 11, with other lots, was owned by Elizabeth A. Humphry at the time of her death. Upon her death, intestate, an undivided one-tenth descended to her sister, Mary E. Richardson. Defendant acquired title to the other undivided nine-tenths. Mary E. Richardson died testate before defendant had been able to secure a deed to her one-tenth. Defendant did secure a deed to this one-tenth from Mrs. W. N. Clothier, sole heir at law of her mother, Mrs. Mary E. Richardson, but by her will Mrs. Richardson had specifically devised her interest in this lot in trust for the maintenance of her brother, George Ellery, empowering the trustees to sell any or all real estate whenever it might appear to them for the best interest of the estate so to do. If this trust was valid, Mrs. Clothier's deed to defendant conveyed nothing. The defendant likewise obtained a deed to the same undivided one-tenth from George Ellery, the beneficiary under the trust, but indisputably George Ellery had no title to convey, being a mere beneficiary entitled to the income or such portion of the principal as the trustees might award for his support. Thereafter Emily A. Humphry, this plaintiff, obtained a convey-

ance from the executor and trustee of the estate of Mary E. Richardson of all right and title to the land in question, and she obtained a like deed from all of the heirs at law of Elizabeth A. Humphry. Subsequently, after settlement of the final account in the estate of Mary E. Richardson, a petition for final distribution was filed, and the property was distributed. The petition for distribution asked for the distribution of the residue of the estate remaining in the hands of the petitioner, and set forth in its schedule certain parcels of real estate, amongst which was not enumerated lot eleven. It alleged the transfer by deed of all the interest of the estate in all the residue of the estate to Emily A. Humphry, and prayed that there be distributed to Emily A. Humphry "the whole of the said residue of the estate of said decedent situated in said counties of Ventura and Santa Barbara of the state of California." The decree of distribution adjudged "that the residue of said estate hereinafter particularly described, and any other property not now known or discovered, which may belong to said estate, or in which said estate may have an interest, be and the same is hereby distributed to the said Emily A. Humphry." The decree in the estate of Elizabeth A. Humphry likewise decreed distribution to this plaintiff of all of the residue of the estate of the said Elizabeth A. Humphry. Upon the trial plaintiff relied for her title upon the decree of distribution, contending that, under the clause above quoted, she obtained title to the undivided one-tenth interest in lot 11, even though it had not been particularly described in the petition for distribution. By defendant it was contended that there was not only a failure to distribute this interest to plaintiff, but an intent not to distribute it, and that, therefore, she took no title. The court decreed that neither plaintiff nor the defendant had title to the disputed one-tenth, and gave judgment for costs. From this judgment, plaintiff appeals.

If the decree of distribution is to be construed according to its language, it certainly, in conforming title to Emily A. Humphry, to "any other property not now known or discovered" vested her with the title to the disputed undivided one-tenth of lot 11. The attack upon this decree of distribution being collateral, its invalidity or insufficiency in any respect must be made to appear on its face. Respondents' contention that there was a manifest design upon the part of the court in probate not to distribute this undivided one-tenth draws support only from the fact that in the petition for distribution this undivided one-tenth was not specifically described. The argument in this connection is that the proceeding is one in rem; that an initiatory step to the obtaining of jurisdiction is the filing of the petition; that the res over which the court acquires jurisdiction is the property, and only the property, describ-

ed in the petition for distribution. But herein respondents are in error. The res in this case was the residue of the estate, and, notwithstanding the omission of the petition specifically to describe the undivided interest in this lot, that the court intended to distribute the whole residue whether described or undescribed, known or unknown, is made plainly manifest from the language which it employs. Moreover, upon final distribution, it is the duty of the court to distribute all of the residue to the persons entitled (Code Civ. Proc. § 1665), and its order and decree in this regard is conclusive as to the rights of the heirs, legatees, or devisees and those holding under them. Code Civ. Proc. § 1666. This is the precise construction which was put upon a like decree of distribution in *Smith v. Biscalluz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314. There, too, the decree distributed "other property not known or discovered which may have belonged to the decedent and in which his estate may have an interest," and it was held that such a decree passed title to lands of the decedent omitted from the particular description; that it was not void for uncertainty of description, the general description being sufficient upon collateral attack to include omitted lands which might be shown by evidence aliunde to have in fact belonged to the decedent at the time of his death.

It is not seriously disputed by respondents that if the decree of distribution be held to cover the disputed one-tenth interest, and to have in fact confirmed title to that interest in the plaintiff, such decree is free upon this collateral attack from any question as to the validity of the trust to George Ellery. It having been determined, as above set forth, that the decree does dispose of this land, it follows that the judgment of the trial court was erroneous. It is therefore reversed and the cause remanded.

We concur: LORIGAN, J.; SLOSS, J.

(154 Cal. 168)

Ex parte MURPHY. (Cr. 1,484.)

(Supreme Court of California. Aug. 17, 1908.)

1. HABEAS CORPUS — PROCEEDINGS — ADMISSION TO BAIL PENDING DETERMINATION — RETURN OF OFFICER TO WRIT.

Pen. Code, § 1476, as amended by St. 1905, p. 476, c. 376, empowers the court or judge who directs the issuance of a writ of habeas corpus to admit the prisoner to bail pending the determination of the proceeding. *Held* that, where a prisoner has been so admitted to bail, and the officer who had him in custody therefore cannot produce his body in court in obedience to the writ, he need only show by his return that his prisoner has been discharged under the terms of the court's order, and he need not personally appear in court for the purpose of making such return.

2. SAME — NECESSITY FOR ATTENDANCE OF PRISONER OUT ON BAIL.

Pen. Code, § 1476, as amended, having necessarily superseded sections 1481, 1482, requir-

ing the prisoner's body to be produced on a writ of habeas corpus, except in specified cases, it is no longer necessary, in order to confer jurisdiction, that the prisoner be personally present, his undertaking or cash deposit having, for jurisdictional purposes, been substituted for his personal presence.

In Bank. Application by J. L. Murphy for a writ of habeas corpus. Writ granted.

E. W. Rice and H. C. Millsap, for petitioner. John E. Carson, for respondent.

PER CURIAM. In view of the amendment to section 1476 of the Penal Code, adopted in 1905 (St. p. 476, c. 376), empowering the court or judge who directs the issuance of a writ of habeas corpus to admit the prisoner to bail pending the determination of the proceeding, the order for the issuance of the writ in this case furnishes a proper occasion for a statement by the court of its views concerning the return to be made to the writ where the prisoner has been set at liberty, upon filing an undertaking of sureties or depositing cash before the return day of the writ. In such case it is obvious that the officer who had the custody of the prisoner cannot produce his body in court in obedience to the writ, and that he can do no more than to show by his return that his prisoner has been discharged under the terms of the court's order. For the purpose of making such return it is equally obvious that the personal attendance of the officer is not required.

As to the prisoner himself, he can always attend, at his own expense if he so desires, but in the view of the court his attendance — when he is at large upon bail — is no longer necessary in order to confer jurisdiction; for the amendment under which he has given bail has necessarily superseded sections 1481 and 1482 of the Penal Code, and for jurisdictional purposes has substituted his undertaking or cash deposit for his personal presence. We make this announcement of our views regarding this matter in order that the counties and municipalities of the state may no longer feel obliged in this class of cases, to incur and defray the useless expense of transporting prisoners or officers to and from the place where the court is sitting.

8 Cal. App. 367

Ex parte COLLINS. (Cr. 91.)

(Court of Appeal, Second District, California.

June 18, 1908.)

1. CRIMINAL LAW — STAY OF EXECUTION.

Unless otherwise provided by law, the court has inherent power to stay execution in a criminal case, and such power, being exercised for the benefit of the defendant, will be presumed to have been with his consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2554.]

2. SAME—PROBATIONARY POWERS.

Under Pen. Code, § 1203, conferring probationary powers on the court in criminal cases, suspension of the execution of a sentence is restricted to sentences to pay a fine with imprisonment as an alternative, while suspension of sentence is the general rule in cases in which the defendant is over 16 years of age.

3. SAME—"JUDGMENT"—TIME OF EXECUTION.

The time at which a judgment or sentence of imprisonment shall be carried into execution, forms no part of the "judgment" which is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution, so that, where the penalty is imprisonment, the sentence may be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

4. SAME — REARREST — EXECUTION OF JUDGMENT.

Where a convicted defendant is at liberty, and has not served his sentence, if there be no statute to the contrary, he may be rearrested as an escape, and ordered into custody on the unexecuted judgment.

5. SAME—STATUTES.

Pen. Code, § 670, provides that the term of imprisonment fixed by the judgment in criminal actions does not commence to run until the defendant is actually delivered at the place of imprisonment. Section 1213 declares that when a judgment other than death has been pronounced, a certified copy of the entry thereof must be forthwith furnished to the officer whose duty it is to execute the judgment, and section 1455 provides that when a judgment of imprisonment is entered, a certified copy must be delivered to the sheriff, marshal, or other officer, which is sufficient warrant for its execution, and section 1216 declares that if the judgment is for imprisonment in the state's prison, the sheriff, on receipt of a certified copy thereof, shall take and deliver the defendant to the warden of the state's prison. *Held*, that while a defendant sentenced to a term of imprisonment is entitled to immediate incarceration thereon, yet if he does not object to the suspension of execution by the court, the judgment during such suspension remains unexecuted, and he may not thereafter object to his incarceration thereunder.

Application by Herbert L. Collins for a writ of habeas corpus. Writ dismissed. Petition denied.

Rowen Irwin, for petitioner. W. V. Buckner and J. L. C. Irwin, for respondent.

TAGGART, J. On June 1, 1907, Herbert L. Collins pleaded guilty to a charge of vagrancy, waived time for sentence on the charge, and a judgment of imprisonment for the term of six months in the county jail was rendered and entered against him thereon. The judgment was not executed at the time. The justice of the peace before whom the proceedings were had merely made an entry in his docket of "commitment withheld," and allowed the defendant to have his liberty. On February 29, 1908, a commitment in execution of said judgment was issued by the justice, and by virtue thereof the sheriff took the defendant into custody, and confined him in the county jail. It is from this confinement his release is sought. Application for

such release was made to the superior court of Kings county, in which county defendant was confined, and after a hearing his application was denied. It was thereupon renewed in this court.

Both demurrer and answer to the petition are presented upon the return. Only one issue of fact is raised by the latter, and no evidence was offered by either party in relation thereto. The petition alleges that at the time the order was made withholding the commitment the defendant was present in court, and ready and willing to surrender himself in execution of the judgment. The answer denies that he was ready or willing, but avers that he was present, and consented to the making of the order. It appears from the declarations of the courts in some jurisdictions that at common law it was competent for a court, having the authority to imprison as a penalty for crime, to make an order staying execution, and the power to do this is held to be inherent in the court. The practice was recognized and followed in England, where there was no appeal, as a matter of right, from a conviction for crime. For this reason, it is said to follow that, unless otherwise provided by statute, the power to stay execution exists in the court, and, being exercised for the benefit of the defendant, will be presumed to have been done with his consent. *Webster v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; *People v. Court*, *Monroe Co.*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

The application of the rule *expressio unius, etc.*, to the provisions of section 1203 of the Penal Code would justify a distinction between the exercise of the probationary powers of the court in suspending sentence and in staying execution after sentence. The suspension of sentence appears to be the general rule in cases in which the defendant is over 16 years of age, while suspension of execution of sentence appears to be restricted to sentences to pay fine with imprisonment in the alternative. This special provision for a stay of execution justifies the further inference as to the legislative intent to limit the power to specially provided cases. If the rule were applicable here, the absence of statutory authority would render the order, "commitment withheld," void. This same rule is invoked by the respondent in connection with the sections of the Code relating to stay of execution on appeal, but we do not think it material to the question before us whether the order be void or not. It may even be conceded that the rule declared in those cases in which the plea of guilty or verdict of conviction has been entered, but no sentence imposed, to wit, that an agreement or condition that the defendant may remain at large unsentenced is void, and that the suspension of the sentence entered by consent is unauthorized (*Gray v. State*, 107 Ind. 177, 8 N. E. 16; *People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230), is applicable here, and the invalidity of the subsequent order stay-

ing execution be admitted for that reason, yet this would not avoid the original judgment (*Sylvester v. State*, 65 N. H. 193, 20 Atl. 934). It would still be a valid, substituting, unexecuted judgment. The time at which a judgment or sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of the sentence. *State v. Cockerham*, 24 N. C. 204; *Dolan's Case*, 101 Mass. 222.

Where the convicted defendant is at liberty and has not served his sentence, if there be no statute to the contrary, he may be rearrested as an escape, and ordered into custody upon the unexecuted judgment. 1 Bishop, New Crim. Proc. § 1384; *In re Shaw*, 31 Minn. 44, 16 N. W. 461; *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574; *People v. Patrich*, 118 Cal. 332, 50 Pac. 425. Not only may the justice of the peace in such a case issue a commitment, but he may even be compelled to do so by mandamus in a proper case. *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452. Says the Colorado court: "The judgment of conviction did not become void because the respondent failed to issue a writ of commitment. * * * It is immaterial that more than 60 days had elapsed since the conviction. Graham was not in prison during that time, and the judgment could be satisfied only by his actual imprisonment for the adjudged period. The duty to issue the writ was mandatory." Section 670 of the Penal Code of this state provides that the term of imprisonment fixed by the judgment in a criminal action does not commence to run until the defendant is actually delivered at the place of imprisonment, and that any time that he is temporarily at large by any legal means must not be computed as part of the term. It was by the application of this section that it was held in *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, that a sentence to commence after the date of the delivery of the defendant at the place of imprisonment, if not within the provisions of sections 669 of the same Code, was invalid. If a person who has entered a plea of guilty, or who has been convicted of a crime, desires that his sentence shall begin, he can, if not in custody, compel the issuance of the commitment (*Mann v. People*, supra), or, if he be in custody, may have a writ of habeas corpus to direct his imprisonment upon such sentence, in the proper place, that his term may begin to run under section 670. If he be serving a sentence for a misdemeanor in the county jail, and be sentenced upon conviction

of a felony, he is entitled to be removed to the state prison forthwith, by virtue of the requirement of section 1216, Pen. Code, to that effect. *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105. While a comparison of section 1213 with section 1455 discloses an absence of the element of time in the provisions for the execution of a judgment under the last section, and the former shows a right of the defendant to immediate action by the sheriff, and it was upon this statutory right to be taken forthwith that the action of the court *Ex parte McGuire* was based, it is unnecessary in support of the court's action, to hold that any difference in the practice was intended by the Legislature. There was a valid, subsisting judgment unexecuted against the defendant on the 29th of February, 1908. The record does not disclose that any objection was made by him to the suspension of sentence, or any effort to have the court execute the judgment. That he was ready and willing to have the sentence executed did not cause him to demand its execution, or to refuse to accept the benefits of the order now claimed to be void. The judgment being valid and the sentence unserved, the commitment of the defendant in execution of the judgment was a legal and valid imprisonment.

Writ dismissed and petition denied.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 450
(Civ. 456.)

HEMENWAY v. ABBOTT.
(Court of Appeal, Third District, California.
June 27, 1908. On Rehearing, July 27,
1908. Rehearing Denied by Su-
preme Court Aug. 24, 1908.)

1. DEEDS—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

Evidence considered, and held to justify a finding by the trial court that a deed to real estate for an expressed consideration of \$10, made by a man 81 years old to a woman in whose lodging house he resided, and who was a relative of his deceased wife, was not voidable as having been obtained by undue influence, nor because of mental incapacity of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638, 641.]

2. PRINCIPAL AND AGENT—DEALINGS BETWEEN—VALIDITY.

An agent and his principal are not prohibited from dealing with each other; but the rule is that in all their dealings respecting the subject-matter of the agency the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly, and honestly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 183.]

3. SAME.

Equity treats the relation of principal and agent in the same general manner, though not with quite the same strictness, as that of trustee and beneficiary; and in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome, but this presumption

is not so weighty or strong as in the case of a trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 183.]

4. SAME—CONVEYANCE OF PROPERTY FROM PRINCIPAL TO AGENT—VALIDITY.

Plaintiff's testator, when 80 years old, went to live in a lodging house kept by defendant, who was a cousin of his deceased wife, where he continued to reside until his death in a street car accident something more than a year later. Shortly after going there, he executed a power of attorney to defendant to sell certain real estate he owned and while such power was still in force, and a few months prior to his death, he made a deed conveying the property to her for an expressed consideration of \$10, which deed defendant recorded during his lifetime. It did not appear that she had made any effort to sell the property under the power of attorney, and there was evidence tending to show that decedent was physically and mentally active for a man of his years, and capable of forming an independent judgment as to his affairs; also, that there was no undue influence exercised over him by defendant, but that the deed was prepared at his request, and that he stated to others that he had previously done well by his children. In an action to set aside a deed made by a principal to one holding his power of attorney to convey the same land conveyed by the deed, evidence considered and held to warrant a finding that defendant took no advantage of her relation as agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 185.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Alice Hemenway, administratrix, against Sabrina L. B. Abbott. Judgment for defendant, and plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. Charles G. Lamberson and Frank Lamberson, for respondent.

CHIPMAN, P. J. This action was brought to cancel a deed to certain real property, made by plaintiff's testate, George W. Proctor, to defendant. Judgment passed for defendant, from which and from the order denying her motion for a new trial plaintiff appeals.

Plaintiff was duly appointed administratrix of the estate of said deceased, with the will annexed, and brings the action as such administratrix. She alleges in her amended complaint that on May 5, 1904, the said Proctor was the owner of certain described real property situated in Kings county; that prior thereto, to wit, on July 29, 1903, the said Proctor executed and delivered to defendant his power of attorney "to sell or negotiate for sale or rent" the said lands above referred to, and also certain other lands situated in San Luis Obispo county; that said power of attorney "was in full force and effect on said 5th day of May, 1904." The foregoing facts are found by the court to be true.

It is then alleged that on said May 5, 1904, said Proctor conveyed to defendant by an instrument, purporting to be executed by him, the said Kings county land, in which

said deed is also described the said land situated in San Luis Obispo county; that on said May 5, 1904, the said Proctor was of the age of 81 years, and "was then and for many years prior thereto had been infirm in body and mind"; that he was practically deaf, blind in one eye, and the sight of his other eye greatly impaired; "that he was easily influenced by flattery, especially at the hands of women, and was by reason of age, infirmities, and mental weakness unfit to transact business"; that defendant, "well knowing the condition, mental and physical, of said George W. Proctor, and at a time when she was occupying toward him the confidential and fiduciary relationship of his agent as aforesaid, did prepare or cause to be prepared, and did, by and through undue influence and for the purpose of benefiting herself, and for illegal and unlawful purposes and objects, cause, compel, and have said George W. Proctor execute, acknowledge, and deliver to her, said defendant, a certain instrument of writing, purporting to be the deed of said George W. Proctor conveying to said defendant the land hereinabove described, together with the said lands in San Luis Obispo county"; that said deed "was made, * * * if at all, by said Proctor to said defendant for a grossly inadequate consideration, to wit, the sum of \$10; that no other or further consideration was paid to or received by said Proctor for said purported deed"; that said lands described in said deed are of the value of \$2,000, and that the said consideration was fictitious, and was, as plaintiff is informed and believes, afterward returned by said Proctor to defendant; that the said deed is void and a nullity "for the reason that the same was made, * * * if at all, for the purpose of creating and upon certain secret trusts, and to be held, retained, and used for the use of said George W. Proctor, and to enable said Proctor to sell, handle, and dispose of said premises through and by his said agent, Sabrina L. B. Abbott"; that the said deed is void because the purposes for which it was made are not expressed therein, and is void because executed "by reason of the undue influence of said defendant over said Proctor, for a grossly inadequate consideration, through the fraud, importunities, and duress of said defendant, and for unlawful and illegal purposes and objects"; that said deed was executed by said Proctor, "if at all, wholly without advice or assistance of counsel or relatives, and wholly by the direction, assistance, and advice of the defendant"; that defendant has never carried into effect the objects for which said deed was executed, and it is now impossible for her to do so. The foregoing are substantially all the averments constituting plaintiff's cause of action. Defendant answered the complaint without demurring thereto, and denied specifically plaintiff's averments of the said Proctor's mental and physical incapacity; denied that

he was induced to make said deed through the undue influence, fraud, and like alleged influences of defendant; denied that the consideration for said deed was fictitious or grossly inadequate, or was upon any secret or other trust or purpose other than expressed upon its face, or was made for the benefit of said Proctor; averred that said deed was made without any undue influence exercised by said defendant, and without any fraud, and for the sole and only lawful purpose of conveying title to defendant to the property therein described. The court made findings negating all the alleged facts set up by plaintiff as ground for the cancellation of said deed, and made findings affirming the truth of defendant's allegations. The findings are challenged as unsupported by the evidence, and it is also claimed that the findings do not support the judgment.

We learn nothing of Mr. Proctor's life from the evidence prior to 1902, nor as to his characteristics, mental or physical. Defendant was said to be related (a cousin) to the second deceased wife of Proctor, and is first mentioned in connection with his family when she visited at Petaluma a daughter of Mrs. Hemenway in the latter part of 1902. Proctor was living with his daughter, Mrs. Hemenway, at that time. Mrs. Hemenway testified that defendant came to her house quite often: "She treated my father very pleasantly during that time. At first she did not treat him in any way that a mere acquaintance would not; only towards the last it was different. She would come to the door, and ask where he was. He would be puttering around. I had 2½ acres of ground, and she would go out where he was and talk with him." She was asked if she ever saw her "display any marks of affection for him at that time," and answered: "I have seen them stand in the yard with her arm over his shoulder." This is the extent of her exhibitions of affection towards him at Petaluma, or elsewhere for that matter, so far as appears. The witness testified that her father and defendant went to San Francisco "several times, and were gone a couple or three days and then came back." It appeared that about this time, in the early part of 1893, defendant took a lodging house in San Francisco, and these visits may have had something to do with that. The evidence furnishes no other probable explanation of the purpose of the visits; for it will not be presumed and is not suggested by plaintiff that they had an immoral purpose, and the evidence shows that he took considerable interest in defendant's establishing a lodging house in San Francisco. The witness testified that her father left her house in March or April, 1903, "just simply because he preferred to live in the city. He could not see very well, and he could see things in the city that amused him. * * * He did not have any means to invest in a lodging house at the time he went to San Francisco; nothing

that could buy a lodging house. He had a little money that my brother Frank sent him." It appeared that Mrs. Hemenway called to see her father while he was lodging at defendant's house, and was shown her father's room by defendant, with whom she said "the conversation was on general lines." Her father visited her several times, she testified, after he went to San Francisco. Of the condition of his mind, in reply to a question she testified: "Well, I think like anything that is growing old, or any old person, it wasn't what it should be. One of his hobbies was trying to appear young and agile." She said he had the hobby of trying to live on five cents a day when there was no necessity for it; another was to answer patent medicine advertisements. The record discloses no evidence whatever in support of the alleged menace, duress, and force as operating causes leading up to the deed from Proctor to defendant; nor is there any evidence of actual fraud surrounding the execution of the deed, unless it can be found in the facts and circumstances brought into the case in support of the alleged undue influence. Such influence is a species of fraud when exercised in the accomplishment of an unconscionable and unfair advantage over the person upon whom it operates. Considering this feature of undue influence and apart from the constructive fraud arising alone out of the admitted pre-existing agency, we think there is evidence justifying the findings of the court upon it.

Bearing upon the question, it is claimed that Proctor was old and physically infirm; that he was susceptible to flattery, especially at the hands of women, was deaf and practically blind, incapable of transacting business by reason of weakness of mind and that he executed the conveyance involved without independent advice and for an inadequate consideration. Upon all these points, except as to his age, the court found against plaintiff's contention. The witnesses all agree that Proctor was physically very active, unusually so far a man 81 years old. He suffered from asthma, but otherwise his health was unimpaired. His ailment did not prevent his taking active exercise, nor did it affect his mind, or weaken him physically to any extent. He was not deaf, but "was quite hard of hearing." Witnesses for both parties, however, testified to conversations with him carried on apparently without much difficulty. He was practically blind in one eye, but the evidence was that he could read and did read books and the newspapers and wrote letters, and found his way around the streets of San Francisco alone and unaided. He met his death by being run over by a street car when he was out sight-seeing and taking exercise in that city. There is no substantial conflict in the evidence as to the foregoing facts, and they may be at once dismissed from further consideration.

His son-in-law, Overton, testified that Proctor "was a man susceptible of being led or influenced very easily. Flattery would lead him almost anywhere." On the contrary, witness Mrs. Barnes testified that "he was stubborn. Anything he made up his mind to do he would do, and anything he made up his mind not to do he would not do. He was very obstinate. In fact, he prided himself on being so. He often told me that no one could influence him to do anything that he did not want to do." Witness Overton was asked his opinion as to whether Proctor was a person easily influenced by women, but the court sustained an objection to the question as not within any of the material issues in the case, and there was no evidence upon the point. Overton, however, was permitted to testify that his "general conversations seemed to dwell upon women—upon sexual intercourse with women. He stated to me that, when he had passed that condition, he was ready to die." If this testimony has any pertinence, it goes to show physical vigor in the old man. There was not the slightest evidence of any immoral relations between him and defendant. He frequently said that she took good care of him, and made her house a comfortable and very agreeable home for him, and that he was happier and more contented there than when living with his daughter at Petaluma. But the law is not so uncharitable as to attribute sinister and fraudulent motives to what appeared to be simple acts of kindness and consideration. Nor will the law compel the inference that, because he chose to reward her considerate treatment, he did so while under some undue influence exerted by defendant, and that this influence was the moving cause for the reward bestowed. His daughter, Mrs. Hemenway, called upon defendant while he was living at defendant's house, and was shown his room. If she discovered any evidence of defendant's unusual influence over him it does not appear. His daughter-in-law, Mrs. Frank Proctor, had some knowledge of the way he was living while with defendant and of the treatment he received at her hands. She wrote defendant a letter dated March 22, 1904, addressing her as "Dear Cousin," saying, among other things: "I thought when you so kindly wrote me of our dear father's safe arrival there that I would write you at once, but so take the will for the deed, and here I am to thank you for your many kindnesses to father. I don't think I would have tried to write you after so many months of delay only father in his last letter as good as said he was on one of his pet fits of starving, and I want you to see he gets everything he needs. I am going to send the check to you and you keep out enough to board him well; say twenty per month would buy and pay you for cooking for him. I know money could not pay for the attention you give him, and kindness can't be paid for. * * * I am glad father has

the home he has, for I could not do for him as you do and he has no amusement here. * * * Lots of love to you both. * * * Now write me soon, and believe me your friend and cousin, Mrs. Frank L. Proctor." This letter was written a few months after Proctor had returned from Cananea, Mexico, where he had been visiting his son Frank. Its statements are inconsistent with some of Mrs. Proctor's testimony by which she seemed to place an entirely different complexion upon the conduct of defendant toward her boarder. The "pet fit" to which she alludes in the letter is explained by her testimony, and that of Mrs. Hemenway, that their father had a notion that people ate too much, and that he could prove it by living on five cents a day and retain his strength.

There is very little testimony bearing upon Proctor's mental condition. Witness Overton testified: "As to his mentality, for an old man he appeared to be very bright, but sometimes he appeared to be very childish; but as a general thing he appeared to be very bright." The only business transaction testified to in which Proctor was interested was a deal in land, and occurred in 1894 or 1895. This resulted in loss, but it was not attributable to weakness of mind, but rather to mistaken judgment not unusual with men in perfect mental health. In the later years of his life Proctor was not engaged in any business, and was supported by his children.

Proctor visited his son Frank in Mexico the latter part of 1903. Frank Proctor testified that in his opinion his father was at that time "not competent to any extent to transact business"; that he would not trust him "with any amount of money to do business on." It appeared, however, that, when he returned to San Francisco, Frank and his wife gave the old man \$780 for his personal use, and purchased a return ticket for him. It would not necessarily follow from this opinion of Proctor's mental capacity to transact business "to any extent" that he could not and did not fully understand the nature of the transaction complained of, or that he was incapable of exercising a free and independent judgment concerning it.

Upon the question of independent advice there was no evidence that Proctor had any. The finding of the court is in accordance with the evidence that defendant prepared the deed at the request of Proctor, and that it was not made "wholly or at all by the direction or advice of defendant." It appears from the testimony of Mrs. Barnes, who lived next door to defendant, that her husband was called in to witness the execution of the deed, and that Proctor, defendant, and Mr. and Mrs. Barnes were present and the deed shows it was "signed, sealed, and delivered" in the presence of Barnes. She testified that the deed was not mentioned, but her husband did not witness the signature to the power of attorney and did witness the execution of the

deed. Reading her testimony in its entirety, there can be no doubt but that it was the deed in controversy to which she referred. Mrs. Barnes testified that Proctor told her he wished to provide for Mrs. Abbott. "He told me that she had made a home for him, and made him much happier than he had been anywhere since his wife died, and for that reason and that she was not a very strong woman he wanted to provide for her as far as he could. He said: 'Mrs. Barnes, I did a good deal for my children when I had money, and I think they should leave me alone and let me be where I am happy.'" Her testimony shows that Proctor knew what he was doing and intended to do what he did in the matter. Mrs. Barnes testified further: "Mr. Proctor was a very bright man, and was at that time and up to the time of his death. I saw him daily, and I considered him a very bright man for a man of his years. * * * He often told me that no one could influence him to do anything that he did not want to do." He lived at Mr. Barnes' house during the last month of his life, and was stopping there when he died. The court was justified, we think, from the testimony of this witness in concluding that Proctor was capable of disposing of his property without the aid of an attorney or other independent advice.

The money consideration paid, as shown by the deed, was but \$10, but the court found on sufficient evidence that Proctor desired defendant "to have and to hold said real property described in said deed as her own property," in consideration, also, for the kind treatment he had received at her hands. Witness Overton was asked: "Did she [defendant] ever state to you what consideration she had given for these deeds, if any? A. As far as I can recollect, she told me that it was simply conveyed to her for the purpose of getting a lodging house; for the benefit of the two of them. She was to run the house and they were to have a kind of partnership." The trial court evidently accepted the more direct and positive testimony of Mrs. Barnes.

Witness Frank Proctor deposed to having received a letter from defendant "in the early part of 1903." He had not the letter, but he deposed to its substance as follows: "Mrs. Abbott made me a proposition that if I would furnish money for her to buy a lodging house in San Francisco that she would marry my father; that he had proposed to her, and her proposition was to me that she would marry him and take care of him during his lifetime if I would furnish her this money for the lodging house, and allow her—provide for her after his death should he die first, during her lifetime—and then that this property would revert back to me." He answered that he "would not do anything; that he would always provide a home for his father." Later, when his father visited him, he testified that he showed this letter to him, but did not remember what his father said about it. "He

talked with me at that time about my furnishing money for a lodging house in San Francisco. He approached the subject in some way, but I never would talk to him about it."

Mrs. Frank Proctor in her deposition also speaks of her father importuning her husband for money to buy a lodging house in San Francisco, and she also testified to having seen a letter from defendant to her father in which defendant urged him "to bring back the money." What credence was given to this testimony by the trial court we cannot know. It bears upon some phases of the case, but the circumstances occurred several months prior to the date of the deed in question, and it was some months later that Mrs. Proctor wrote the letter already referred to.

To one other circumstance, upon which appellant lays stress, our attention is especially invited. Proctor made an olographic will, couched in few words, on May 22, 1903, to which he appended a codicil on May 28, 1903. Appellant urges that this shows a recognition of his obligation to and affection for his children, and manifests his intention as to the disposition of his property. This will was executed about the time his daughter, Mrs. Hemenway, says he went to San Francisco, and a year before he conveyed the property to defendant. As tending to show his state of mind towards his children or defendant a year later, it has slight probative force. Indeed, it would be difficult to make much meaning out of this document because of its incoherency, except as an exhibition of illiteracy.

The learned trial court doubtless felt itself brought by the evidence to the consideration of the case in the light of the relation of principal and agent alone between Proctor and defendant, and, as there was evidence justifying its conclusion, this court cannot interfere.

This relation is shown by a power of attorney given by Proctor to defendant which is dated July 29, 1903. It was duly acknowledged before Justin Gates, a notary at San Francisco, and appears to have been witnessed by him, but was not recorded. The circumstances under which this power was given do not appear, nor does it appear that defendant ever acted under it or made any effort to sell the property by virtue of it. It was in existence, however, when the deed in controversy was executed and delivered, and the court so found. The deed in question was executed May 5, 1904, was acknowledged at San Francisco before F. C. Ford, notary, on the same day, and purports to have been "signed, sealed, and delivered in the presence of R. L. C. Barnes." It was recorded at the request of defendant in Kings county on July 9, 1904, more than a month prior to Proctor's death, and manifestly not in anticipation of his death, for it occurred by accident.

We may with propriety state some of the principles applicable to cases of this character. The agent and his principal are not pro-

hibited from dealing with each other, but the rule is that in all their dealings respecting the subject-matter of the agency the utmost good faith is required; and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly, and honestly. See the subject quite fully discussed and the authorities cited in *Curry v. King* (Cal. App.) 92 Pac. 662. "The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price of the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract." Pom. Eq. Juris. § 926. "If there is nothing but inadequacy of price, the case must be extreme, in order to call for the interposition of equity." Id. § 928. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequate price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstances of oppression. Id. § 928. "The equitable conception of true consent assumes physical power of the party, an intellectual and moral power, and that he exercised these powers freely and deliberately." It is difficult to formulate any rule determining the amount of mental weakness which will destroy the person's capacity to devise or convey property. The following has been adopted and is stated by Mr. Pomeroy to be clearly just: "Had the testator a disposing memory? Was he able, without prompting, to recollect the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form: Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will?" The same rule applies to conveyances and other agreements inter vivos. Pom. Eq. Juris. § 947, note 1. "It is equally certain that mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not sufficient ground to defeat the enforcement of an executory contract or to set aside an executed agreement or conveyance." Id. Undue influence and fiduciary relations constitute different doctrines. Id. § 965. Equity treats the relation of principal and agent in the same general manner, though not with quite the same strictness, as that of trustee and beneficiary. In any contract of purchase or sale with the principal, or other transac-

tion by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome, but this presumption is not so weighty or strong as in the case of a trustee. Id. § 959. A gift by a principal to his agent may be valid and be sustained, if the absolute good faith, knowledge, and intent of both parties is clearly established. Id. With these principles in view, we think the findings of the trial court are supported by the evidence and that the findings support the judgment.

We discover no prejudicial error in any of the rulings of the court.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

On Rehearing.

CHIPMAN, P. J. Petition for rehearing. The principal ground upon which we are asked to open the case is that it falls within the rule laid down by this court in *Nobles v. Hutton* (Cal. App.) 93 Pac. 289, where the court said: "It is a well-established principle that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them"—citing, also, *Yordi v. Yordi* (Cal. App.) 91 Pac. 348. It was said in *Robins v. Hope*, 57 Cal. 493, 497: "The phrases 'confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife (naming some others). In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost good faith (*uberima fides*) in all transactions between the parties." 1 Story's Eq. Jur. 218. In *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030, 1032, it was held that "the term 'confidential relation' is not confined to any specific association of the parties to it. While the most frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and generally all persons who are associated by any relation of trust and confidence." As further illustrating the meaning of these terms, it was held in *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808, 810, that "the relation exists and relief is granted in all cases in which influence has been acquired and abused in which confidence has been reposed and betrayed. The origin of the con-

fidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another."

Assuming that the power of attorney given to plaintiff by Proctor created a confidential relation between them in respect of the property, it does not necessarily follow that the principal could not sell or give the property to the agent except under the guidance of independent advice. The cases where the courts have attached importance to the fact that the party, alleged to have been overreached, received no independent advice, are cases in which the recipient of such party's favor had some overmastering influence, actual or presumptive, over the latter by reason of their natural relation or because of some physical or mental infirmity by means of which the beneficiary was enabled to obtain an undue advantage. For example where a child under majority conveys valuable property to the parent or releases his interest in some expectancy of value, "the law," as said by Judge Story, "in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost good faith in all transactions between them," and the absence of independent advice in such case might be given special significance. So, also, where the relation is that of husband and wife. But we do not think that it has ever been held that before such a transaction can be shown to be valid and binding it must appear in every case as indispensable that the child or wife had independent advice. *Nobles v. Hutton* and *Yordi v. Yordi*, supra, were cases where the court, because of the peculiar relationships of the parties, and the circumstances shown, attached special significance to the failure to show that the persons conferring the benefit acted under independent advice. But it was not intended to lay down the hard and fast rule that under no state of circumstances can a conveyance made by a minor child to his parent or wife to her husband be upheld unless it be shown to have been executed upon independent advice. An examination of the case of *Nobles v. Hutton* will show that the principle above quoted was enunciated with reference to the peculiar and controlling circumstances of the case. So, also, was it in *Yordi v. Yordi*. The rule certainly cannot be more rigid when applied to the ordinary relation of principal and agent. To show that the principle contended for does not necessarily apply in all cases where the relation, for example, is that of parent and child, let us suppose a conveyance by the parent to his child. Here we have the relation, but the situation of the parties to the transaction is reversed and the rule would not ordinarily apply. And yet it might appear that the parent was of great age and of weak mind; that the child had the power to and in fact did exercise

undue influence over his parent; and that these facts and other circumstances attending the transaction would require that the act of the parent should be shown to have been performed under the direction of independent advice; i. e., by some impartial person or persons. Speaking of gifts by a child to a parent, Mr. Pomeroy says: "The law on the subject is well settled. A child makes a gift to a parent, and such a gift is good if it is not tainted with parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst the dominion lasts, it lies on the parent maintaining the gift to disprove the exercise or parental influence by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is whether there was a deliberate, unbiased intention on the part of the child to give to the parent. Where the positions of the two parties are reversed, where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity." 2 Pom. Eq. Juris. § 962 and note 3. In the present case there is but slight, if any, evidence of actual undue influence exercised by plaintiff over Proctor. Aside from her personal attention to his wants, in a way to excite in him a sense of gratitude for her kindness, there is little, if any, evidence, and in this treatment no ulterior motive to possess his property is shown. His manifestation of trust and confidence in her is shown by the power of attorney to sell the property, but that she had some overmastering power over him or could unduly influence him in matters of business there is no evidence. The witness Overton testified that she told him the property "was simply conveyed to her for the purpose of getting a lodging house; for the benefit of the two of them. She was to run the house and they were to have a kind of partnership." But this was in conflict with other evidence and the trial court did not accept this as a statement to be believed, or, at least, as affecting the conviction of the court based upon the testimony of Mrs. Barnes and other evidence in the case.

It is further urged as ground for a rehearing that the court failed to comment upon the fact that defendant did not testify in the case. Why she was not called as a witness does not appear. It would doubtless have been more satisfactory had she made a full explanation of her relations with Proctor, but it cannot be said as matter of law that her failure to testify destroyed the probative

force of the evidence submitted in the case in her behalf.

We are unable to discover sufficient ground for granting a rehearing, and it is therefore denied.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 435

CITY OF ESCONDIDO v. ESCONDIDO
LUMBER, HAY & GRAIN CO.
(Civ. 499.)

(Court of Appeal, Second District, California.
June 26, 1908.)

1. MUNICIPAL CORPORATIONS — TAXATION —
TIME FOR ASSESSMENT—POWER OF LOCAL
AUTHORITIES TO FIX.

Municipal Corporation Act, § 871 (St. 1883, p. 273, c. 49), under which a city of the sixth class was created, provided that the board of trustees should have power, and it should be their duty, to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, not inconsistent with the provisions of the chapter, which system should conform as nearly as possible to the law as to the assessment, etc., of state and county taxes, except as to the officers by whom such duties are to be performed. The city by ordinance adopted a tax system for city taxes, and provided that property should be assessed as of May 1st, instead of the first Monday in March as in state and county assessments. Pol. Code, §§ 3628-3630. *Held*, that by section 871, as to matters not within the exception, the board was given discretion to make such changes in the law of state and county assessments as might be warranted by the facts; and, in the absence of anything to the contrary, it must be presumed that circumstances justified the provision that the assessment should be made as of May 1st, instead of the first Monday in March, since the law presumes that public officers have not neglected their official duties, and where the public's rights require it, the presumption is strong.

2. SAME.

Municipal Corporation Act, § 871 (St. 1883, p. 273, c. 49), provides that all taxes assessed shall constitute liens on the property assessed from the first Monday in March of each year. *Held*, that the provision is not inconsistent with the power given the board to fix a day other than the first Monday of March to which the assessment shall relate; taxes not being a lien unless expressly made so by statute, and the time when the lien will attach, if at all, being determinable by the statute.

3. STATUTES — CONSTRUCTION — EFFECT TO BE
GIVEN TO EVERY PART.

In construing a statute, effect should be given to every part thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 283.]

4. MUNICIPAL CORPORATIONS — TAXATION —
CONSTITUTIONAL PROVISION.

Const. art. 13, § 8, providing that the Legislature shall require each taxpayer in the state to deliver to the county assessor annually a sworn statement setting forth the property owned by him, or in his possession or control, at 12 o'clock M. on the first Monday of March, has no application to the assessment of property in incorporated cities for local purposes.

5. SAME—STATUTORY PROVISIONS.

Municipal Corporation Act, § 871 (St. 1883, p. 273, c. 49), is the general law for cities of the sixth class, enacted in pursuance of Const. art. 11, § 12, making it the duty of the Legislature, by general laws, to vest in the corporate authorities of municipalities the power to assess and collect taxes for municipal purposes.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the city of Escondido against the Escondido Lumber, Hay & Grain Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Haines & Haines, for appellant. F. P. Willard, for respondent.

SHAW, J. This action was instituted by the city of Escondido, a municipal corporation of the sixth class, created under the Municipal Corporation Act of 1883 (St. 1883, p. 266, c. 49) to recover from defendant certain taxes for the fiscal year 1904, together with penalties and costs. Judgment was rendered for plaintiff, from which, and a denial of its motion for a new trial, defendant appeals.

By ordinance of the city the fiscal year is made identical with the calendar year. The due making of the assessment for the year 1904, which forms the basis of the action, is alleged in the complaint, and this allegation is denied in the answer. To sustain the allegation plaintiff tendered in evidence an assessment book or assessment roll, which at the time defendant admitted was the one prepared by the city assessor of the city of Escondido for said city for the year 1904, and stipulated that said book or document constituted the assessment roll for said city as the same was made out by said city assessor for said year 1904 and by him delivered to the city marshal of said city. Attached to said assessment book or roll were two affidavits; one made by the city clerk, the other by the assessor, the said clerk being ex officio assessor. Defendant objected to the reception of said book, or any part thereof, in evidence, upon the ground that it was incompetent, irrelevant, and immaterial: "First, because the complaint does not state a cause of action; second, because said book purports to be an assessment for the years 1904-05, and not for the fiscal year 1904, as alleged in the complaint; third, because the assessment book is not authenticated by the affidavit required by section 3732 of the Political Code, which was, when said alleged assessment was made, a part of the tax system of the city of Escondido; and fourth, because said assessment book is not authenticated by the certificate required by section 872 of the Municipal Corporation Act of 1883." This objection was overruled. The ordinance levying taxes for the year 1904-05 was offered in evidence, and defendant's objection upon the ground that it purported to be a levy of taxes for the year 1904-05, and not for the fiscal year of 1904, as alleged in the complaint, was likewise overruled. Appellant assigns these rulings as error. Reference to the opinion of the Supreme Court in the case of the City of Escondido v. Wohlford (Cal.) 94 Pac. 232, sufficiently answers ap-

pellant's contention on these points. The action there was to recover taxes based on the identical assessment, affidavit, and ordinance received as evidence in the case at bar. The record before the court was identical with the record here, save that the trial court in that case had sustained defendant's objection to the documents in question. The Supreme Court reversed the ruling of the trial court, thus establishing the validity and regularity of the proceedings so far as these points are concerned.

Another point urged by appellant merits further consideration. It is alleged in the complaint, and the court finds, "that in said list [referring to the list of taxable property prepared by the city assessor] the assessor described said property assessed and the value thereof, and listed all of said property upon the assessment roll of said city for said year in the name of the person who owned it or in whose possession or under whose control it was on the 1st day of May of said year." Section 871 of the Municipal Corporation Act, under which the city of Escondido was created, as it stood when the proceedings under consideration were taken, provided that: "The board of trustees shall have power and it shall be their duty to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes not inconsistent with the provisions of this chapter, which system shall conform as nearly as the circumstances of the case may permit to the provisions of the laws of this state in reference to the assessment, levy, and collection of state and county taxes, except as to the times for such assessment, levy, and collection, and except as to the officers by whom such duties are to be performed." Pursuant to this provision of said section 871, the board of trustees of the said city of Escondido adopted an ordinance, whereby it provided a system for the assessment, levy, and collection of city taxes; and, among other things, it was provided by said ordinance that the words "first day of May" should be substituted for the words "first Monday in March," wherever they occurred in sections 3628, 3629, and 3630 of the Political Code; and that the words "first day of May" and "first day of August" should be substituted for the words "first Monday in March" and "first Monday in July," wherever they occurred in said sections; the purpose being to assess the property in the city according to its status at 12 o'clock M., May 1st, instead of 12 o'clock M., the first Monday in March. The question, therefore, is whether the assessment of the property as of May 1st, as provided by the ordinance, instead of as it stood the first Monday in March, is a valid assessment. Section 871, supra, provides that the system adopted by the board of trustees "shall conform as nearly as the circumstances of the case may permit to the provisions of the laws of this state in reference to the assessment, levy, and col-

lection of state and county taxes, except as to the times of such assessment, levy and collection, and except as to the officers by whom such duties are to be performed." It will be noted that, as to those matters falling within the exception, no limitations are placed upon the action of the board. As to other matters not thus enumerated power is conferred upon the board in its discretion to make such changes in the provisions of the law, applicable to state and county assessments, as in its judgment may be warranted by the facts presented. In the absence of anything appearing to the contrary, we must presume that circumstances did exist which justified the board in providing that the assessment for the year 1904 should be made as of date May 1st, instead of relating to the first Monday in March. "The law constantly presumes that public officers charged with the performance of official duty have not neglected the same, but have duly performed it at the proper time and in the proper manner. * * * Where the rights of the public require it, the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear." *Mechem on Public Officers*, § 579.

It is further provided in said section 871 that all taxes assessed shall constitute liens on the property assessed from and after the first Monday in March of each year. We do not regard this provision as inconsistent with the power given the board of trustees to fix a day other than the first Monday in March to which the assessment shall relate. The status of the property, so far as its valuation and ownership are concerned, is assessed upon the conditions existing May 1st, but the lien for the tax, not levied upon such assessment until September 6, 1904, and under which the property may be sold for nonpayment of taxes, attached on the first Monday in March. The general rule is that taxes are not a lien unless expressly made so by statute (*Cooley on Taxation*, p. 865), and the time when the lien will attach, if at all, must be determined by the statute. Under the rule in question, inconvenience and inequalities might arise in isolated cases, but we perceive no constitutional inhibition against the adoption of such system. In thus construing the section adherence is had to the rule that effect should be given to every part thereof in interpreting a statute. Section 8, art. 13, of the Constitution, has no application to the assessment of property in incorporated cities for local purposes. Section 12 of article 11 makes it the duty of the Legislature, by general laws, to "vest in the corporate authorities thereof [the municipalities] the power to assess and collect taxes for" municipal purposes. This general law for cities of the sixth class is embodied in said section 871, supra, pursuant to which the board of trustees of the city of Escondido adopted a revenue system conforming as nearly as the circumstances would permit

to the provisions for state and county assessment, levy, and collection of taxes.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

CITY OF ESCONDIDO v. WOHLFORD et al.
(Civ. 498.)

(Court of Appeal, Second District, California.
June 26, 1908.)

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the city of Escondido against Sallie B. Wohlford and another. From a judgment for plaintiff and a denial of a new trial, defendants appeal. Affirmed.

Haines & Haines, for appellants. F. P. Willard, for respondent.

SHAW, J. This case involves the same questions that are discussed and decided in *City of Escondido v. Escondido Lumber, Hay & Grain Company* (Civ. 499) 97 Pac. 197, and is submitted upon points and arguments presented therein. Upon the authority of that case, the judgment and order from which this appeal is prosecuted are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 440

Ex parte MURPHY. (Cr. 85.)

(Court of Appeal, Second District, California.
June 26, 1908.)

1. NUISANCE — BILLIARD HALL AND POOL-ROOM.

The business of conducting a public billiard hall and poolroom is not per se a nuisance, though it may become such by reason of its environment or surrounding conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 148.]

2. MUNICIPAL CORPORATIONS—POLICE POWER — CONSTITUTIONAL PROVISIONS.

While the power of a municipality, as to a class of business recognized as necessary and useful employments, the character of which renders their operation obnoxious to the health, welfare, or comfort of others in the community, extends to regulation only, and the question of the reasonableness of ordinances regulating the conduct of such business and excluding their operation from, or confining it to, certain prescribed limits, as well as the uniform operation of the ordinances, is always a proper subject of judicial inquiry, the citizen having a fundamental right to engage therein, the power of the municipality over nonuseful callings is much broader, as the citizen possesses no inherent right to conduct for profit a public place intended purely for the amusement of its patrons, the tendency of which is immoral or vicious, and under Const. art. 11, § 11, providing that any county, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, a city may, in the absence of a general law, prohibit entirely the maintenance of a public billiard hall and poolroom for hire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1328.]

3. SAME—ORDINANCES — UNIFORMITY OF OPERATION.

An ordinance prohibiting the maintenance of billiard or pool tables for hire or public use, but allowing the proprietors of hotels having 25

bedrooms and upwards, furnished as such, to obtain permits from the board of trustees to maintain such tables for the use of regular guests only, is not invalid as special and class legislation, since it applies to all who keep such tables for hire or public use as a class.

4. SAME.

Even if the ordinance in its application to the proprietors of such hotels and others was not uniform, it would not be invalid, since, as the municipality can prohibit the business altogether, it may impose such conditions upon its existence as it pleases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1328.]

5. SAME.

For the same reason, the arbitrary power to grant permits to hotels could be properly vested in the board of trustees.

Application of J. L. Murphy for a writ of habeas corpus. Writ denied, and petitioner remanded to custody.

Lawler, Allen, Van Dyke & Jutten, and H. C. Milsap, for petitioner. John E. Carson, City Atty., for respondent.

SHAW, J. Ordinance No. 262, duly adopted by the city of South Pasadena, and entitled "An ordinance for police regulation, relating to billiard halls, poolrooms, and places where billiard and pool tables are kept for hire or public use in the city of South Pasadena," provides:

"The board of trustees of the city of South Pasadena do ordain as follows:

"Section 1. It shall be, and is hereby made unlawful for any person or persons, individually or by association with others, either as owner, principal, clerk, agent, servant or employé, to establish, open, keep, carry on, or assist in carrying on, or maintain, or assist in maintaining any billiard hall, or poolroom, or other place in the city of South Pasadena, where any billiard, pool, or combination billiard and pool table, or tables, is or are kept for hire or public use, and any person or persons opening, keeping, carrying on, or assisting in carrying on, maintaining, or assisting in maintaining, any such place, herein specified, in said city of South Pasadena, shall be guilty of a misdemeanor, and every act in violation of this section shall separately, or for each day of its continuance, be deemed a separate offense.

"Provided, however, that nothing in this ordinance shall be construed or understood as prohibiting the owner, manager or lessee of any hotel, universally recognized as a hotel, using a general register for guests, and having twenty-five bedrooms and upwards, furnished as such, from keeping and maintaining any billiard, pool, or combination billiard and pool table, or tables, for the use of regular guests only of said hotel, in a room provided for that purpose in the building in which said hotel is located, and at no other place, on receiving a permit so to do from the board of trustees of the city of South Pasadena. Application for such

permits shall be in writing, and filed with the board of trustees at least five days before the same is granted. If, on investigation, said board finds the hotel for which such permit is desired, equipped and conducted as herein specified, it may, in its discretion, grant and issue such permit, without charge, and for such time as desired by the applicant, but in no event to extend beyond the date of the next succeeding municipal election; provided, if said board of trustees shall at any time become satisfied that any person to whom any such permit is granted, his clerk, agent or employé, has permitted any person other than a regular guest of said hotel, or any person who has not in good faith become a regular guest of said hotel, or is guilty of a violation of any provision of this ordinance, they shall cancel, revoke, and withdraw such permit and all rights thereunder, and no other permit shall thereafter be granted to said person."

On January 18, 1908, petitioner was arrested, upon a complaint which charged "that on the 17th day of January, 1908, at said city of South Pasadena, in the county of Los Angeles, state of California, the crime of violating Ordinance No. 262 of said city of South Pasadena was committed by J. L. Murphy, who at the time and place last aforesaid, did willfully and unlawfully engage in, establish, open, keep, carry on, assist in carrying on, maintain and assist in maintaining, a billiard hall and poolroom and place, by then and there keeping billiard, pool, and combination billiard and pool tables for hire and for public use." An answer was filed controverting certain allegations of the petition regarding the manner in which the business was conducted by petitioner, the character of those who frequented the place, and the fact that the conduct of the business was disassociated from any practice tending to encourage profligacy or injuriously affect the good morals of the community. Inasmuch, however, as, according to our view, the validity of the ordinance is unaffected by such alleged facts, conceding them to be true, it is therefore unnecessary to discuss the issues thus raised.

The sole question relates to the validity of the ordinance, disassociated from any consideration of extrinsic questions affecting its reasonableness. Petitioner contends that the ordinance is unconstitutional and void, for the reasons: First, that poolrooms are not a nuisance per se; second, that it is not within the power conferred upon municipalities by section 11, art. 11, of the Constitution of the state of California; third, that it vests arbitrary power in the board of trustees; and, fourth, that it is special and class legislation, in that it confers privileges and immunities upon certain citizens which it denies to others, thus creating a monopoly in the one class. An inspection of the ordinance makes it apparent that it is not a

measure adopted for the purpose of raising revenue; hence not an exercise of the power given cities of the sixth class, to which South Pasadena belongs, under the provisions of subdivision 10 of section 862 of the municipal corporation act (St. 1883, p. 270, c. 49), which authorizes such cities to "license, for the purpose of revenue and regulation, all and every kind of business authorized by law, * * * and lawful games carried on therein. * * *" Its purpose is not to license, but to prohibit. *Merced Co. v. Helm*, 102 Cal. 159, 36 Pac. 399. Authority to enact this ordinance, if it exists at all, is found in section 11, art. 11, of the Constitution of the state of California, which provides: "Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Under this provision the city's power to legislate upon all matters included within its terms is limited only by its territorial boundaries, provided that such legislation shall not conflict with general laws. As said in *Odd Fellows' Cem. Ass'n et al. v. San Francisco et al.*, 140 Cal. 226, 73 Pac. 987, subject to these limitations, the power of the city "is as broad as that of the Legislature itself." There can be no doubt that under this constitutional grant municipalities may, in proper cases, exercise the power therein conferred to the extent of prohibiting the carrying on of a business altogether. Illustrations of the exercise of such power are seen in ordinances for the prohibition of the sale of intoxicating liquors, the suppression of gambling and bawdy houses. *Ex parte Shrader*, 33 Cal. 279; *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *Odd Fellows' Cem. Ass'n et al. v. San Francisco et al.*, *supra*; *Merced Co. v. Helm*, *supra*.

We may concede at the outset that the business of conducting a public billiard hall and poolroom is not per se a nuisance. In the case of *Ex parte Meyers* (Cal. App.) 94 Pac. 870, this court, in considering the validity of "an ordinance prohibiting minors from visiting * * * public billiard and poolrooms, * * *" said: "That a billiard hall is immoral per se because it is public will hardly be contended by any one." Petitioner insists that, unless the business is held to be immoral, or a nuisance per se, it is not subject to the exercise of the city's police power to the extent that it may be prohibited. His contention is that billiard halls and poolrooms fall within that class of cases, the conduct of which might, by reason of the character of the business, prove obnoxious or injurious to health, or affect the comfort and welfare of others, such as laundries, tanneries, and soap factories; that as to those the power of a municipality is to regulate only. This is true as to that class of business recognized as necessary and useful employments, but the character of

which renders their operation obnoxious to the health, welfare, or comfort of others in the community. The question of the reasonableness of ordinances regulating the conduct of such business, and excluding their operation from, or confining it to, certain prescribed limits, as well as the uniform operation of the same, is always a proper subject for judicial inquiry. Such avocations being necessary and useful, the citizen, under proper restrictions, has a fundamental right to engage therein. *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588. When dealing with a nonuseful calling, the power of the municipality is much broader. The citizen possesses no inherent right to conduct for profit a public place intended purely for the amusement of its patrons, the tendency of which is immoral or vicious. In all such cases the question arises, what is the effect of the conduct of the business upon the morals and public welfare of the community? "That a public pool and billiard hall," says petitioner's counsel, "is a proper subject for police regulation is not denied," and concedes that "stringent rules undoubtedly may be enacted to regulate the said business." Referring again to the case of *Ex parte Joseph Meyers*, supra, wherein this court held that a poolroom was not per se a nuisance, it was said: "That it may become such by the presence of the professional billiardist and gambler, ready to fleece the unwary and to inculcate the gambling habit in the youth of the city, must be admitted." In the case of *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678, it is said: "Public billiard halls are regarded by many as vicious in their tendencies, leading to idleness, gambling, and other vices." In *Goytino v. McAleer et al.*, 4 Cal. App. 655, 88 Pac. 991, Mr. Justice Allen, expressing the views of this court, said: "Nor can it be said that, as ordinarily, if not invariably, conducted, such business might not within the limits of reasonable probability be attended with uses injurious to the public peace and morals." "Any practice or business, the tendency of which as shown by experience is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition." *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; *State v. Thompson*, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468. It thus appears that a public billiard hall and poolroom may, by reason of its environment or conditions existing in some communities, constitute a menace and danger to the morals and well-being of the citizens thereof; and it is therefore a subject for regulation or absolute prohibition, notwithstanding the fact that it is not a nuisance per se; the right of the city depending upon a question of fact, the existence of which it

is conclusively presumed the board of trustees has properly passed upon, and the courts cannot go behind such finding. *Ex parte Shrader*, 33 Cal. 279. Regulation measures, not extending to the stringency of prohibition, might afford adequate protection in some communities, while in others conditions might exist by reason of which the public welfare demanded the absolute suppression of the business. In all cases, however, the extent to which the power shall be exercised is a matter for the legislative body of the municipality to determine. The power of the legislative body of the state, under its police power, to enact general laws prohibiting poolrooms and billiard halls cannot be questioned, and it must follow, in the absence of such general laws, that the police power of a municipality, within its territorial limits, under section 11 of article 11 of the Constitution, is coextensive with that of the state. Cases from other jurisdictions, cited by petitioner in support of the proposition that the power conferred by said section 11, art. 11, extends only to the right to regulate, are inapplicable to the case at bar, for the reason that the questions involved were under charters containing special and limited grants as to the exercise of police power.

Petitioner insists that the ordinance is obnoxious by reason of its being special and class legislation, in that its provisions do not apply to the proprietors of hotels having 25 or more furnished bedrooms, and using a general register for guests. There is no merit in this contention. The ordinance is directed at those persons who keep billiard halls and poolrooms for hire or public use, and its provisions apply to all alike falling within this class. It prohibits every one from engaging in such business. The provisions do not apply to the individual who keeps a pool table in his house for the use of himself and guests, nor to the hotelkeeper who maintains tables for use of bona fide guests only. In neither case can it be said to be public, nor that it creates in either a monopoly of the business. All are alike amenable to the law prohibiting them from conducting such place for hire or public use. Even accepting petitioner's theory as to the effect and operation of the ordinance, there is no force in the objection. As we have seen the city may prohibit altogether, "and if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747. And as said in *Ex parte Kidd*, 5 Cal. App. 159, 89 Pac. 987: "Let the correctness of his [petitioner's] conclusions be assumed, and we have a case where the lawmaking power is regulating a business, the tendency of which is injurious to the public morals, safety, and welfare." It for the legislative body to determine whether the business shall exist at all, and, if so, under what restrictions. It is quite appar-

ent that keeping billiard and pool tables in a hotel for the exclusive use of its guests would be, to a very great extent, if not altogether, free from the resultant evils and vicious tendencies connected with the public poolroom. If there be a diversity in such legislation, this fact suggests a rational reason for such classification. Counsel for petitioner has cited many authorities in support of his contention. These citations almost without exception, relate to the operation of laws licensing or regulating the conduct of the ordinary and useful avocations of life; that is, those the conduct of which is not recognized as having injurious tendencies. Such cases are wholly inapplicable to the case at bar, for the reason that the inherent and fundamental right of the citizen to conduct the business in the one class of cases is wholly wanting in the other. In the case of *In re Zhizhuzza*, 147 Cal. 328, 81 Pac. 955, Mr. Justice Van Dyke, in discussing the uniform operation of laws, said: "There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless where they unjustly discriminate, they are sometimes declared unreasonable and therefore void. A law is general which applies to all of a class, the classification being a proper one, and the requirement of the constitutional provision in question is satisfied if it applies to all the class alike. The word 'uniform' in the Constitution does not mean universal. The section intends simply that the effect of the general laws shall be the same to and upon all persons who stand in the same relation to the law; that is all the facts of whose cases are substantially the same." In addition to the cases already cited, see *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29, 61 C. C. A. 91; *Ex parte Koser*, 60 Cal. 177; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

That portion of the ordinance relating to hotels keeping billiard and pool tables provides that the board of trustees may, in its discretion, grant permits therefor to such hotels. It is contended that the ordinance is void by reason of the fact that it vests an arbitrary power in the board. Conceding this to be true, nevertheless, since the governing power can prohibit altogether, it may impose any restrictions deemed proper and necessary as a condition of granting permits to conduct such business. In discussing this point in his opinion the late Judge Smith, of the superior court of Los Angeles county, very properly stated, in denying the application of petitioner for a similar writ: "But we have seen that the conducting of a poolroom is not a useful occupation, and does not come within the purview of any of the authorities quoted by the petitioner upon his proposition. The law is well settled in this

state, as has been shown by the authorities already cited, that where a business is not a useful occupation, such as conducting a saloon and many kindred places, the Supreme Court has always upheld the power that has been vested in a board or in a person to say whether such person shall have a license or not. Consequently, the many authorities cited by petitioner have to do with lawful and useful businesses, such as referred to in the *Yick Wo Case*, 118 U. S. 356, 6 Sup. Ct. 1004, 30 L. Ed. 220, which was a laundry case, *State v. Mahner*, 43 La. Ann. 496, 9 South. 480, which was a dairy case, and other cases of similar character; consequently there is no application to this case." Moreover, petitioner does not bring himself within the class who could be affected by the exercise of such arbitrary discretion, and hence is not affected thereby. *Ex parte Kidd*, supra.

We find no valid objection to the constitutionality of the ordinance. The writ is denied, and petitioner is remanded to the custody of the city marshal.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 342

PEOPLE v. SILVA. (Cr. 84.)

(Court of Appeal, Second District, California.
June 5, 1908. Rehearing Denied
July 9, 1908.)

1. LEWDNESS—INDICTMENT—"ADULTERY."

Pen. Code, § 269a, provides that every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and Civ. Code, § 93, defines "adultery" as the voluntary intercourse of a married person with a person other than the offender's husband or wife. *Held*, that an indictment charging defendants with the crime of living "in a state of open and notorious cohabitation and adultery with each other," they, the said defendants, not being then and there married to each other, was not defective for failure to allege that either of the defendants was married to another.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 212-214.]

2. CRIMINAL LAW—APPEAL—RECORD—QUESTIONS PRESENTED.

Where the evidence is not brought before the appellate tribunal, an objection that certain instructions given were not justified by the evidence could not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2941.]

3. SAME—PREJUDICE.

In a prosecution for living in notorious cohabitation and adultery, defendants were not prejudiced by the court embodying the substance of Pen. Code, §§ 31, 659, defining principles and declaring that, whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the commission thereof is prescribed by law, every person who counsels or aids is guilty of a misdemeanor, in its instructions, though such sections were inapplicable to any issue in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3159.]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Manuel Silva was convicted of living in

open and notorious cohabitation and adultery with another, and he appeals. Affirmed.

Lamy & Putnam, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. The appellant, Manuel Silva, and one Mary Rodrigues were jointly charged by indictment, under section 269a, Pen. Code, with the crime of living "in a state of open and notorious cohabitation and adultery with each other, said parties not being then and there married to each other." The indictment contained no direct charge that either of said parties was married at all. A demurrer was interposed to the indictment, upon the grounds, among others: First, that the facts stated in the indictment did not constitute a public offense; and, second that the indictment did not substantially conform to the requirements of sections 950, 951, and 952, Pen. Code. The demurrer was overruled, and the trial resulted in the conviction of appellant, who thereupon made a motion in arrest of judgment, on substantially the same grounds specified in his demurrer. The motion was denied. The appeal is on the judgment roll.

Section 269a provides that "every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor." The indictment charges that "the said Manuel Silva and said Mary Rodrigues, before the finding of this indictment, and between the 1st day of February, 1907, and the 14th day of January, 1908, and at and in the county of San Luis Obispo, state of California, did willfully and unlawfully live in a state of open and notorious cohabitation and adultery with each other, and the said Manuel Silva and the said Mary Rodrigues not being then and there lawfully married to each other, contrary," etc. The general rule is that an indictment is sufficient which charges the offense in the language of the statute. "When the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged." *People v. Ward*, 110 Cal. 369, 42 Pac. 894. This is particularly true where the words used in the statute in defining the offense have a well-recognized or technical meaning. In this case, not only does the statute specify just what acts shall constitute the offense, but in so doing employs words the meaning of which is furnished by the Codes. Section 93, Civ. Code, defines adultery as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." The exception to the rule is well stated by Mr. Justice Lorigan in *People v. Perales*, 141 Cal. 583, 75 Pac. 170, where it is said: "When, however, the words or terms used in the statute have no technical or pre-

cise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted." The indictment used the language of the statute in charging appellant with all the acts and facts which the Legislature has said shall constitute the offense, and this was sufficient to apprise defendant of the nature of the accusation. It was not necessary to allege therein that he had a lawful wife. The allegation is implied by the charge in the indictment (*State v. Hinton*, 6 Ala. 864), which fully answers the requirements of subdivision 2 of section 950, Pen. Code, in that it contains "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended" (*People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *People v. Mahony*, 145 Cal. 104, 78 Pac. 354).

It is next contended that the court, at the request of the state, erroneously embodied the substance of sections 31 and 659, Pen. Code, in the instructions given the jury. As the evidence is not before us, we cannot say that it did not, upon some theory of the case, justify the instructions given. Moreover, conceding the instructions were not applicable to any issue, it is difficult to conceive how the substantial rights of defendant could have been prejudiced by the giving of the same. *Blashfield on Instructions to Juries*, § 91; *People v. Cain* (Cal. App.) 93 Pac. 1037.

The judgment appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 546

GONDOLFO v. GARBARINO. (Civ. 515.)
(Court of Appeal, First District, California.
July 15, 1908.)

1. PARTNERSHIP—SALES OF INTEREST—CONSTRUCTION OF CONTRACT—CONDITIONS.

Evidence held to support findings that a contract of one partner to sell his interest in vegetable gardens to another partner was conditioned upon the consent of the remaining partners, and that they refused to consent thereto.

2. WITNESSES—CROSS-EXAMINATION—SCOPE.

In an action for breach of a contract of one partner to sell his interest to another, plaintiff had testified, in direct examination, as to the agreement to sell, a payment made to defendant, and the conversation that took place

at that time. On cross-examination he testified that two of the other partners were present. *Held*, that it was proper to ask him, on cross-examination, if any of those present had said that the sale could not be made without the consent of the partners, since the question related to the subject-matter, as to which the witness had testified in chief, and defendant had a right to the whole conversation, and to test the witness' memory and accuracy in regard to the agreement to sell, and to the things he said were done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 967-974.]

3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—IMPROPER CROSS-EXAMINATION.

The witness having answered, "I never heard anything about that, and I went away," the answer was harmless, even if it were improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4143, 4145.]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by Davide Gondolfo against Giovanni Garbarino. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Devoto & Richardson, for appellant. C. L. Patton and Eugene Bianchi, Jr., for respondent.

COOPER, P. J. This appeal is from the judgment and the order denying plaintiff's motion for a new trial. The complaint alleges that the defendant agreed to sell to plaintiff an undivided one-fifth interest in and to certain vegetable gardens, known as the "Stagnaro Gardens," near the Six-Mile House in the city and county of San Francisco, for the sum of \$300, and the plaintiff paid to defendant \$100 on account of such purchase price; that plaintiff has tendered the balance of the purchase price, but that defendant has at all times refused to accept the balance of \$200, or to convey the interest to plaintiff as he agreed. Judgment is prayed for \$1,500 for breach of the alleged contract.

The answer alleges, by way of affirmative defense, that at the time of the agreement to sell the said vegetable gardens were partnership property, and owned by the following partners, to wit: Emanuele Stagnaro, Giovanni Queirolo, B. Costa, Giacomo Barga-glotti, Fortunato Gotelli, Giovanni Garbarino, Davide Gondolfo, Stefano Ghiorso, and Marco Ghiesa; that the agreement to sell was made upon the express condition and understanding that the other partners should consent and agree to the said sale, or it should not be binding upon defendant, and that the other partners of defendant refused to consent to such sale; that the defendant, upon ascertaining that his partners would not consent to such sale, tendered to plaintiff the \$100 that had been paid to him, and that plaintiff refused to accept it.

The case turned upon the question as to whether or not the agreement to sell was

conditional upon the consent of the other partners being obtained. The court found as follows: "(3) That on said 20th day of May, 1906, defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from defendant, one-fifth of the vegetable garden and other property described in paragraph 1 of the complaint herein for the sum of \$300, upon the express condition, however, that the other partners, owning seven-tenths of said vegetable garden and other property (as set forth in finding No. 1) should consent and agree to the sale of defendant's one-fifth interest therein to plaintiff. * * * (5) That the partners of plaintiff and defendant have refused to consent and agree, and did not and do not consent and agree, to the transfer or sale of defendant's interest in said vegetable garden and property described in paragraph 1 of the complaint herein to plaintiff." It is claimed that the evidence is insufficient to sustain the above findings; but, after a careful examination, we conclude that it is sufficient. The defendant testified that at the time of the agreement to sell plaintiff said to him that he would pay the deposit, and, if the other partners were not satisfied, defendant would have to return the deposit, and that the sale was upon the condition that the other partners would consent; that if they did not consent he would return the deposit to plaintiff. Ghiesa, one of the partners, testified that he was present at the time of the agreement to sell; that he told the parties that they could not sell out unless the partners were satisfied; and he further testified that he refused to give his consent to the transfer or the contemplated sale. Ghiorso, another partner, testified that he told the parties that the sale could not be made without the consent of all the partners; that he was not content with the sale, for the reason that defendant is the head man, who plants all the vegetables.

It is not necessary to notice the other several findings, for the reason that the findings discussed go to the merits of the whole case, and dispose of it.

It is unnecessary to discuss the question as to whether or not a contract, by which one partner is prohibited from selling his interest in the partnership assets, would be void as against public policy. This is not such case, but one of a condition, annexed to the sale, to the effect that it should not be consummated or valid unless the other persons were satisfied. There certainly is nothing unlawful or contrary to public policy or morals for one partner to agree to sell if his partners are satisfied and will consent, at the same time saying that he will not sell unless they are satisfied.

Plaintiff's counsel claim that the court erred in overruling certain objections made by them to questions asked by defendant's counsel, and in regard to certain rulings in other respects, in the admission or exclusion of testimony. A sample of such alleged errors

is the first one, in which it is claimed that the court erred in overruling the plaintiff's objection to a question asked of plaintiff himself in cross-examination. Plaintiff had testified, in direct examination, as to the agreement to sell, the payment of \$100 to defendant, and the conversation that took place at the time. In cross-examination he testified that Ghiesa and Ghiorso, two of the partners, were present. Counsel for defendant then asked the plaintiff in cross-examination the following question: "Did any of those present say that this sale could not be made without the consent of the partners?" Plaintiff's counsel objected to the question as irrelevant, incompetent, and immaterial, and not proper cross-examination. The objection was overruled, and plaintiff's counsel duly excepted. In view of the direct examination the question was proper. It related to the subject-matter concerning which the witness had testified in chief. The defendant had a right to the whole of the conversation, and to test the memory of the witness, and the accuracy of his statements in regard to the agreement to sell, and in regard to the matters and things that he said were done. But, aside from this, the answer was harmless. The witness answered the question as follows: "I never heard anything about that, and I went away." It is apparent from what has been said that the matter is too trivial for further discussion.

The other objections are equally without merit, and we will not discuss them further. The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

8 Cal. App. 490

SANCHEZ v. YORBA. (Civ. 470.)

(Court of Appeal, Second District, California.
July 8, 1908.)

1. BROKERS—EMPLOYMENT TO SELL LAND—RIGHT TO COMMISSION.

The right of a broker to recover a commission for making a sale of land is purely a matter of contract; and, where a valid contract in writing has been made, it is immaterial whether or not the party to be charged is the owner of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 62.]

2. SAME—SUFFICIENCY OF CONTRACT.

Under Civ. Code, § 1624, which provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent," it is not essential that the employment should be evidenced by a written contract, but merely that there should be some note or memorandum thereof, signed by the party to be charged; nor is it necessary that the real estate should be fully and accurately described therein, but it is sufficient if it contains a description by which the land can be identified. A letter giving the price on property described as the "Yorba Ranch," and promising to pay a commission in case of sale, is sufficient, under the

statute, to sustain an action for the commission on a sale of such ranch.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 44.]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. B. Sanchez against P. J. Yorba. Judgment for plaintiff, and defendant appeals. Affirmed.

Variel & Hannon, for appellant. Avery & French, for respondent.

SHAW, J. This is an action to recover a real estate broker's commission for services, alleged to have been performed in making a sale of certain lands owned by defendant and his sister. It is alleged that the employment was, by a written instrument, subscribed by defendant, whereby defendant employed plaintiff's assignor, T. G. Yorba, to sell certain real estate situated in Orange county, Cal., known as the "Yorba Ranch," and consisting of lots one to six, inclusive, of the Trinidad Yorba Estate, as shown by a certain map of the Rancho Cañon de Santa Ana, and whereby defendant also agreed to pay said T. G. Yorba regular commission fees in case of a sale thereof. The complaint alleges: "That said T. G. Yorba, in pursuance of said agreement, himself and by his agents and employés did, on or about the 5th day of February, 1906, find and procure a purchaser therefor in one Jacob Stern, and caused said defendant and said Stern to come into communication with one another regarding a sale thereof; that said Stern was ready, able, and willing to purchase said land, and did, on or about the 10th day of May, 1906, purchase lots numbers 1, 2, 4, 5, and 6 thereof, containing 1,378.86 acres, through the said efforts of said T. G. Yorba"; that said sale was made for \$69,000; that the regular commission fees for making such sale was 5 per cent. on the sale price thereof—followed by allegations of nonpayment and due assignment of the claim to plaintiff. The complaint contains a second count for the reasonable value of the services rendered by T. G. Yorba, at the special instance and request of defendant, in writing, in aiding and procuring the sale of said lands, with like allegations of nonpayment and assignment of the claim to plaintiff. Judgment was rendered in favor of plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

Defendant's demurrer interposed to the complaint was overruled. This ruling is assigned as error, defendant contending that the complaint is insufficient, by reason of the fact that it fails to allege that defendant was the owner of the real estate, which it is alleged he employed plaintiff's assignor to sell. In support of this contention he cites, among other cases, *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222, where it is said: "A real estate agent's right of recovery depends entirely upon his contract with the owner of

the land." And *McCarthy v. Loupe*, 62 Cal. 302, where it is said, in order to justify a recovery, "it is indispensable that he [the agent] should show that he was employed by the owner to make the sale." Neither of these cases constitutes authority in support of appellant's contention. In the former case the point at issue was whether the facts entitled the agent to recover under the terms of the contract. The effect of the decision is to hold that the right of recovery in the agent must be measured by the contract, which in that case was made with one who was the owner of the land. In the latter case the alleged agent, in the absence of any writing, sought to recover upon an implied promise, and in deciding that he could not recover thereon the court used the language quoted, the meaning of which, when applied to the facts, is quite clear and unambiguous. Subdivision 6 of section 1624, Civ. Code, provides that: "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed [not by the owner but] by the party to be charged, or by his agent." Under the construction for which appellant contends, ordinary prudence would require an agent in his dealings to procure an abstract of title, or resort to other means of ascertaining whether his principal had a clear and marketable title to the land which he was employed to sell. Under said section 1624, Civ. Code, there is no reason why A. should not by contract charge himself with the duty of paying C. a commission for selling or finding a purchaser for the lands of B. It is purely a matter of contract, and it is immaterial so far as concerns the agent's right to recover, whether the party to be charged therein is or is not the owner of the land which the agent is employed to sell. It is unnecessary to discuss other grounds of demurrer; suffice it to say there is no merit in them.

Appellant attacks a number of findings and insists that they are unsupported by the evidence. The chief question involved is the sufficiency of the written instrument under which it is sought to charge defendant with the payment of commissions. As said in *Toomy v. Dunphy*, 86 Cal. 640, 25 Pac. 131, "the employment is the chief element in the contract"; and, in 1 *Lawson's Rights, Remedies, and Practice*, § 226, it is said: "To entitle a real estate agent to recover the commissions for the sale of property he must show the employment." For the purpose of showing that defendant did employ plaintiff's assignor, a letter, addressed to T. G. Yorba, by defendant, was offered and admitted in evidence, over objections of the defendant. This letter, which forms the basis of this action, is as follows:

"Lordsburg, Calif., 12—12—1905.

"T. G. Yorba, Whittier, Calif.—Dear Uncle: Yours received. I saw Francesca, and she said \$125 per acre is her price on her 44-acre lot. With regards to the price on the Yorba Ranch, \$50 per acre is all right, and we also agree to pay regular commission fees in case of sale. Remembrance to all the family. Your nephew,
P. J. Yorba."

The statute does not require that the employment or authorization shall be evidenced by a written contract, but merely that there shall be some note or memorandum thereof, signed by the party to be charged. In the case of *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237, the principal had in a letter, after referring to a conversation wherein the agent stated he could get \$30,000 for a piece of property, said: "We will sell at that price, * * * and allow you 2½ per cent. on said price, and if no sale is made, no expenses made to us. William Ede." The agent, under the authority of this letter, executed a contract of sale to a proposed purchaser and it was sought to enforce the same. The court, in holding that the letter did not empower the agent to make a contract of sale binding upon his principal, in the course of its opinion, stated: "Without this written memorandum signed by the party to be charged, Martin [the agent] could not have recovered compensation for negotiating the sale of the property." It is true the question of recovery on the part of the agent was not involved in the action, but the language of the court is, nevertheless, significant. See, also, *Lindley v. Fay*, 119 Cal. 239, 51 Pac. 333. Appellant lays much stress upon the letter involved in the case of *Mendenhall v. Rose* (Cal.) 33 Pac. 884, but reference to this case shows that it bears no analogy to the case at bar. The court very properly held that the letter there considered did not purport to employ the agent to sell a certain tract of land, referred to by the writer as the "Hoza Bernal Tract." The letter in the case at bar must be construed as a sufficient note or memorandum, whereby T. G. Yorba was authorized to sell the land for the price named, and constitutes an agreement on defendant's part to pay him, in case of a sale, regular commissions therefor. Under this view, it was properly admitted in evidence as proof of the employment of plaintiff's assignor by the defendant, and fully supports the finding of the court with reference to the employment.

There is nothing in the point that the note or memorandum should have contained a full and accurate description of the land. The uncontroverted allegations of the complaint and evidence admit of no question as to the identity of the property sold with the Yorba Ranch mentioned in the letter. Defendant himself testifies that the land described in the deed, whereby he conveyed it to one Ray acting for Stern, the purchaser, is the

Yorba Ranch. The description of the land as the Yorba Ranch furnishes the means for readily identifying the property. Ontario, etc., Assn. v. Cutting F. P. Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; Marriner v. Dennison, 78 Cal. 208, 20 Pac. 386; Browne on Stat. of Frauds, § 385. In the case of Mendenhall v. Rose, supra, cited by appellant in support of his contention on this point, the court clearly points out wherein the letter there furnished no means for identifying the property.

The court found that T. G. Yorba, in pursuance of said agreement, himself and by his agents and employes, and on or about February 5, 1906, did find and procure a purchaser for said land in one Jacob Stern; that said Stern was ready, willing, and able to purchase said land; and appellant contends that this finding is unsupported by the evidence. The evidence shows that on January 2, 1906, T. G. Yorba and J. B. Sanchez, plaintiff in the action, entered into a contract, whereby, after reciting that defendant had, in writing, authorized T. G. Yorba to sell the land in question, and agreed to pay him the usual commissions therefor, it was agreed that said T. G. Yorba and Sanchez should combine their efforts in an endeavor to sell the property, and, in case they succeeded, they would divide the commissions as therein provided. The evidence also tends to show that subsequent to this arrangement Sanchez had a conversation with defendant, wherein defendant said that his price for the land was \$50 per acre, in accordance with his letter to T. G. Yorba. That on the 6th day of February, 1906, Sanchez notified defendant by phone that he had a man by the name of Stern who wanted to buy the ranch, and asked defendant if he knew him. Receiving an affirmative answer, he then asked defendant: "Do you think it will justify me in taking him out; has he got any money?" Defendant replied: "Yes; he has got money. You take him out"—to which Sanchez replied: "All right; I take him out to-morrow. On the following day Sanchez met Mr. Stern and others at Fullerton, and provided conveyances, in which they were conducted by him to and over the property, Sanchez pointing out the corners. There is abundant testimony to show that Sanchez and Stern met frequently during a period of several weeks, the object of such meetings being the discussion of the proposed sale of the property to Stern. On one of these occasions, according to plaintiff's testimony, he (Stern) brought with him his partner, and asked plaintiff to give him the price of the land, to which plaintiff replied: "You can talk to Mr. Yorba in person. I will call him up." Stern replied: "No; I will think it over, and will come in again." On May 10, 1906, defendant gave Stern an option on the land at \$48.75 per acre, followed later by a deed of transfer. The evidence is ample in showing that both T. G. Yorba and plaintiff labored joint-

ly in an effort to dispose of the property, and that defendant was fully aware that both parties were laboring to that end. Defendant himself testifies that at one meeting with a party who offered him \$40 per acre T. G. Yorba was present. This was a meeting in response to a message from Sanchez, telling him that he had a purchaser, and had \$500 to close the deal.

Appellant attacks the finding that Stern was ready, willing, and able to purchase the land. A sufficient answer to this contention is that the evidence conclusively shows that he did purchase that portion known as the "Yorba Ranch," and at a price satisfactory to defendant.

Appellant assigns error in the rulings of the court in the admission and exclusion of testimony, nearly all of which alleged errors, however, are based upon appellant's theory of the insufficiency of the letter to constitute an employment. What has been said upon this subject sufficiently disposes of these errors; suffice it to say that we find no prejudicial error in the rulings of the court in admitting evidence.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 489

LITCH et al. v. O'CONNOR et al. (Civ. 444.)
(Court of Appeal, Third District, California.
July 7, 1908.)

1. COURTS — APPELLATE COURTS — JURISDICTION — EQUITY CASES — "EQUITABLE ACTION."

An action to set aside a default entered in a foreclosure proceeding, and to have the decree entered therein vacated and declared void, is an equitable action within Const. art. 6, § 4, giving the Supreme Court jurisdiction in equity cases; and hence an appeal in such action was improperly brought to the Court of Appeal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2433.]

2. SAME—TRANSFER OF CAUSES—CASES APPEALED TO WRONG COURT.

Under Const. art. 6, § 4, providing that no appeal taken to a Court of Appeal shall be dismissed because it was not taken to the proper court, but shall be transferred to the proper court, an appeal in an equity case improperly brought to the appellate court is not lost, but will be transferred to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

Appeal from Superior Court, Butte County; K. S. Mahan, Judge.

Action by A. G. Litch and another against Charles A. O'Connor and another. From a judgment for defendants, plaintiffs appeal. Cause transferred to the Supreme Court.

L. F. Eggers, for appellants. Park Henshaw, for respondents.

PER CURIAM. The record in this case is called to our attention by a motion to dismiss the appeal as prematurely taken and also as taken from a nonappealable order.

The action is to set aside a default entered in a foreclosure proceeding, and to have the decree of foreclosure entered therein vacated, and declared null and void. The action is clearly in equity. The appeal is taken directly to this court, whereas by the provisions of section 4, art. 6, Const., appellate jurisdiction is given to the Supreme Court. The appeal, however, is not lost, but the same section of the Constitution provides that the cause be transferred to the proper court.

It is therefore ordered that the cause be transferred to the Supreme Court.

8 Cal. App. 527

BOARD OF DIRECTORS OF WOMAN'S RELIEF CORPS HOME ASS'N OF CALIFORNIA v. NYE, State Comptroller. (Civ. 447.)

(Court of Appeal, Third District, California. July 11, 1908.)

1. STATES—ACT APPROPRIATING MONEY TO CHARITABLE INSTITUTION—CONSTITUTIONALITY—STATE INSTITUTIONS—"INSTITUTION UNDER EXCLUSIVE MANAGEMENT AND CONTROL OF STATE."

By St. 1897, p. 447, c. 274, an appropriation was made for the support and maintenance of certain classes of inmates of the home at Evergreen under the auspices of the Woman's Relief Corps Home Association, which was then a private corporation. The act further provided that the home should be managed by a board of directors, to be appointed by the Governor, who was empowered to fill all vacancies therein and remove any director for cause; that the board should keep accounts of all receipts and expenditures and report annually to the Governor; and that all claims under the appropriation made should be presented and audited as other claims against the state. *Held*, that such act made the home a state institution under the exclusive management and control of the state, within the provision of article 4, § 22, Const. Cal., that with certain exceptions no money shall be appropriated or drawn from the state treasury "for the use or benefit of any corporation * * * or any other institution not under the exclusive management and control of the state as a state institution."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, § 118.]

2. SAME—APPROPRIATIONS—GIFTS.

An act making an appropriation for the support, in the Home of the Woman's Relief Corps Home Association, of ex army nurses and certain female relatives of veterans of the Civil War, which provides that no inmate for whose support there is paid, independent of state aid, \$12.50 per month or more, shall be entitled to any aid under the act, and that, where less than \$12.50 a month is paid, state aid may be had to raise the amount for support to that sum, cannot be held a gift within Const. art. 4, § 31, forbidding the Legislature to make any gift of any public money to any individual or corporation, when the duty of the state to care for its citizens who are unable to support themselves is considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, § 118.]

3. STATUTES—SPECIAL LEGISLATION — POWER TO MAINTAIN INSTITUTIONS FOR SUPPORT OF VETERAN SOLDIERS AND DEPENDENT RELATIVES.

Under the general power of the state to provide for the maintenance of those citizens

who are unable to care for themselves, and the implied power given to the Legislature by Const. art. 4, § 25, subd. 33, to enact special laws where a general law cannot be made applicable, the Legislature may lawfully provide for the maintenance and support, in a different manner from others of such general class, of veteran soldiers and their dependent relatives, who constitute a special class having peculiar claims upon the state, as well as the nation, and may also provide for the support of ex army nurses and dependent female relatives of veterans in a separate institution and in a different manner from the veterans themselves, and an act appropriating money for the support of such ex-nurses and female relatives in the home established at Evergreen by the Woman's Relief Corps Home Association, which has been made a state institution, is not unconstitutional as special legislation.

4. SAME—APPLICABILITY OF GENERAL LAW.

Under Const. art. 4, § 25, subd. 33, providing that the Legislature shall not pass a local or special law in cases where a general law can be made applicable, the question whether in a given case a general law can be made applicable is a matter for decision by the Legislature, and the courts cannot interfere except in case of a clear disregard of the constitutional requirement.

Petition by the board of directors of the Woman's Relief Corps Home Association of California against A. B. Nye, State Controller, for writ of mandamus. Writ granted.

H. C. Dibble and Oliver Dibble, for petitioners. U. S. Webb, Atty. Gen., for respondent.

HART, J. This is a direct application to this court by the petitioners for a writ of mandate to compel the respondent, as State Controller, to draw his warrant on the State Treasurer for the sum of \$784.50, which said sum is alleged in the petition to be an unexpended balance of the sum of \$10,000 appropriated by the Legislature of 1903 for the support and maintenance of the Woman's Relief Corps Home Association, located at Evergreen, Santa Clara county, Cal. It is alleged in the petition that the petitioners presented to the state board of examiners a duly verified account and demand for the payment of said sum of \$784.50, and that said board, on the 15th day of February, 1908, allowed and approved the said account and demand for said sum, and on the same day presented the same to the respondent, with the request that he draw his warrant upon the State Treasurer in favor of the petitioners for the payment of said claim; and that said respondent, as State Controller, refused to draw his warrant on the State Treasurer for the same. Annexed to and made part of the petition is a letter from the respondent addressed to the attorney for the petitioners herein, giving his reason for refusing to draw his warrant on the treasurer for the claim. Said letter reads: "Referring to your letter of February 25th, relative to the claim of the Woman's Relief Corps Home Association, I beg to say that there was this day received in this office a claim for support for the half year ending

December 31st, 1906, amounting to \$784.50; such claim having been passed by the state board of examiners. After giving due attention to this claim, I have reached the conclusion that I cannot draw a warrant for the payment of the same, because I am not fully satisfied that the Woman's Relief Corps Home Association is a state institution." The ground upon which the respondent refuses to draw his warrant, as intimated in the foregoing letter, is that the act making the appropriation for the support and maintenance of the Woman's Relief Corps Home Association is repugnant to certain provisions of the Constitution. The Attorney General, representing respondent, has interposed a demurrer to the petition, and thus the questions necessary to be considered and decided are presented.

The Legislature of 1897 (St. 1897, p. 447, c. 274) passed an act, and the Governor approved the same, the purpose of which may best be exhibited by reference to the provisions thereof. Section 1 provides for the appropriation of the sum of \$10,000 "for the support and maintenance of the ex army nurses and the widows, wives, mothers, and dependent destitute maiden daughters or sisters of Union veterans who served honorably in the Civil War, residing in the home at Evergreen, Santa Clara county, under the auspices of the Woman's Relief Corps Home Association, a corporation duly created and existing under the laws of the state, in the manner following, to wit: The sum of \$150.00 per annum for each ex army nurse, widow, wife, mother, or maiden daughter or sister, duly admitted and residing in such home; provided, the whole of said sum shall not be expended in any one year for such support and maintenance." Section 3 of said act provides that the management and control of said home shall be by a board of 11 directors, to be appointed by the Governor, 6 of whom shall be appointed for two years and five of whom for one year, and section 4 provides that "as the terms of office of directors shall expire, or in case of vacancy, the Governor shall appoint their successors. The Governor shall have power to remove any director for cause." Section 5 requires that "each member of the board of directors shall take and file with the Secretary of State the oath of office as provided by law." The third, fourth, and fifth subdivisions of section 6 make it incumbent on the board to keep a full record of its meetings, a book containing the monthly accounts, in which shall be entered all moneys received from any and all sources, all disbursements made and the purpose for which made; to keep a pay roll of the employes and the amount disbursed to each, at what rate of wages and for the length and kind of services, and to forward to and file with the state board of examiners, at the time of making demand or presenting claims for state aid, a transcript of such books and

pay roll, verified by the oath of the president or secretary of said home. Section 7 reads: "Every claim for aid under this act shall be presented to and audited and allowed by the state board of examiners, and when allowed, in whole or in part, by said board of examiners, it shall be the duty of the Controller to draw his warrant for the amount thereof in favor of the president and treasurer of the board of directors of said home association, and it shall be the duty of the State Treasurer to pay the same on due presentation." Section 9 provides: "The board shall cause to be made a verified report on the fifteenth day of August of each year to the Governor, containing a statement of all receipts and expenses, the condition of the home, the number of inmates during the year ending June 30th, and such other matters as may be required by him. All reports shall be verified by the oath of the president and secretary of the board."

The assault upon the act by the respondent involves, principally, two questions, to wit: (1) Is the Woman's Relief Corps Home Association, by the provisions of said act, placed under the exclusive management and control of the state as a state institution? (2) If the act does make said home a state institution to be exclusively managed and controlled as such by the state, assuming that in view of its purposes it can be made one, did the Legislature violate certain provisions of the Constitution in the enactment of such legislation?

The fact is conceded that prior to the passage of the act in question the Woman's Relief Corps Home Association existed as a private corporation; it having been organized under the laws of the state. It is claimed by the Attorney General that the act does not make the home a state institution, hence it is contended that the appropriation made by said act is in direct contravention of section 22 of article 4 of the Constitution. Said section, among other things, provides: " * * * No money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state; provided, that, notwithstanding anything contained in this or any other section of this Constitution, the Legislature shall have the power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances—such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions." It will be observed that the first part of the foregoing provision of the Constitution prohibits the Legislature from making appropriations for the use of corporations, etc., not under the

exclusive control of the state as state institutions; while the latter part expressly excepts from the operation of said provision institutions having the care, maintenance, and support of minor orphans, half orphans, abandoned children, and aged persons in indigent circumstances, although such institutions are not under the exclusive management and control of the state as state institutions.

It is contended by the respondent that the Woman's Relief Corps Home is still a private corporation, notwithstanding the provisions of the act of 1897 (St. 1897, p. 447, c. 274) purporting to place the home under the control of the state as a state institution; that the Legislature, assuming the act in question to involve the exercise of competent legislative power, has utterly failed to make it a state institution, etc. We are unable to agree with the learned Attorney General in this contention. In 1889 the Legislature made an appropriation of \$25,000, of which \$10,000 were to be expended in the construction of buildings and \$15,000 for the support of the widows, wives, etc., of veterans and army nurses in indigent circumstances who were or were to become inmates of the home so provided for. At that time the home was a private corporation; but the circumstance of the making of said appropriation by the Legislature is important here in determining whether the Legislature, by the act under consideration, intended to make the home a state institution, to be under the exclusive management and control of the state. By that act (St. 1889, p. 418, c. 268) it was made manifest that the legislative department of the state government recognized, as the federal government had already done for itself, the duty of contributing toward the support and maintenance of such of those citizens as might require it who fought the battles of their country when the dark clouds of Civil War enveloped it and threatened the destruction of its Constitution and its institutions. To carry out this policy founded in a strong moral duty, it was, of course, necessary that there should be legislation, and that whatever legislation might be required should be enacted, if it could be done, in accordance with the commands and the terms of the Constitution of the state. In 1897 the Legislature, in pursuance of this policy, passed the law, the constitutional validity of which is questioned in this proceeding. That the Legislature by the last-mentioned act intended to adopt the Woman's Relief Corps Home Association as a state institution, of which it intended that the state should exercise exclusive management and control, I do not entertain the slightest doubt. The act provides, as seen, for the appointment of a board of directors of said home by the Governor of the state. It provides that the executive shall fill by appointment all vacancies occurring in the board of directors from whatever cause. It requires the board and other officers to keep an account of its receipts of

money and of all expenditures, and provides that no money shall be drawn on the fund established by legislative appropriation for its support or the support of its inmates, except it be done in the manner authorized by law for the payment of all other claims against the state. It provides that a verified report, containing a statement of the receipts and expenses of the home and the condition thereof, etc., shall be by the board of directors transmitted to the Governor on the 15th day of August of each year. The Governor is given by the act the power to remove any director for cause. I cannot perceive how the Legislature could have more plainly demonstrated its intention to make the home a state institution, as much under the control and supervision of the state as are the state hospitals and other like institutions, than by the provisions to which I have just referred. It is true that there is no language in the act expressly declaring the home to be a state institution, or that its management and control shall be exclusively vested in the state. But I do not apprehend that, in order to make it so, it must be specifically labeled as such. It is sufficiently known by the clothes that it wears. The single fact that the power of the removal of a director is placed by the act with the executive of the state is itself plainly indicative of the intention of the Legislature to make it a state institution under the exclusive management and control of the state. The other provisions of the act emphasize this intention. The Legislature found in the home a mere private corporation, organized under the laws of the state for eleemosynary purposes, and by an act deprived it of the character of a private corporation by impressing it with all the essential qualities of a state institution. The very argument of the Attorney General tends to establish the soundness of this proposition, for he correctly declares that, if the home still remains a private corporation, the mode of appointing the directors authorized by the act would be in conflict with the thirty-third subdivision of section 25 of article 4 of the Constitution, providing that the Legislature shall not pass local or special laws in cases where a general law can be made applicable. It is not to be assumed that the Legislature would deliberately attempt to invalidate a private corporation, already duly organized according to the laws of the state, by annexing to it a mode of selecting its directors plainly and palpably in violation of the requirements of the Constitution. It will no doubt be conceded that the Constitution contains no language prohibiting the Legislature from converting a private corporation into a state institution and placing it under the exclusive management and control of the state, provided, of course, that the purposes sought to be achieved by such corporation are within the general legislative power or involve some duty or function of government. *Melvin v. State*, 121 Cal. 16, 55 Pac. 416.

In dismissing this point I feel no reluctance in confessing that if the language of the statute under consideration does not make the home a state institution under the exclusive management and control of the state, within the meaning of section 22 of article 4 of the Constitution, then I am at a loss to understand what the Legislature meant or intended to accomplish by the enactment of the law. For the purposes of the discussion of this point, I have assumed, as before observed, that the Legislature possesses the constitutional right and power to establish the home as a state institution—a proposition, the consideration of which I now approach fully sensible of its great importance, both as to the legal questions involved as well as to the significance of the consequences of the decision, whatever it may be. If, on the one hand, it should be found necessary to declare that the act under review represents an exercise of unauthorized power by the Legislature, the effect of such decision will react not alone upon the institution here involved, but will, of necessity, operate upon and destroy, as a state institution, the veteran's home for United States soldiers and sailors, at Yountville, this state, the same having been established and declared a state institution by the Legislature of 1889. St. 1889, p. 418, c. 268. The two institutions must stand or fall upon the same identical principles. On the other hand, the provisions of the Constitution cannot be lightly brushed aside because certain persons or set of persons may, to some extent, suffer by their proper enforcement. They should, of course, be enforced, as it was intended that they should be, without regard to the consequences which may follow such enforcement.

Among the provisions of the Constitution to which the Attorney General insists that the act in question is repugnant are the following: " * * * Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Article 1, § 21. "(2) The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Granting to any corporation, association or individual any special or exclusive right, privilege or immunity." Article 4, § 25, subd. 19. "(3) * * * Nor shall it (the Legislature) have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." Article 4, § 31. The foregoing provisions, it is claimed, were disregarded by the Legislature in the enactment of this law. To uphold the enactment, it is urged, the courts must close their eyes to the plain mandates of the Constitution. The Attorney General argues that the purposes of the home are entirely nongovernmental, and that it is in excess of the power of the Legislature to convert or undertake to transform such a corporation into a state

institution, or place it as such under the exclusive management and control of the state; that the mere fact that the Legislature has attempted to invest it with the character of a state institution does not necessarily make it so, since only those institutions which are the instruments through which some governmental functions are to be performed can the Legislature make state institutions under the exclusive management and control of the state. Therefore it is argued an appropriation of money by the Legislature for the use and benefit of such an "institution" would amount to a gift contrary to the provisions of section 31 of article 4 of the Constitution. This position, if the premise be well founded, would perhaps be sound. And it is further contended that even if the objects of the home are germane to the functions of government, and are therefore within the legislative power, the legislation involved in the act is special, and consequently unconstitutional, because it does not apply "equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction." *Pasadena v. Stimson*, 91 Cal. 251, 27 Pac. 604; *Darcy v. Mayor of San Jose*, 104 Cal. 642, 38 Pac. 500; *Marsh v. Supervisors*, 111 Cal. 372, 42 Pac. 975; *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17. In other words, it is claimed that the act attempts to provide for the care of certain persons arbitrarily selected from the body of the people.

As a matter of course, no one will dispute the proposition that the support of paupers and the giving of assistance to those who, by reason of age, infirmity, or disability, or inability for any reason to take care of themselves, might become such, is, by the practice and common consent of civilized countries, a public purpose, and within the general legislative power. As is said by Judge Cooley, in his work on Taxation, p. 205, speaking of the establishment of hospitals where dependent classes can receive medical aid and assistance, asylums where the deaf, the dumb, and the blind may be supported and taught, and where the insane may be kept from doing or receiving harm and can have such careful and scientific treatment, with a view to their restoration, as they would not be likely to receive elsewhere: "He would be a bold man who, in these days, should question the public right to make provision for these benevolent purposes." There is, of course, no question raised here of the right and duty of the state to provide for those who, through physical or mental disability, are unable to provide for themselves; but the power sought to be exercised by the act under consideration is the same as the power spoken of by Judge Cooley, although such legislation, when applied to the persons concerned here, proceeds less upon the principle of benevolence than

upon the consideration that aid accorded by the state to those who defended and preserved the governments of our country, when, as supposed to have been originally constituted, they were threatened with complete annihilation, is rather in the nature of some reward for a service, the value of which can scarcely be estimated. The general scheme and the paramount purpose of the act appear to be the establishment of a refuge or a permanent home, where the comforts of home life may, to some extent, be had, for the ex army nurses and certain relatives of ex Union soldiers, who served honorably in the Civil War, who are unable to provide homes for themselves. Section 8 provides that "no inmate for whose support there is paid, independent of state aid, the sum of twelve dollars and fifty cents or more per month, shall be entitled to any aid under this act. But if such sum be less than twelve dollars and fifty cents per month, aid shall be granted for such sum only as is necessary to make the full amount for support, including the state aid, twelve dollars and fifty cents per month." St. 1897, p. 449, c. 274. By this provision of the act it is made perfectly clear that only such persons as have no income whatever or who have an income not equal to the sum of \$12.50 per month shall receive any financial aid from the appropriation provided for by the act. Of course, as already shown, ex Union soldiers and their families, if in a condition in which, by reason of old age or other physical disability, they are unable to properly take care of themselves, and are without means with which to provide for their proper care and support, and there are no relatives financially able, who are obligated by the law to contribute to their support and care, would be entitled to be supported and maintained at the expense of the public under the general duty and power of the state government to support paupers and those who are likely to become such for the reasons stated. In other words, the persons provided for by the act here, being unable to take care of themselves, would be entitled to be cared for by the public in some form, and the power is therefore vested in the Legislature to make some sort of provision for them. From this it, of course, follows that the contention of the respondent that the appropriation provided for by said act amounts to a gift within the meaning of section 31 of article 4 of the Constitution cannot be sustained. See case of Yosemite Stage, etc., Co. v. Dunn, 83 Cal. 265, 23 Pac. 369, as to what constitutes a gift within the purview of said provision of the Constitution. The only question, then, is: Has the Legislature, by the manner in which it has exercised or attempted to exercise its right to provide for the care and support of the persons eligible to become inmates of the home, violated any other of the provisions of the Constitution?

At the outset, it may be conceded that the

act in question is a special law, because it provides only for certain members of what I regard as a class within the definition of that term as given by the Supreme Court in the cases of Pasadena v. Stimson, supra, Darcy v. Mayor of San Jose, 104 Cal. 642, 38 Pac. 500, Marsh v. Supervisors, 111 Cal. 372, 43 Pac. 975, Ex parte Jentzsch, 112 Cal. 372, 44 Pac. 803, 32 L. R. A. 664, and Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17. In other words, I am of the opinion that the veterans of the Civil War constitute a class founded upon a natural distinction; that is, a distinction arising in the very nature of things. In one of the opinions to which I have referred it is said that the distinction must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation. Or, as I understand it, a distinction founded upon the necessity of legislation peculiarly applicable to a particular set of persons who are distinguished from the general body of the people by reason of the possession of some exclusive characteristic or characteristics, common to such set of persons. The "exclusive characteristic" possessed by the veterans of the Civil War consists in the peculiar and extraordinary service performed by them in the defense and preservation of the government of the Union as well as of the governments of the states when those governments were threatened with destruction. The act under consideration is, as stated, a special law for the reason that its provisions do not and by their terms cannot apply to and operate equally upon all belonging to the class to which the persons concerned here belong. That is to say, conceding, as I think must be done, that the relatives of the Civil War veterans and the ex army nurses provided for by the act are members of the class to which the veterans themselves belong, the legislation under attack here is, obviously, designed to operate upon and benefit only a certain portion of said class. The question, therefore, to be determined is: Has the Legislature constitutional power to enact a law specially applicable to the persons concerned here?

It is a fact, of which the courts may take judicial notice, that almost immediately after the close of the Civil War the national government, through its Congress, recognized it to be the duty of the public to take special care of those who, through the most exalted motives of patriotism, devoted themselves to their country's cause, in a civil conflict which meant, if not victorious for the Union, absolute destruction to the principles of government enunciated by the federal Constitution, as the provisions of that instrument were construed by the master minds of Judge Marshall, Webster, and other distinguished adherents of the school of broad construction. To execute this duty

Congress passed laws pensioning ex Union soldiers and otherwise providing for their care, support, and maintenance in all cases of disability from any cause engendered while in the service of the country. Thus Congress established this duty as a policy of the federal government. It must be borne in mind that the government of the Union is one of delegated powers, with no right or authority to exercise any but the express powers granted to it and such implied powers as may be necessary to carry out and execute the former. There is no express provision in the federal Constitution, to which my attention has been called, authorizing the appropriation of public moneys for the pensioning of soldiers who fought to preserve the Union, and it certainly must be admitted that it would require a severe stretch of the imagination to hold that an implied power to do so may be found in the provisions of that instrument authorizing Congress "to declare war," etc., and "to raise and support armies," etc. Nevertheless Congress has exercised the right to give such aid to ex Union soldiers, and whatever may be its authority for doing so, whether a claimed implied or incidental power, or upon the principle of a paramount, overruling duty, the courts have sustained the legislation. *Frisbie v. U. S.*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657; *Walton v. Cotton*, 19 How. 355, 15 L. Ed. 658; *U. S. v. Fairchild*, Fed. Cas. No. 15,067. There may be no impropriety in suggesting, however, that it is doubtful if much higher authority ought to be required for such legislation by both the nation and the states than is to be found in these memorable words used by the immortal Lincoln in his second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."

Nor can I conceive any rational ground for holding that the states, if disposed to exercise the right, should not contribute toward the support and maintenance of these worthy persons in need of assistance. The moral duty to do so undoubtedly rests upon both the federal and state governments, and, if there be any difference as to the responsibility of discharging such duty as between the two governments, it is only in degree, and not in principle. It is only a question of whether the states will recognize this duty by the enactment of appropriate legislation for its performance. It is a familiar historical fact that the loyal states, acting through their Governors, and responding to the call for troops from the government at Washington, drafted into the service of our common country in the Civil War certain of

the citizens of such states who made up the great armies which won for the states as well as for the Union on the battlefields what could not be won in the great council halls of the nation. The perpetuity of the states, as members of an unbroken union, was as much at stake as was the maintenance of the Union itself. The states, governed under their present system, could not, of course, have survived if the war had resulted in the establishment of the right of secession. The state of California has, as is shown by the legislation which has from time to time been enacted by its Legislature, adopted as a policy of the state government the duty of contributing toward the support and maintenance of the veterans of the Civil War and their families who are unable, by reason of physical disability, to support and maintain themselves. And are there not sound and unimpeachable reasons for caring for and supporting these persons in a manner different from the mode adopted for the care and maintenance of that class who have no other claim upon the bounty of the government than that they are without ability, physical or financial, to provide for themselves? It surely could not have been intended by the Constitution makers that the Legislature should be powerless, in the treatment of these war veterans or their families, in need of help, to provide for their care and support except under the general power of providing aid for those coming within the category of paupers, or other needy persons who, from physical disability, are apt to become such. The service which these veterans performed, not only distinguishes them as a class from the general body of citizens, but necessarily differentiates them from the members of the other class entitled to the public bounty because they have not the ability to care for themselves. The principle upon which the government should recognize its duty to provide for the veterans of our wars, with whose personal destinies those of the persons concerned here were and are inseparably linked, is a higher and broader one than that which inspires the public duty to care for the other class; for, the idea that those who have performed such extraordinary service for the government, when its preservation depended entirely upon such service, should be succored in times of need under the category of paupers or of those who would become paupers but for aid from the public bounty, is intolerable and so abhorrent to a profound, patriotic sense of gratitude and the sentiments and principles of a justly grateful people that there is hardly reasonable ground for the assumption that the framers of our fundamental law ever intended that the legislative power should be so circumscribed as to prevent legislation appropriately expressive of the great debt of honor due from the state to those loyal defenders of our common country.

Nor is it to be said that such legislation is altogether in the nature of compensation for services performed. The highest and fullest compensation for these great services consists in the realization by themselves, as well as by their countrymen, of the fruition of their patriotic, dauntless, and eminently successful efforts to preserve the Union. Indeed, as I have before suggested, the value of such services cannot be measured by any known standard by which the value of human activities may ordinarily be determined. It involves no mere figure of speech to say that the soldiers who battled to make this a united country, and the federal Constitution the supreme law of the land, are the saviors of our country. They became such, not because they expected reward founded upon a money or commercial basis, but because of high patriotic motives, founded in a firm and impregnable belief in the indissolubility of the Union under the terms of the Constitution given us by our fathers. The service thus performed was, as before observed, a peculiar service, for the reason that it was an extraordinary governmental service, called out only because of the exigencies of overruling necessity. Thus it is essentially different from the ordinary service involved in the civil administration of the affairs of government. Therefore, I think, that those who performed that extraordinary service for the government constitute a class, distinguished by a line clearly segregating them not only from the general body of the people, but also from that other class entitled to be cared for, supported, and maintained at public expense. The consequence of these views is that, in the recognition of its moral duty to aid these persons when they need such assistance, the state has the right, through its Legislature, to enact laws upon the subject whose provisions are peculiarly applicable to them as a class, and that such laws, if operative upon all members of such class, do not offend the constitutional injunction that "all laws of a general nature shall have a uniform operation."

But, since it is patent, as before observed, that this act is not designed to apply to all belonging to said class, and as it is manifest that a general law could not be made applicable in the case here, it is nevertheless within the constitutional power of the Legislature to enact special legislation to meet the peculiar circumstances of the case. It must at all times be kept in mind that the subject to which this legislation relates is one as to which the Legislature, under its general power, has the right to legislate. It is true that the legislation pertains to a duty, the performance of which is a matter which primarily rests entirely in the discretion of the Legislature. It is different from such duties as are expressly commanded by the Constitution to be performed by the Legislature. It is, as I have attempted to show, a

moral duty which the Legislature may or may not discharge. But it is a duty which, in my opinion, it ought to assume. As I have before stated, the difficulty in the legislative solution of the proposition lies in the problem of how or in what manner the Legislature may exercise its right to grant aid to the persons concerned. As previously observed, I believe it has the undoubted right to do so in a manner different from that within its general power to give public assistance to paupers and others unable, by reason of disability of some sort, to take care of themselves. By subdivision 33 of section 25 of article 4 of the Constitution it is provided (negatively it may be), and the Supreme Court, construing that subdivision of said section has held, that in all cases where a general law cannot be made applicable the Legislature is authorized to pass a special law for the purpose of meeting the exigencies of the particular case. *People v. McFadden*, 81 Cal. 498, 22 Pac. 581, 15 Am. St. Rep. 66; *People v. Mullender*, 132 Cal. 221, 64 Pac. 299. Said section 25 of article 4 of the Constitution, after enumerating 32 subjects upon which local and special legislation is prohibited, provides: "* * * (33) In all other cases where a general law can be made applicable." In the *Mullender* Case, supra, the Supreme Court says: "That the act here in question is both local and special is conceded. But that is not conclusive. The language of said paragraph [referring to the thirty-third subdivision of section 25, art. 4, supra] plainly implies that there are or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation. The Constitution submits the question whether a general law can be made applicable in any given case to the judgment of the Legislature, to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable. In Indiana it is held that the Legislature is the exclusive judge whether a general law can be made applicable—citing *State v. Tucker*, 46 Ind. 358, and cases therein cited. In Iowa it is held that where a local or special law is not within the evil which the Constitution sought to provide against, or where the enactment of a general law would not afford any remedy for or relief from that evil, such local or special law is valid"—citing *State v. Squires*, 26 Iowa, 340, 345. See, also, *State v. Hitchcock*, 1 Kan. 178, 185, 81 Am. Dec. 503, and *Farrelly v. Cole*, 60 Kan. 375, 56 Pac. 492, 44 L. R. A. 464.

From the foregoing interpretation of the power of the Legislature under the thirty-third subdivision of section 25 of article 4 of the Constitution, and from the views heretofore ventured in this opinion as to the

right of the Legislature to grant aid in some form to the persons interested in this act, it follows that the law-making branch of the state government, in the exercise of the discretion committed to it by said thirty-third subdivision of said section and article of the Constitution, has not transcended its constitutional power in providing for these persons through a special law; for it is plain to be seen that a general law cannot be made to apply. Unless it appears clear that the Constitution has been violated, this legislative determination is, under the decisions, conclusive upon the courts, and the right to pass a special law to meet the circumstances of the case is authorized under the doctrine of those decisions. The law under attack in the Mullender Case, supra, established a state board of harbor commissioners for the bay of San Diego. Said law does not refer or apply to any of the other harbors within the state, and it involves essentially by the scope and very nature of its provisions, local and special legislation. It was sustained by the Supreme Court as a species of local and special legislation authorized by the subdivision of the section and article of the Constitution referred to. I conclude that, for the reasons stated, the act here, though involving special legislation, is justified and authorized by the Constitution.

But, in addition to the foregoing considerations, it may be suggested that the legislation here could well be sustained upon the principle upon which the Legislatures of the states have often conferred upon municipalities, for instance, the right to appropriate money for the purpose of commemorating the anniversary of important events in the history of our country, as, for illustration, the Fourth of July. Referring to those cases in other jurisdictions in which such appropriations of municipal funds have been held to be not warranted, only for the reason, however, that the power to do so had not been expressly conferred by the Legislature upon such municipalities, the Supreme Court, in the case of Daggett v. Colgan, 92 Cal. 59, 28 Pac. 53, 14 L. R. A. 474, 27 Am. St. Rep. 95, in a well-considered opinion by United States District Judge De Haven, then a member of our Supreme Court, says: "But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as an appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. * * * These cases are authority for the proposition that the state itself, unless restrained by its Constitution, has the power to make appropriations for such purposes, because unless it possesses the power it could not confer it upon its municipal corporations. Such expenditures are justified under the general power which the state has to provide for the public welfare—the limits of which are perhaps not capable of exact definition—

and are the same in principle as appropriations made for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation." (Italics ours.) The principle underlying and sustaining the legislation referred to in the foregoing excerpt from said opinion is that from which the Legislature deduces its right to pass laws authorizing the pensioning of police officers of certain cities of the state. Such legislation is founded upon the theory that to hold out such a reward to those engaged in certain branches of the public service, especially those branches in which the service required is beset by perils and danger to the lives and health of those performing it, has a tendency to enhance the efficiency of such service and is consequently in the interest of the public welfare. And the money appropriated for such purpose has been held by our Supreme Court not to be a gift of public money or the legislation authorizing it violative of any of the provisions of the Constitution. *Pennie v. Reis*, 80 Cal. 266, 22 Pac. 176. Upon a similar principle Congress has assumed the right to pension the widows of former presidents of the United States, as in the case of the widow of the lamented Garfield. It will not be denied that there is no language in the federal Constitution from which it can even be implied that any such power is vested in Congress. Yet such appropriations of the public money are sustained by the common sentiment and patriotism of the whole country, and the right of Congress to make them, in proper cases, will never, in my opinion, be challenged so long as a vestige of gratitude remains in the people of the United States.

I have examined and considered the questions presented here in extenso and with painstaking care because, as before declared, I am deeply sensible of their importance and equally impressed with the conviction that an act of the Legislature granting aid to the necessitous benefactors of our country and the relatives dependent upon them involves legislation for the benefit of the public weal and welfare and within the constitutional power of the Legislature. Such legislation adds strength and durability to the natural patriotism of the people, because it furnishes further proof that the institutions of the country for which they fought and for which others may be called upon to do battle are all that is claimed for them, and as they believed them to be when they willingly and patriotically made every sacrifice to sustain them.

The demurrer of the respondent, for the reasons stated in this opinion, is overruled, and a peremptory writ of mandate ordered in accordance with the prayer of the petition.

I concur: CHIPMAN, P. J.

I concur in the judgment: BURNETT, J.

8 Cal. App. 515

GOLDTREE v. CITY OF SAN DIEGO et al.
(Civ. 445.)(Court of Appeal, Second District, California.
July 9, 1908. Rehearing Denied Aug. 8,
1908; Denied by Supreme Court
Sept. 7, 1908.)**1. MECHANIC'S LIEN—ORIGIN OF RIGHT.**

The right to a mechanic's lien is created by Const. art. 20, § 15, declaring that laborers of every class shall have a lien; the mechanic's lien law of the Code being only the statutory provisions for enforcement of the lien which such section of the Constitution required the Legislature to provide.

2. SAME—PUBLIC WORKS.

Under Const. art. 20, § 15, declaring that laborers shall have a lien on the property on which they have bestowed labor, while, for reasons of public policy, a lien may not be enforced against a sewer built for a city, it may be against the fund owing by the city to the contractor for the part of work into which the labor entered.

3. SAME—NOTICE OF CLAIM.

The method provided by Code Civ. Proc. § 1184, for giving notice of claim of lien by notice to the holder of the fund earned by the claimant's labor, and not that provided by section 1183, by recording against the property, applies where a lien is claimed for work done on a public improvement.

4. SAME—OTHER REMEDY.

Bond Act 1897 (Laws 1897, p. 201, c. 140) does not exclude the right to a lien for labor on public work by merely giving a cumulative means for securing payment for the claim.

5. SAME—EQUITABLE COGNIZANCE.

A mechanic's lien is of equitable cognizance.

6. MUNICIPAL CORPORATIONS — ACTIONS AGAINST.

Const. art. 20, § 6, providing that suits may be brought against the state in such manner and in such court as shall be declared by laws, has no application to municipal corporations.

7. MECHANICS' LIENS—PERSONAL JUDGMENT.

A laborer doing work for a subcontractor is not entitled, in a mechanic's lien case, to a personal judgment against the contractor.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by S. A. Goldtree against the city of San Diego and others. Judgment for plaintiff. Defendants P. A. Howard and others appeal. Modified and affirmed.

Cassius Carter, for appellants. S. F. Smith and Collier, Smith & Hoff, for respondent.

On Rehearing.

TAGGART, J. It being assumed, upon the former decision of this appeal, that the errors relied upon on the appeal from the judgment were the same as those presented on appeal No. 472, 97 Pac. 218, which was considered with it, the error of the trial court in awarding a personal judgment against the defendants Howard and Long escaped attention. We are satisfied that, while the laborers working for the subcontractor Stabler were entitled to have that portion of the sewer fund earned by their labor applied to the payment of their claims, they were not entitled to a personal judgment against the contractors. In other respects we are satisfied with

the opinion of this court, filed in appeals Nos. 472 and 445, on the 10th day of January, 1908, which opinion is as follows:

"Both of these appeals relate to a consolidated action to enforce an equitable lien upon a sewer improvement fund in the treasury of the city of San Diego, claimed by plaintiff as the assignee of 48 laborers, who worked upon the sewer system for which said fund was provided. Judgment was for plaintiff. Appeal No. 445 is by all the defendants other than the city of San Diego, and is from the judgment and from an order denying their motion for a new trial. No. 472 is an appeal by the city of San Diego from a part of the judgment. These two appeals are brought up on separate records, but were submitted together by consent of the respective parties, and the briefs in each case are considered as if filed in both. Upon the oral presentation of Appeal No. 445 it was stated, by the presiding justice of this court, that if the papers claimed to have been omitted from the transcript were deemed necessary for a full consideration of the cause upon its merits, counsel for appellants would be notified and permitted to supply the same. Since these papers are all before us in the record in No. 472, the causes will be heard as if upon a consolidated record embracing both transcripts, and the objections to the transcript in No. 445 will not be considered. Plaintiff's assignors performed labor to the value of various sums, ranging from \$3.96 to \$53.46, and amounting in the aggregate to \$1,231.96, upon a sewer system constructed by the city of San Diego. This labor was done under an employment by the defendant Stabler, who was a subcontractor under the defendants Howard & Long, who were contractors with the city to construct such sewer system. Stabler defaulted in his subcontract, and discontinued and abandoned work upon the portion of the sewer which he was to construct, and it was completed by said Howard & Long. At the time of the abandonment there was, in the hands of the city of San Diego, then due from it to the contractors, from the fund in its treasury applicable to such sewer construction, the sum of \$5,000, and of this sum more than \$1,000 was earned by the work done on the portion of the sewer constructed by Stabler. Stabler failed to pay the said 48 laborers for their labor on the sewer, and, immediately upon his abandoning the work, and while said sum was still in the city treasury, they each served notice in writing on the city of their several claims upon said fund, as provided by section 1184 of the Code of Civil Procedure. Thereafter the 48 claims were assigned to plaintiff, who brought a single action upon the combined claims, and also separate actions upon each of them, which actions were, by order of the trial court, consolidated, as provided by section 1048 of the Code of Civil Procedure.

"The first point made by appellants we do not think it necessary for us to consider at

length. The validity of the bond given by the contractors is not in question here, as no recovery on the bond is sought by plaintiff. The reference to it in the complaint is to a step in the proceedings taken and had in the making of a valid contract between the city and Howard & Long. The order overruling defendants' demurrers to the complaint, on the ground of want of jurisdiction of the court, must be considered, then, in connection with the objections (1) that the amount sued upon in each of the actions is less than \$300; and (2) that service of the notice provided to be given by section 1184 does not create an equitable lien upon that part of the sewer improvement fund in the city treasury which is due and owing, under the contract with Howard & Long, for work done upon that portion of the sewer system constructed by the labor of plaintiff's assignors. The state Constitution (section 15, art. 20) declares that laborers of every class shall have a lien upon the property upon which they have bestowed labor, for the value of the labor done. No exception as to public or municipal property is made by the section. Only because of other constitutional provisions, or by reason of public policy, can the laborer be deprived of the right so created by the people. Without constitutional authority the right to the lien cannot be taken away by the Legislature, either by legislation or lack of legislation. The last clause of section 15 requires the Legislature to provide, by law, for the speedy and efficient enforcement of the liens, the right to which are thereby created. The question of whether or not section 15 is self-executing is not material, since the Legislature in obedience thereto has already provided a good and sufficient procedure whereby the lien may be declared and enforced. Authorities based upon the theory that the lien law is a creation of the statute, in the strict sense of that term, are misleading when the right to the lien is under consideration in this state. Only as the terms 'statute' or 'statutory law' are intended to include the Constitution, as well as the enactments of the Legislature, can they be said to create the right to a mechanic's lien. *Spinney v. Griffith*, 98 Cal. 149, 32 Pac. 974. The more recent decisions of the Supreme Court recognize the force of the constitutional declaration of the right. *Hampton v. Christensen*, 148 Cal. 737, 84 Pac. 200; *Hughes Bros. v. Hoover*, 3 Cal. App. 150, 84 Pac. 681. The mechanic's lien law of the Code is the statutory provision made by the Legislature in obedience to the constitutional mandate of section 15, and prescribes the manner in which the right to the lien in each particular case may be declared and rendered effective. Two methods are provided for giving notice of claim of lien; one by recording against the property (section 1183), and the other by notice to the holder of the fund which has been earned by the claimant's labor (section 1184). The former, for reasons of public policy, cannot be enforced against

a public building or improvement, but no such objection exists as to the latter. It is contended by appellants that both of these methods were intended by the Legislature to apply only to private owners. To so construe the enactment would be to hold that the Legislature has failed to carry out the command to provide means to render effectual the right created by the Constitution; that it has only partially complied with the requirement of the section. Bond Act 1897 (Laws 1897, p. 201, c. 140) does not recognize a lien, or provide for the speedy and efficient enforcement of one. As a means of securing the payment of the claims of laborers employed upon public work, it is merely cumulative, and does not exclude or do away with the constitutional lien. Section 1184 furnishes the only available method by which the laborer can obtain the benefit of his lien upon public work. It is apparently upon this principle that the decisions in *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438, and the cases relying thereon were decided.

"The contention that the lien is not of equitable cognizance because created by law cannot be considered. Such a distinction would destroy all equitable jurisdiction to carry out the provisions of the Code. The remedy for the enforcement of the lien is clearly an equitable one. *Weldon v. Superior Court*, 138 Cal. 431, 71 Pac. 502. It is not the ordinary action that the plaintiff might have brought against the employer of his assignors for their wages. The right of the plaintiff to serve an ordinary garnishment upon the funds held by the city is not before us.

"The part of the judgment affecting the city of San Diego merely decrees a lien upon the sewer fund found to be owing to the contractors for the construction of the sewer, and orders that there be paid from this fund to plaintiff the amount found to be due to his assignors from the contractors. We are not able to see any distinction, in this respect, between the position of the city of San Diego here and that of the county of Santa Barbara in the case of *Bates v. Santa Barbara*. It is contended by appellants that in the *Bates* Case the county was satisfied, while the city of San Diego is contesting in the case at bar. The real contest here is whether the laborers or the contractors shall receive the money earned by the former, and the determination of this question will not affect the amount which the city will be required to pay for its sewer. No reason is apparent why it should not be satisfied, whatever the decision of the court upon the question to whom the money shall be paid. The case of *Bates v. Santa Barbara* is directly in point because there, as here, the question was to whom should be paid the money due upon a contract for public work, the validity of which contract was not assailed and the obligation of the city to pay for the work undenied.

"We do not think the provisions of section 6 of article 20 of the Constitution are to be

construed as extending to municipalities as well as to the state. The judgment here is not against the city, but against the fund, and there is ample authority in this state sustaining the power of the courts to render judgments against municipalities of the character of the judgment in this case. *S. F. Gas Co. v. San Francisco*, 9 Cal. 453; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Water Works v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *Contra Costa v. Breed*, 139 Cal. 432, 73 Pac. 189; *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Bates v. Santa Barbara*, supra.

"We recognize that it has been determined in *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, that a mechanic's lien cannot be enforced against a public schoolhouse erected by a public school district, and that it has been declared in *Skelly v. School District*, 103 Cal. 659, 37 Pac. 643, that trustees of a school district cannot be garnisheed in an ordinary action to recover for work done and materials furnished in the building of a schoolhouse, but we do not think it was necessary to the decision of either case to so construe the constitutional provisions for a mechanic's lien as to exclude laborers upon public works from its benefits, beyond the extent which public policy requires. Under the construction we have given the Constitution and the statute, none of the grounds of public policy urged against the enforcement of a lien against public property are violated. The performance of the public duties of the municipality will in no way be interfered with. The city's only interest in the litigation is that of a stakeholder, and no costs of the litigation can be imposed upon it. Only the fund, not the property, is subject to the lien. In *Skelly v. School District*, supra, a distinction is drawn by Temple, C., writing the opinion, between the scope of the powers of a school district and those of a city. He says: "They [school districts] may be sued, it is true, but this does not enlarge the scope of their powers. On the other hand, some of the powers of a city may be considered private, as they are for the special advantage of the municipality as distinct from the general public. School districts being, like counties, political subdivisions of the state, can be sued only by permission of the state. Their funds are all devoted by statute to specific purposes"—and therefore cannot be garnisheed. *Bates v. Santa Barbara* has been and is accepted as establishing the right contended for by the plaintiff, and we think, in so far as there is any conflict or inconsistency between it and the cases last cited, in this respect, the *Bates Case* is more in accord with the spirit and intention of the constitutional provision and the more recent declarations of the Supreme Court.

"The court finds, and there is evidence to support the finding, that notices under section 1184 of the Code of Civil Procedure were regularly served upon the city by each of plaintiff's assignors, and thereafter their claims were assigned to plaintiff. Whether the lien of these laborers on the sewer fund be considered as a personal right which cannot be assigned until this mere inchoate right has been perfected by service of notice (*Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168), or a lien which would be deemed accessory to the obligation secured under section 2909 of the Civil Code, and which would pass by assignment of the obligation by the provisions of section 1084 of that Code (*Duncan v. Hawn*, 104 Cal. 12, 37 Pac. 626), is immaterial. The notice was given, and the lien attached to the fund before the assignment was made.

"There was no misjoinder either of parties or causes of action, and there is sufficient evidence to sustain the findings against the attacks made by appellants."

It is accordingly hereby ordered that the judgment of the superior court be modified by striking out the names "P. A. Howard, John T. Long," following the words "do have and recover of and from the defendants," in paragraph 2 thereof, and that the judgment as so modified be affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 512

GOLDTREE v. CITY OF SAN DIEGO et al.
(Civ. 472.)

(Court of Appeal, Second District, California.
July 9, 1908.)

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by S. A. Goldtree against the city of San Diego and others. Judgment for plaintiff, Defendant city of San Diego appeals. Modified and affirmed.

W. R. Andrews, for appellant. S. F. Smith and Collier, Smith & Hoff, for respondent.

On Rehearing.

TAGGART, J. The reasons for the decision rendered by this court on January 10, 1908, in this appeal and appeal No. 445, 97 Pac. 216, are approved and adopted, but our attention not having been particularly called to the form of the judgment on the former presentation of this appeal, we then overlooked the fact that a personal judgment had been improperly rendered against the defendants Howard and Long.

This matter is not here presented at this time by the appellant city of San Diego, but being presented and considered in civil appeal No. 445, the decision in which is this day filed, and an order to this effect being this day entered in that case, it is hereby ordered that the said judgment be modified by striking out the names "P. A. Howard, John T. Long" following the words "do have and recover of and from the defendants," in paragraph 2 thereof, and that the judgment as so modified be affirmed.

We concur: ALLEN, P. J.; SHAW, J.

154 Cal. 204

In re MCGEE'S ESTATE. (L. A. 2,200.)
(Supreme Court of California. Aug. 27, 1908.)

1. HOMESTEAD—DEVISE—"HEIRS."

Civ. Code, § 1265, provides that a homestead, selected by one spouse in the separate property of the other without the consent of the latter, on the death of the owner goes to his "heirs or devisees." Code Civ. Proc. § 1474, provides that in such case the property passes on the death of the owner to his "heirs," and such section, having been amended in 1880 ten days after the amendment of section 1265 of the Civil Code, must be taken as the last expression of the legislative will, and, since the word "heirs" cannot be construed to include "devisees," as repealing by implication the part of section 1265 of the Civil Code which would permit the owner to dispose of such a homestead by devise to the exclusion of the rights of the surviving spouse or other heir at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 249.

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3264; vol. 8, pp. 7677-7678.]

2. DESCENT AND DISTRIBUTION—HUSBAND AS HEIR OF DECEASED WIFE.

On the death of a married woman pending the settlement of an estate from which she was entitled to an interest in real estate as an heir at law, leaving a husband, but no children, the husband is entitled, under Civ. Code, § 1386, subd. 2, to one-half of the share of his deceased wife in such real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 145.]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Hugh Patrick McGee, deceased. From the decree of distribution, the administrator and distributees other than the widow appeal. Remanded for correction of decree.

Henry B. Lister and Richards & Carrier, for appellants. A. J. Bledsoe, for respondent.

SLOSS, J. Hugh Patrick McGee died testate in January, 1902, leaving a widow, Catherine McGee and six children, all of whom were over the age of majority. His estate consisted in part of a tract of 154.89 acres of land in Mendocino county, which was his separate property. During the lifetime of the decedent, his wife, Catherine McGee, had made a declaration of homestead upon this land. The decedent did not join in the selection and declaration. The will devised all of the testator's estate to his six children in equal shares. It was duly admitted to probate in the superior court of Santa Barbara county, and at the close of administration a decree was made distributing the homestead tract to the heirs of the decedent, in the proportion of one-third to the widow and two-thirds to the surviving children and to the heirs of those of them who had died pending the administration of the estate. The executor and the distributees other than the widow appeal from the decree of distribution.

The claim of appellants is that as devisees they were entitled to have the homestead property distributed to them, to the exclusion of the widow. Section 1265 of the Civil Code,

upon which the appellants place their reliance, provides that a homestead selected as was the one in the case at bar goes, upon the death of the person whose property was selected, to his heirs or devisees. On the other hand, the rule laid down by section 1474 of the Code of Civil Procedure is that the homestead in such case vests in the heirs of the person from whose property it was selected. The word "heirs" cannot be construed to include "devisees," and section 1474 therefore operates, as was said in construing similar language in section 1468 of the Code of Civil Procedure, "to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will." In re Walkery, 108 Cal. 627, 655, 41 Pac. 772, 49 Am. St. Rep. 68.

The turning point of the case is, then, whether section 1474 of the Code of Civil Procedure or section 1265 of the Civil Code shall control where their provisions are conflicting. The question thus presented is no longer an open one in this court. In *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254, we said: "The devolution of the title to the homestead premises in case of the death of one of the spouses is provided for in section 1265 of the Civil Code, and also in section 1474 of the Code of Civil Procedure. The latter section was amended ten days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will." Again in *Estate of Fath*, 132 Cal. 609, 64 Pac. 995, it is said that "this section (1474), in its present form, is the latest expression of the legislative will upon the subject, and supersedes the provisions thereon in section 1265 of the Civil Code. *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254." If there be any merit in appellants' contention that the declaration in the *Weinreich* Case was not necessary to the decision, this point certainly cannot be urged as affecting the authoritative force of *Estate of Fath*. There the superior court had denied a petition of the devisees for distribution, and it was essential to a disposition of the appeal to determine whether the case was governed by the section which gave to the devisees an interest in the homestead property, or by that which vested the homestead in the heirs. It must be taken to be settled that the two Code sections cannot be harmonized, and that, as between them, effect is to be given to the later enactment.

On the question of which is to be regarded as the later, the appellants seek, however, to distinguish the *Fath* Case. The two sections under consideration were last amended in 1880. These are the amendments referred to in *Weinreich v. Hensley*. Prior to the amendments of 1880, these sections had been amended in 1874; the amendment of section 1474 antedating that of section 1265 by six days. The amendment of 1880 made no substantial change in section 1265 of the Civil Code.

Section 1474 of the Code of Civil Procedure, as amended in 1874, provided that a homestead, if selected from community property, vested, on the death of one of the spouses, in the survivor, while, if it was selected from the separate property of one of the spouses, it vested, on the death of that one, in his or her heirs. The amendment of 1880 made no change in the case of homesteads selected from community property, but with reference to homesteads selected from separate property it distinguished between those selected by, or with the consent of, the owner of the property, and those selected by one of the spouses without the consent of the other. Those of the former class were made to go to the survivor; of the latter, to the heirs of the person from whose property the selection had been made. Thus the only change made by the amendment of 1880 to section 1474 was with relation to homesteads selected from separate property where the owner of the property made the selection or joined in it. Such a homestead was involved in Estate of Fath. But here we have a case of a homestead selected by the wife from the separate property of the husband without his consent. Such property went to the heirs by the provisions of section 1474 before as well as after the amendment of 1880.

Under the rule declared in section 325 of the Political Code, the portions of an amended section which are not altered "are to be considered as having been the law from the time they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." *C. P. R. R. Co. v. Shackelford*, 63 Cal. 261; *Swamp Land Dist. v. Glide*, 112 Cal. 85, 44 Pac. 451. Therefore, appellants argue, while section 1474 may be regarded as newly enacted in 1880 in so far as it deals with succession to homesteads selected from separate property by or with the consent of the owner (as in the Fath Case), it must be considered as a mere continuation of existing law in so far as it declares the right of succession to homesteads selected from separate property without the consent of the owner. As to such cases we are, it is claimed, thrown back to the amendments of 1874, whereby the two sections under discussion were first made to contain the conflicting provisions now found in them with reference to homesteads selected from the separate property of a nonconsenting spouse by the other. The amendment of 1874 to section 1265 was approved six days later than that to 1474, and it is argued that the provision of section 1265, vesting the homestead in the "heirs or devisees," was the later, and therefore the controlling, enactment with reference to cases like the one before us. But this argument, while ingenious, is seen, upon consideration, to destroy itself. The ground upon which a later enactment is made to overcome an earlier conflicting one is that it is a repeal by implication of the earlier. If, in 1874, the amendment of sec-

tion 1265 repealed the conflicting provision introduced into section 1474 six days earlier, the latter provision ceased to be the law. The rule that an amendment of a law is to be deemed a continuation of the portion not changed can have application only to existing laws, not to those that once existed, but have been repealed. In 1880 the provision that a homestead selected from separate property without the owner's consent vested in his or her heirs had not been the law, according to appellants' contention, for six years. The amendment of the section must be regarded as a new enactment as to everything which was not, at the time of the amendment, a living statutory rule. The case is not, therefore, distinguishable from Estate of Fath, and the court below rightly held that the homestead property passed to the heirs of the decedent, rather than to his devisees.

One point remains. Clara C. Parrent, one of the six children of the testator, died intestate during the administration of her father's estate, leaving a husband, Louis Parrent, but no children. By the decree the court awarded to her surviving husband only one-third of her share, instead of one-half, to which, under subdivision 2 of section 1386 of the Civil Code, he was entitled. The cause must be remanded for the correction of this error, by reason of which the shares of all the heirs, except the widow, were increased at the expense of Louis Parrent. But inasmuch as this is a matter affecting only the rights of the appellants among themselves, and in no wise concerning the widow, no costs should be allowed to appellants on this appeal.

The cause is remanded, with directions to the superior court to enter a decree in accordance with the views herein expressed. The appellants shall not recover costs of appeal.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

154 Cal. 186

KEATING et al. v. SMITH. (L. A. 2,056.) (Supreme Court of California. Aug. 27, 1908.)

1. JUDGMENT—RES JUDICATA—TESTAMENTARY TRUSTS—CONTROLLING EFFECT OF DECREE OF DISTRIBUTION.

A decree distributing the estate of a testator upon a trust created by the will, unappealed from, is conclusive of the validity of the trust, whether originally valid or not, and also as to its terms and the rights of all parties interested under the will, which are thereafter to be measured by the decree, and not by the will.

2. TRUSTS—CONSTRUCTION OF DECREE—VESTED REMAINDER—"To Go."

A decree distributed the residuary estate of a testator to a trustee named in the will, "in trust to manage, control, and care for said property and the accumulations thereof" until the youngest surviving child of the testator reached majority, "and then to go" one-third to the

widow and the remainder in equal shares to the surviving children of the testator. It also provided that in the meantime the income should annually be distributed to the widow and children in the same proportions. *Held*, that the words "to go" were clear words of direct grant or devise, and that under the same the widow took a vested estate in remainder, which on her death intestate before the termination of the trust descended to her heirs, notwithstanding the provisions of Civ. Code, § 863, that "every express trust in real property * * * vests the whole estate in the trustees subject only to the execution of the trust," and that "the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust"; the estate which a trustee takes by virtue of such section not being necessarily a fee, but only such estate as is required for the execution of his trust.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Alfred Vincent Keating and George H. Hutton, as trustees, and others, against Isaiah H. Smith, personally and as administrator of the estate of Isabell Keating Smith, deceased. Decree for defendant, and plaintiffs appeal. Affirmed.

Shankland & Chandler, for appellants. Walter J. Horgan and Hutton & Williams, for respondent.

SLOSS, J. Andrew J. W. Keating died on August 15, 1901, leaving a will, which was duly admitted to probate by the superior court of the county of Los Angeles on the 16th day of October, 1901. By this will, which bore date the 8th day of May, 1896, the testator gave to a son, William Keating, residing at Taltal, Chile, all of his property at that place. All the residue of his estate he devised and bequeathed to his wife, Isabell Keating, and two of his sons, Alfred Vincent Keating and Arthur Harry Keating, in trust for the following uses and purposes, to wit: "To manage, control and care for said properties and accumulations thereof, and to hold the said property intact, so far as possible, until my youngest son Edward Keating, now aged about six years, shall attain the age of twenty-one years, and then to convey all of said property, other than the said property hereinbefore devised to my said son William Keating, being said property in Taltal, Chile, to the following persons, and in the following proportions, to wit: An undivided one-third thereof to my said wife Isabell Keating, and an undivided two-thirds thereof to my said children Alfred Vincent Keating, Arthur Harry Keating, Julius Augustus Keating, Henry Keating, Walter Keating, Edward Keating, Helena Keating, and Elvira Keating, share and share alike. And, in case of the death of any of my said children before my said son Edward Keating attains the age of twenty-one years, then to convey the undivided two-thirds of said property to my surviving children, other than the said William Keating. In case my said son Edward Keating dies

before reaching his majority, then to convey all the rest and residue of said property (other than the said property in Chile, hereinbefore devised to my said son William Keating), whenever the youngest of my remaining children reaches the age of majority, in the following proportions, to wit: An undivided one-third thereof to my said wife Isabell Keating, and the remaining undivided two-thirds thereof to my said children, then surviving, other than the said William Keating, share and share alike." The wife and sons named as trustees are by the will appointed executors, and are given, as executors and trustees, full power to sell and convey all portions of the testator's estate and to invest the proceeds, all investments to be held in trust in like manner as the property devised to the trustees.

Arthur Harry Keating died prior to the death of the testator. The widow renounced her right to act as executrix, and letters testamentary were issued to Alfred Vincent Keating. At the close of the administration a decree was duly made, distributing all of the residue of the estate to Alfred Vincent Keating as sole trustee; the widow declining to act as trustee. In defining the trusts the decree of distribution differs in some respects from the will. By the decree it is adjudged that the trust was by the will "created and established as an accumulation directed by said will to commence upon the distribution of this estate, and to terminate at the expiration of the minority of said children, * * * and at the termination of said trust as aforesaid all the property of the testator, other than that devised to his son William Keating, * * * should go to and be conveyed to the trustee to said widow and children in the following proportions. * * *" The decree then orders, adjudges, and decrees that the residue of the estate "be, and the same is hereby, distributed according to law and the provisions of said will, as follows: To Alfred Vincent Keating, as trustee, in trust to manage, control, and care for said property and the accumulations thereof, during the minority of the said children, as hereinafter provided, and to terminate at the expiration of their minority, that is to say, upon the attainment of the youngest child of the age of majority, and then to go as follows, to wit: One-third thereof to Isabell Keating, the widow, and the remaining two-thirds thereof to the children of the said deceased (other than the said William Keating) share and share alike, and in case of the death of any of said children before they attain the age of 21 years, then to the surviving children other than the said William Keating, and in case the youngest son, Edward Keating aforesaid, may die before attaining his majority, then to the said surviving children other than the said William Keating, at the time when the youngest of them may reach the age of majority; that is to say, an undivided one-third to Isabell Keating and

the remaining two-thirds to the said children other than the said William Keating, surviving at the time the youngest living child may attain the age of 21 years, if said child be a son, or at the time when the youngest child may attain the age of 18 years, if said youngest child be a daughter."

To the decree are attached conditions whereby the court retains authority to confirm all sales made by the trustee, the trustee is required to give a bond, and the entire income derived from the estate is directed to be apportioned by the trustee at least once a year, as follows: One-third of the income to the widow of the deceased, and one-ninth of the income to each of the six surviving children of the deceased, other than William Keating, with a proviso that, if the income over and above the sum of \$10,000 a year receivable from one Colton should not be sufficient to pay to the widow \$300 a month and to each child \$100 a month, then the deficiency should be supplied out of the Colton moneys to the extent necessary to make the payments equal to such monthly sums. The decree became final by lapse of the time within which an appeal could have been taken. By subsequent orders of the superior court Alfred Vincent Keating and George H. Hutton have been appointed as trustees to succeed Alfred Vincent Keating and Henry Charles Keating. On October 24, 1904, Isabella Keating, the widow of the decedent was married to the defendant Isaiah H. Smith. She died intestate on February 24, 1906. Letters of administration were issued to her surviving husband in March, 1906. At the time of her death some of the Keating children were still minors.

This action was instituted against Smith, individually and as administrator of his wife's estate, by the trustees and the children of the decedent named as beneficiaries of the trust. The complaint prays that the defendant be required to set forth his claims against the trust estate, and that it be decreed that the trustees plaintiff are the owners of all the residue of the estate for the benefit of the six children. The action is based upon the theory that by the death of Isabella Keating Smith, the widow of the deceased, before the termination of the trust, her interest in the trust estate lapsed, and that the defendant had no interest therein, either as administrator of her estate or as one of her heirs. The court gave judgment in favor of the defendant, adjudging that the right and interest of Isabella Keating Smith did not cease or terminate at her death, but that all of her right, title, and interest in and to the property in the hands of the trustees is to be held and managed by the trustees, subject only to and in accordance with the terms and provisions of the decree of distribution; that the trustees are to hold all the interest of said Isabella Keating Smith in the said property and in said trust for the defendant Isaiah H. Smith, as

administrator of the estate of Isabella Keating Smith, deceased, and, subject to the administration of said estate, for the heirs at law of the said Isabella Keating Smith, deceased, until the termination of said trust. Thereupon all of the interest of said Isabella Keating Smith in said trust is to go to the said defendant Smith as such administrator for purposes of administration, and, subject to such administration, to the heirs at law of the said Isabella Keating Smith, deceased. The court "leaves to the proper court the determination and adjudication of such heirship" in the proceeding in the matter of the estate of Isabella Keating Smith, deceased. The plaintiffs appeal from the judgment. The facts are undisputed, and the only question is whether the death of Isabella Keating Smith so terminated her interest that nothing passed to her heirs or representatives.

The will attempted to create a trust which, considered by itself, was no doubt invalid under the rule declared in *Estate of Fair*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. The validity of the trust is, however, no longer open to question. The decree of the superior court distributing the residue of the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator. *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Goldtree v. Allison*, 119 Cal. 344, 51 Pac. 561. And it is equally conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will. *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; *Williams v. Marx*, 124 Cal. 22, 56 Pac. 603; *More v. More*, 133 Cal. 489, 65 Pac. 1044. The decree supersedes the will and prevails "over any provision therein which may be thought inconsistent with the decree." *Goad v. Montgomery*, supra. In determining the rights of the widow, we are, therefore, to look, not to the terms of the will, but to those of the decree of distribution.

The question resolves itself, primarily, into one of construction. Did the terms of the decree of distribution establish in the widow a present interest, which could pass, upon her death, to her heirs or devisees? By the provisions of the clauses above quoted, one-third of the residue is, upon the termination of the minority of the children, to go to the widow. Her right to the possession of the principal of this third is postponed; but, under the language of the decree, she is to receive it in any event. Except in regard to the time when it may come into her possession, there is no uncertainty. The gift is not made contingent upon the occurrence or nonoccurrence of any event whatever. There is no gift over in the event of her death, as there is in the case of the minor children. Furthermore, she is, during the existence of the trust, to receive one-third of the income of the property. That, at com-

mon law, this provision for the wife would have been regarded as creating in her a vested estate, and that, in the absence of statutory rule to the contrary, such estate, whether legal or equitable, would pass from her by inheritance or devise, are propositions that are not, and cannot be, questioned. 1 Jarm. Wills (6th Ed.) 756 et seq.; 28 Am. & Eng. Enc. of Law (2d Ed.) 933. Nor is it disputed that, under our Code, the estate or interest of the wife, if she took any interest or estate, vested at once. Civ. Code, § 694.

The appellants rely, however, upon section 863 of the Civil Code, providing that "every express trust in real property * * * vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." From this it is argued that the beneficiary of such express trust, taking no "estate or interest," takes nothing that is descendible, but only a right to compel the trustees to perform the trust, if the beneficiary should be in existence at the time when the trustees are to perform. The beneficiaries have, it is argued, a "mere possibility, such as the expectancy of an heir apparent," which, under Civ. Code, § 700, is "not to be deemed an interest of any kind," and is not capable of being transferred or inherited. If this be conceded to be a sound construction of sections 700 and 863, its application here is based upon the assumption that the only rights of the beneficiaries are those declared by the will, which makes no direct devise of the residue to any one but the trustees, and gives to the beneficiaries only the right to "receive new estates created by the conveyances" from the trustees. Estate of Fair, *supra*.

But, as has heretofore been pointed out, the rights of the parties are to be ascertained from an inspection of the decree of distribution, rather than of the will. That decree is the final and conclusive adjudication of the testamentary disposition made by the decedent. By the decree the residue is distributed to the trustees, in trust to manage, control, and care for said property during the minority of testator's children, "and then to go as follows, to wit: One-third thereof to Isabell Keating, the widow," etc. The words "to go" are "clear words of direct devise." Estate of Dunphy, 147 Cal. 95, 81 Pac. 315. The estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust. Morfiew v. S. F., etc., R. R. Co., 107 Cal. 587, 40 Pac. 810. Here the trustees are given an estate expressly limited in duration to the minority of the children. The widow takes a legal remainder by virtue of the terms of the decree itself, without the intervention of any conveyance, from the trustees. She succeeds to a portion of the testator's estate which was "not embraced in the trust." Civ. Code, §

866. That her actual possession and control of her interest are postponed is not material. "Future interests pass by succession, will and transfer in the same manner as present interests." Civ. Code, § 699. The case, as regards the widow, is precisely similar to that supposed in the following passage from the opinion of the court in the Fair Case, and the consequences are as there stated (132 Cal. 539, 60 Pac. 458 [84 Am. St. Rep. 70]): "If, in the case at bar, the testator had made a direct devise in remainder to the persons of the classes named in the will, those of the latter who were alive at the testator's death would have immediately taken vested estates. The interests of each would have been a property and ownership in the land, with all the rights, powers, and advantages which legally belong to such an interest."

There being nothing in the decree purporting either to make the widow's right contingent upon her living until the youngest child should attain majority, or divesting her estate in the event of her death during the existence of the trust, the court below rightly held that, upon her dying intestate, the interest owned by her passed, subject to the trust and to the possession of her personal representatives for purposes of administration, to her heirs.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

154 Cal. 179

INDEPENDENCE LEAGUE v. TAYLOR,
Mayor, et al. (S. F. 4,999.)

(Supreme Court of California. Aug. 27, 1908.)

1. MANDAMUS—SCOPE OF REMEDY—TITLE TO OFFICE.

In a proceeding to compel a mayor to appoint members of a board of election commissioners from a certain political party, persons theretofore appointed by him from other political organizations are not proper parties, since they are de facto, if not de jure, members of the commission, and their title to the office cannot be tried in such a proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 161, 162.]

2. ELECTIONS—BOARD OF COMMISSIONERS—APPOINTMENT—REPRESENTATION OF POLITICAL PARTIES.

San Francisco Charter, art. 11, c. 1, § 1, vests the management of elections in a board of five election commissioners, to be appointed by the mayor. Two of the five members first appointed shall be chosen from each of the two parties casting the highest vote for Governor or presidential electors, as the case may be, at the preceding general election. Upon the expiration of the term of any commissioner, the new appointee must be chosen from the same party as the retiring commissioner, consistently with the foregoing provisions as to equal representation of the two parties casting the highest vote at the preceding general election. The Independence League, a political party, cast at a general election next preceding the date when two vacancies occurred on the board of commissioners, the second highest number of votes for Governor. *Held*, that the mayor could be compelled by mandamus to fill the vacancies

from members of the Independence League; he having no discretion to appoint members of any other class.

3. CORPORATIONS—LEGAL CAPACITY OF POLITICAL PARTIES.

Political parties, when incorporated under the general laws, are converted into legal entities in all essential respects identical with other corporate bodies not organized for profit, and as such may enforce by an action in their party names the rights conferred upon them by law.

Sloss and Angellotti, JJ., dissenting in part.

In Bank. Mandamus by the Independence League, a political party, to compel Edward R. Taylor, as mayor of the city and county of San Francisco, to appoint as members of the board of election commissioners of that city and county two persons selected from the Independence League. Cameron H. King and another were made parties respondent. Writ granted as to the mayor. Proceeding dismissed as to the other respondents.

Daniel O'Connell and Hugh McIsaac, for petitioner. King & Kirk, for respondents.

BEATTY, C. J. Application for mandate in Supreme Court to Edward R. Taylor, as mayor of the city and county of San Francisco, and others. The object of this proceeding by mandamus is to compel the mayor of the city and county of San Francisco to appoint as members of the board of election commissioners of said city and county two persons selected from said Independence League. The other persons, King and Apperson, who are named as respondents, are members of other political parties who were appointed to fill vacancies in the board of election commissioners at a time when, by reason of their party affiliations, they were ineligible as contended by petitioners, and when members of the Independence League were alone eligible. They are now in the possession of the offices to which they were so appointed, and are at least de facto, if not de jure, members of the commission. They seem to have been named as parties defendant upon the view that the court could, in this proceeding, turn them out and put others in their places; but we are satisfied that we cannot now grant that measure of relief on any view as to the statutory duty of the mayor with regard to the selection of his appointees. If it shall be concluded that it was the imperative duty of the mayor to appoint members of the Independence League, and none others, to the vacancies in the commission, and that the performance of that duty can and ought now to be enforced by a peremptory writ of mandate, the only effect will be that any new appointees of the mayor will be invested with a claim of title to the offices in question which will enable them to contest the right of King and Apperson to continue in possession. This, of course, gives them a contingent and indirect interest in the result of this proceeding, but it does not en-

title them to be treated as parties properly before the court. Upon this view of the case, we are relieved of any further consideration of the point to which most of the argument of counsel was addressed, viz., the point urged in behalf of King and Apperson that mandamus is not the proper remedy for the trial of the title to an office. Conceding that proposition, as we do, the simple result is that they are no longer in the case, and the only question we have to decide is whether the mayor can now be commanded to confer a title upon two persons selected by him from the ranks of the Independence League.

On the part of the mayor the case has been submitted on a demurrer, which raises only two questions—first, the legal capacity of the league to maintain the action; and, second, the sufficiency of the facts alleged to warrant the court in granting the relief sought. Among the facts alleged, and by the demurrer admitted, are the following: The Independence League is a political party which was duly organized under the laws of California prior to the general election in 1906. Its candidates for state and for city and county offices were placed upon the official ballot used at that election, and they received, respectively, more than 3 per cent. of the votes cast in the state and city and county at said election, viz., 45,008 votes in the state, and 10,523 votes in the city and county of San Francisco. The vote in the city and county for their candidate for Governor (10,523) was higher than the vote of any other party candidate for that office, except that cast for the Republican candidate. The Democratic candidate received not more than 7,000 votes, the Union Labor candidate not more than 6,000 votes, the Socialist candidate not more than 2,103 votes, and the Prohibition candidate not more than 156 votes. On January 6, 1908, the terms of office of two members of the board of election commissioners expired, creating two vacancies, which it was the duty of the mayor to fill by appointment in accordance with the provisions of the charter. No member of the board was then or had ever been a member of the Independence League, as the mayor well knew, but with this knowledge he appointed to fill said vacancies Cameron H. King, a member of the Socialist party, and C. L. Apperson, a member of the Democratic party. Upon being informed of this fact the Independence League, by its county committee, on March 8, 1908, made a written demand upon the mayor to appoint members of that party, with which demand he refused to comply. There were among the many thousand members of the league a large number of persons fit and proper and duly qualified to be appointed as members of the commission, as the mayor at all times well knew.

With reference to the right of Daniel O'Connell and John S. Kelly to maintain the

action in the name of the league, it is admitted that they are, respectively, the chairman and secretary of the county committee of the party, and at a regular meeting of the committee on March 19, 1908, were duly authorized and directed to commence this proceeding. In connection with these facts the petitioners plead section 1 of chapter I of article 11 of the charter of San Francisco, which reads as follows: "The conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the city and county, shall be vested exclusively in and exercised by a board of election commissioners consisting of five members who shall be appointed by the mayor, and shall hold office for four years. Each of the commissioners shall receive an annual salary of one thousand dollars. Each member of the board must be an elector of the city and county at the time of his appointment and must have been such for five years next preceding such time. Those first appointed must, immediately after their appointment, so classify themselves by lot that one shall go out of office at the end of one year, one at the end of two years, one at the end of three years, and two at the end of four years. The mayor shall not make any appointment upon the board at any time before thirty days prior to the time when such appointee is to take office. Two of the five members first appointed shall be chosen from each of the two political parties casting in the city and county the highest vote for Governor or electors of President and Vice President, as the case may be, at the last preceding general election. The fifth member shall be chosen from the political party casting the third highest such vote at such election, if there be such third party, and if not, then at the discretion of the mayor. Upon the expiration of the term of office of any commissioner, the appointee must be chosen from the same political party as the retiring commissioner, consistently with the foregoing provisions as to equal representation at all times of the two political parties casting the highest vote at the general election last preceding the appointment in question as prescribed in this section."

Upon the conceded facts, as above stated, it does not seem to us to admit of any doubt that it was the imperative duty of the mayor under this provision of the charter to fill the vacancies which occurred in the election commission in January last by appointing members of the Independence League. The terms of the section are so plain and the policy of the provision so obvious that discussion as to the meaning of the first or the vital importance of the latter would be superfluous. The functions of the board with regard to the whole series of acts from the registration of voters till the canvass of their votes are so numerous and important, and the necessity

of making such a body, armed with such powers, representative of the two leading parties in a republican or democratic government is so universally recognized, that no argument is needed to fortify the conclusion that the framers of the charter, and the people who adopted it, intended to deprive the mayor of any discretion to disregard its plain mandate. The policy of the law is to prevent frauds in elections, and not only to secure fairness in their conduct, but to give to the public a practical assurance that they have been fairly conducted and their results honestly declared. The mayor has, and necessarily must have, a discretion in the selection of the individuals to be appointed; but he has no discretion to seek those individuals outside of the designated class of eligibles. To admit that he has such a discretion, and that such discretion is uncontrolled, is to bring about the very condition which the framers of the charter designed to prevent. Upon the facts presented by the petition and demurrer, our conclusion is that the mayor violated the charter in appointing King and Apperson, and that he has neglected and refused to perform an act specially enjoined as a duty resulting from his office in refusing to appoint two members of the Independence League to the places left vacant in January last.

It seems to be argued that, because those places are now occupied by King and Apperson, the court cannot order the respondent to appoint others to the same positions. This argument also reduces the charter provision in question to a mere academic declaration of political ethics, and deprives the leading political parties of any effective remedy for the violation of the important rights it was intended to secure. If its validity were admitted, the mayor might select the members of the commission from a peace club with perfect impunity so far as the courts are concerned.

And this brings us to the other question raised by the demurrer—the question as to the legal capacity of a political party to maintain an action in the party name for the enforcement of rights conferred upon the party in its corporate capacity. It is urged that there is not a single instance to be found in the reported cases in which a political party has been a party plaintiff or petitioner in a legal proceeding. This argument is of little weight, in view of the fact that only within a very few years have political parties been converted into legal entities. That they are such legal entities, when organized under the general laws of this state recently enacted there can be no doubt. They are in all essential respects strictly identical with other corporate bodies not organized for profit, and it would be a startling anomaly to hold that they have no capacity to enforce by ordinary legal process the rights which have been conferred upon them by valid laws.

The demurrer of the mayor is overruled. His answer, already on file, presents issues of fact as to which we have understood that the parties could and would agree. They have not as yet presented any agreed statement, and if they cannot reach an agreement it may become necessary for the court to hear the evidence.

As to King and Apperson—named as respondents—the proceeding is dismissed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.

SLOSS and ANGELLOTTI, JJ. (dissenting). Except as to the remedy we are entirely in agreement with the views of the court as above expressed; that is to say, we are satisfied, first, that the intent of the charter provision relied upon was to require such appointments to the election board as would secure, as far as possible, an equal representation to the two political parties which had cast the highest vote for Governor or electors at the election next preceding such appointments, and that, upon the facts stated in the petition, it was the duty of the mayor to fill the vacancies in the election commission from members of the Independence League; and, second, that political parties, as such, are legal bodies beneficially interested in securing such appointments, and entitled to maintain legal proceedings in that behalf.

We are not satisfied, however, that where the mayor has made his appointments, and the offices are thereby in fact filled, he can be compelled by mandamus proceedings to make other appointments, until it has first been determined, in some proceeding where it can be effectually determined as to all parties interested, that the appointments already made are illegal. The opinion concedes that no such determination can be made in this proceeding, and for that reason the dismissal of the proceeding as to King and Apperson, the appointees, has been ordered. The question of the eligibility of one elected or appointed to public office to hold such office is ordinarily determined in a contest proceeding provided by statute or in the proceeding of quo warranto, in either of which the party whose right is assailed is a necessary party, and the effect of the judgment therein is to oust him from the office or to establish his right thereto. We have found no decision holding that such question can be determined in any other way, and it may be claimed with much force that, until the question is legally determined in some such proceeding, the appointments cannot elsewhere be held to be absolutely void, and the appointing power compelled to proceed as though no appointments had in fact been made.

However, as a majority of the court has decided in favor of the appropriateness of the remedy of mandamus in this case, a definite expression of opinion on this to us doubtful point is unnecessary.

154 Cal. 194

PEOPLE v. BANK OF SAN LUIS OBISPO
et al. (L. A. 2,106.)

(Supreme Court of California. Aug. 27, 1908.
Rehearing Denied Sept. 24, 1908.)

1. STATUTES—VALIDITY—EFFECT OF PARTIAL INVALIDITY.

Act March 30, 1878 (St. 1877-78, p. 744, c. 481) § 11, requires that the attorney general, upon notice from the bank commissioners that a bank was unsafe or had refused to comply with the order of the commissioners to discontinue unsafe practices, shall immediately commence an action to dissolve the corporation, and an amendment of March 10, 1887 (St. 1887, p. 90, c. 80), requires that when any corporation refused to comply with the commissioners' order to discontinue unsafe practices, or if it was unsafe to continue business, the commissioners shall notify the attorney general, who after examination, may commence suit to dissolve the corporation, etc. Act March 26, 1895 (St. 1895, p. 172, c. 147), substantially the same as Act March 24, 1903, § 10 (St. 1903, p. 368, c. 266), provides that upon the failure of a bank to conform to the commissioners' order, requiring the discontinuance of unsafe practices, or if the commissioners decide it to be unsafe for the bank to continue business they shall take control of the bank property and immediately notify the attorney general of their action, who shall then commence suit to prohibit further transaction of business by it. *Held*, that even if the provisions of section 10, authorizing the commissioners to seize corporate effects and hold them pending the action, were unconstitutional, the right of the attorney general to sue to dissolve the corporation was not affected, as the provision for seizure was collateral to his right to bring the action and was not a condition precedent to notification by the commissioners to the attorney general to commence suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58-66.]

2. SAME—IMPLIED REPEAL—CONSTITUTIONAL PROVISIONS.

Act March 30, 1878 (St. 1877-78, p. 740, c. 481), as amended by several subsequent acts, authorized the dissolution of a bank at the suit of the attorney general after notification to him by the bank commissioners that the bank was unsafe, etc. By Const. art. 22, § 1, all laws in force at its adoption not inconsistent therewith shall remain in force until altered or repealed. Defendant bank was organized in 1873, and the Civil Code prescribed certain rights and powers of banking corporations when the Constitution was adopted. *Held* that any provision of the Civil Code is subject to a subsequent general law in conflict therewith whether such law is contained in the Codes or in a separate act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 229.]

3. BANKS AND BANKING—INSOLVENCY AND DISSOLUTION—PROCEEDINGS—PLEADING—ALLEGATIONS OF INSOLVENCY.

Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, provides that if the bank commissioners find that a bank is doing business in an unsafe manner, they shall direct the discontinuance of such unsafe practices and if the bank fails to obey, or if the commissioners unanimously decide it is unsafe for the bank to continue business, they shall take control of its effects and notify the attorney general who shall commence suit to dissolve it. In a suit by the attorney general the complaint alleged that the commissioners unanimously found that the bank was insolvent and unable to pay its obligations, and further alleged the fact of insolvency. *Held*, that, though there was no averment in the language of the statute that it was unsafe for the bank to continue business,

the act contemplated that it was unsafe for an insolvent bank to continue business, and an allegation of insolvency was equivalent to an allegation that it was unsafe for it to continue business.

4. SAME.

Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, authorizing the bank commissioners to require banks to discontinue unsafe practices and upon their failure to do so, or if it appear unsafe to allow any bank to continue business, to seize the effects of the bank and notify the attorney general, who shall commence suit to dissolve the corporation, etc., was intended to supersede the general insolvency act so far as it applied to banking corporations.

5. SAME—PROCEEDINGS TO ENFORCE DISSOLUTION—ACTION OF BANK COMMISSIONERS.

Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, provides that upon the failure of a bank to conform to the requirements of the bank commissioners, or if the commissioners unanimously decide that it is unsafe for the bank to continue business, they shall take its property, whereupon the attorney general shall commence suit to enjoin the transaction of business by such bank, the act also providing that there shall be four bank commissioners. *Held* that the fact that there were only three bank commissioners serving when they decided that a continuance of defendant's bank was unsafe did not prevent a "unanimous" decision under the act, as they could exercise the powers conferred by law so long as there was in office a majority of the number provided by statute.

6. STATUTES — SUBJECTS AND TITLES — EXPRESSION IN TITLE OF SUBJECT.

Act March 24, 1903, St. 1903, p. 365, c. 266, entitled "An act creating a board of bank commissioners and prescribing their duties and powers" and providing that if the commissioners find that a bank is conducted illegally or in an unsafe manner, they shall order the discontinuance of such unsafe practices and on the bank's failure to do so, shall seize its property and notify the attorney general, who shall commence an action to enjoin further business, does not violate Const. art. 4, § 24, requiring every act to embrace but one subject, to be expressed in its title, on the ground that the title did not mention the duties of the attorney general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 141.]

7. BANKS AND BANKING—INSOLVENCY—RECEIVERS—APPOINTMENT—APPOINTMENT ON COURT'S OWN MOTION.

In a suit by an attorney general under Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, authorizing a suit to enjoin a bank from continuing business if it fails to obey the order of the bank commissioners as to the manner of doing business, or if the commissioners decide it is unsafe for the bank to continue business, the attorney general, on being notified, shall commence an action to enjoin the bank from transacting further business, and the court, if it finds it insolvent, shall order the commissioners to surrender the property to a receiver appointed by the court, it was unnecessary to make an issue as to the appointment of a receiver or to pray for such relief, since the statute authorized such appointment, upon a finding of insolvency, as a part of the relief sought by the action.

8. SAME—NOTICE OF APPOINTMENT.

The appointment of the receiver on the court's own motion, upon a finding of insolvency, was not an appointment without notice to the corporation, as the act itself constituted full notice that such appointment would be made upon a finding of insolvency in such an action.

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Proceedings by the people, by the Attorney General, upon the complaint of the state bank commissioners, against the Bank of San Luis Obispo and others. From a judgment for petitioner, defendants appeal. Affirmed.

See 92 Pac. 481.

James L. Crittenden, for appellants. U. S. Webb, Atty Gen., and Geo. A. Sturtevant, Asst. Atty. Gen., for respondent.

ANGELLOTTI, J. This is an appeal by the defendants, a banking corporation and its directors, from a judgment given in a proceeding instituted under the provisions of an act, entitled "An act creating a board of bank commissioners and prescribing their duties and powers," approved March 24, 1903 (St. 1903, p. 365, c. 266), as amended March 20, 1905 (St. 1905, p. 304, c. 296), to obtain a decree declaring defendant corporation to be insolvent, ordering it into involuntary liquidation, and restraining it from the transaction of any further business, except for the purpose of liquidation. Judgment was given to this effect, and by the judgment one Neil Stewart was appointed receiver of said corporation, and the bank commissioners were directed to deliver to him all the money, property, and effects of said corporation which had come into their hands. The appeal is on the judgment roll alone.

Section 10 of the act of March 24, 1903, is so far as material here, practically the same as section 11 of the former act on the same subject—that of March 30, 1878 (St. 1877-78, p. 740, c. 481), as amended in 1895 (St. 1895, p. 172, c. 147). It provides that if the bank commissioners, on examination of the affairs of any banking corporation, shall find that it has been guilty of violating its charter, the laws of this state, or any of the provisions of the act, or is conducting business in an unsafe manner, they shall direct a discontinuance of the illegal and unsafe practices, and a conformity with the requirements of the law and charter. It then provides: "And if such corporation shall refuse or neglect to conform with such requirements before the expiration of the time in the order specified, or if it shall appear to said commissioners and they shall unanimously decide that it is unsafe for any such corporation to continue to transact business, it shall be the duty of the commissioners immediately to take such control of such corporation, and all the property and effects thereof, as may be necessary to prevent waste or diversion of assets, and to hold possession of the same until the order of court hereinafter mentioned, and to immediately notify the Governor and the Attorney General of their action; and it is hereby made the duty of the Attorney General, upon receiving such

notification, to immediately commence suit in the proper court against such corporation, and all the directors or trustees thereof, to enjoin and prohibit them from the transaction of any further business. If, upon the hearing of the case, the court shall find that such corporation is solvent and may safely continue business, it shall dismiss the action, and order that the corporation be restored to the possession of the property, but if the court shall find that it is unsafe for such corporation to continue business, or that such corporation is insolvent, said court shall by its decree order said corporation into involuntary liquidation, and shall issue the injunction applied for, and shall cause the same to be served according to law, and shall order the commissioners to surrender the property of the corporation in their possession to a receiver appointed by the court for the purpose of liquidation in such proceeding, under the order and direction of the court."

This action was commenced by the Attorney General on February 1, 1906. The findings, based on appropriate allegations in that behalf in the complaint, establish the following facts: Defendant corporation was organized on August 28, 1873, and has ever since been engaged in the general banking business at San Luis Obispo, its principal place of business. At all times mentioned in the complaint Messrs. Silver, Blackstock, and Duns-moor were the only bank commissioners holding office under the act; the act providing that there shall be four such commissioners. In November, 1905, the bank was examined by said commissioners, and they determined that it was conducting business in an unsafe manner and ordered certain changes in the conduct of the business. On January 24, 1906, said bank commissioners, without notice to the corporation or its board of directors, found and determined that the corporation had not discontinued its unsafe practices, and unanimously found and determined that said corporation was insolvent and unable to pay its obligations from its own means, as such obligations became due and payable in the ordinary course of business. On the same day said commissioners, without the consent of the corporation, took immediate control of said bank and all the property and effects thereof, and have ever since held the same. On the same day they notified the Governor and the Attorney General of their action. Said bank is, and was, at all times after January 10, 1906, insolvent and unable to pay its obligations from its own means, as such obligations became due and payable in the ordinary course of business.

The principal claim made by defendants is that the provision of section 10, authorizing the bank commissioners, upon their own determination that it is unsafe for the corporation to transact business, made without notice, to take such control of the corpora-

tion and of its property and effects as is necessary to prevent waste or diversion, and to hold such possession pending determination of the action to be thereupon instituted, is in violation of various provisions of the Constitution of the United States and that of this state; that the right of the Attorney General to bring any action under the act is absolutely dependent on the validity of the provisions as to seizure and sequestration of the property of the corporation by the commissioners, and can be exercised only after a valid seizure, and that, therefore, this action must fail. We are satisfied that no such result would follow a conclusion that the portion of the section thus assailed is void.

Ever since the adoption of the act of March 30, 1878 (St. 1877-78, p. 740, c. 481), it has been the law in this state that the question of the solvency or safety of a banking institution shall be determined in an action to enjoin the doing of further business, brought by the Attorney General upon notice from the bank commissioners, and that in such action, in the event of a finding of insolvency, or that it is unsafe for the institution to further continue business, the judgment shall prohibit the doing of further business, and the affairs of the institution shall be wound up under the supervision of the court. In section 11 of the original act it was provided that the Attorney General "shall immediately commence" such action upon receiving a communication from the bank commissioners. By an amendment approved March 10, 1887 (St. 1887, p. 90, c. 80), the section was changed so as to provide that when any such corporation refused or neglected to comply with the order of the commissioners to discontinue illegal and unsafe practices or whenever it appeared to the commissioners that it is unsafe for it to continue business, the commissioners shall notify the Attorney General of such fact, "who after examination, in his discretion, may commence suit," etc. On March 26, 1895, the act of March 30, 1878, was again amended by inserting in section 11 what is almost verbatim the portion of section 10 of the act of 1903 that is here assailed. As so added by the amendment to the act of March 30, 1878, it was nothing but a collateral provision for the safe-keeping of the property of the bank for the benefit of all concerned, pending the proceeding authorized by the act, and was not intended in any degree to affect the right of the Attorney General to bring an action upon notice from the commissioners of their determination that it was unsafe for a banking corporation to continue to transact business. The amendment was undoubtedly considered necessary in view of the decisions of this court that the proceeding was purely statutory, and that under the act as it originally existed no injunction could issue until after hearing (*Sav. Bank v. Superior Court*, 103 Cal. 27, 36 Pac. 1015),

and there were no means provided by which the property could be guarded against waste and diversion pending the litigation. It is true that the amendment made it the duty of the Attorney General to commence suit only upon being notified by the commissioners "of their action" in the premises, which, of course, included not only their determination but also their taking possession of the property, where they had done so; but we do not think it is open to serious question that they were not required to take any possession or control of any property of the corporation as a condition precedent to a notification to the Attorney General of their determination that it was unsafe for the corporation to continue business sufficient to require him to immediately commence the action provided for by the act. So far as the Attorney General was concerned, the important thing was that the commissioners had made the required determination as to the safety of the bank and notified him thereof. Thereupon his duty and power to commence an action arose, and it was absolutely immaterial in this regard whether the commissioners had attempted to prevent waste or diversion by a compliance with the provision as to taking possession.

When the act of March 30, 1878, was revised and re-enacted by the act of March 24, 1903, that portion of section 11 relating to the duty of the bank commissioners and the Attorney General in such a case was adopted practically word for word as a part of section 10; notification to the Governor being required in addition to that given to the Attorney General. It means the same thing there that it did when made by amendment a portion of the act of March 30, 1878. If it be invalid, its invalidity would not affect the remainder of the act. Therefore it is not at all essential to the upholding of the judgment herein that the provision of the section as to taking possession of the property of the bank by the commissioners be held a constitutional law. If invalid, the only consequence is that the defendants have, without warrant, been deprived of the possession of their property during the pendency of this litigation, a matter which could not affect the result in this action, and for which invasion of their rights their remedy must be found elsewhere. All that is necessary to sustain the action and the judgment in this case is that it appeared to the commissioners and that they unanimously decided that it was unsafe for defendant corporation to continue to transact business, that they notified the Governor and the Attorney General of their action in the matter, that he thereupon commenced this action, and that as a matter of fact defendant corporation was insolvent.

Eliminating the question of the constitutionality of the provision assailed, the objections made to the judgment are absolutely without merit.

It is urged that the act under consideration is not applicable to the defendant corporation, for the reason that it was organized and received its charter on August 28, 1873, which was prior to the adoption of the substantially similar act of March 30, 1878. The claim is that to hold legislation of this kind applicable to a corporation organized prior to its adoption would be in violation of section 1 of article 22 of the Constitution, declaring that all laws in force at the adoption of the Constitution, not inconsistent therewith, shall remain in full force or effect until altered or repealed by the Legislature; the claim as stated being that, as the Civil Code of the state prescribes certain rights and powers of the corporation at the time of the adoption of the Constitution, such rights can be affected only by a modification or amendment of the Civil Code itself, and that a general act adopted by the Legislature, "not made as amendments to the Civil Code," can have no such effect. Of course, there is nothing in this claim. Any provision of the Civil Code is subject to a general law necessarily in conflict therewith subsequently passed, wherever that law may be placed, whether in one of the Codes or in a separate act, and there is nothing in the constitutional provision relied on implying otherwise. No reason is apparent to us why the act of March 24, 1903, is not applicable to every banking corporation doing business in the state, whenever incorporated.

It is claimed that the complaint does not state facts sufficient to constitute an action, in that it did not allege that the bank commissioners unanimously decided that "it is unsafe" for the bank "to continue business," which is the language of the act; the complaint alleging in this behalf simply that "said bank commissioners * * * did further unanimously find and determine that said Bank of San Luis Obispo, a corporation as aforesaid, was insolvent, and unable to pay its obligations from its own means as such obligations become due and payable in the ordinary course of business," and further alleging the fact of such insolvency. We have no doubt that this was a sufficient allegation under the act, an allegation of a determination by the commissioners of what was equivalent to a finding that it was unsafe for the bank to continue business. It is true that the phrase "unsafe * * * to continue to transact business," as used in the act, is broader than the term "insolvent," and that a finding that it is unsafe for a banking corporation to continue business does not necessarily mean that it is insolvent. But the converse of this is not true. The act clearly contemplates that it is unsafe for an insolvent banking corporation to continue business, and that a determination by the commissioners that such corporation is insolvent is equivalent to a finding that it is unsafe for it to continue business. This is shown by the subsequent provision that "if

upon the hearing of the case the court shall find that such corporation is solvent and may safely continue business, it shall dismiss the action, * * * but if the court shall find that it is unsafe for such corporation to continue business, or that such corporation is insolvent," it shall order it into involuntary liquidation, etc. As has been uniformly held by this court, the section of the act under consideration was intended, so far as banking corporations are concerned, to supersede the provisions of the general insolvency act (see *Crane v. Pacific Bank*, 106 Cal. 64, 70, 39 Pac. 215, 27 L. R. A. 562), and to be applicable in all cases of insolvency of such corporations.

As has been seen, the statute requires that the commissioners "shall unanimously decide," etc., and the act provides that there shall be four bank commissioners, to be appointed by the Governor. It appearing that during all the times mentioned there was a vacancy as to one of said commissionerships, and that consequently there were only three commissioners in office, it is urged that there could be no "unanimous" decision of the kind called for by the act. We do not think the act should be construed as meaning that a vacancy in the office of one of the commissioners should suspend the power of the commission in this important matter. As long as the commission has sufficient members to be an effective body at all, which, in the absence of provisions to the contrary, must be the case wherever there are in office a majority of the requisite number, it may exercise the powers and perform the duties allotted by the law, and when the statute provides that if they "shall unanimously decide," etc., they may do certain things, it means no more than that if those then holding the office of bank commissioner, if at least three in number, unanimously so decide, they may then do the thing specified.

It is claimed that the act is unconstitutional in so far as it purports to give any authority to the Attorney General to bring or prosecute this action, for the reason that "the title of the act does not mention duties, authority, or power of the Attorney General," and section 24 of article 4 of the Constitution provides that every act shall embrace but one subject, which shall be expressed in its title, and that any act shall be void as to any subject embraced therein which is not expressed in its title. The title of the act of March 24, 1903, is the same as that of March 30, 1878. In *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492, section 11 of the act of 1878, corresponding to section 10 of the act of 1903, providing for such an action by the Attorney General, was assailed on various grounds; one being that the title did not sufficiently express the subject-matter of said section. The court said: "We think that the title of the act sufficiently expresses the subject of the act and is sufficiently general in its scope. It is not necessary that the title to

the act should embrace an abstract of its contents. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251." We see no reason to doubt the correctness of this ruling.

It is claimed that the appointment of a receiver without any issue made by the pleadings in that behalf, and without any prayer for such relief, and without notice, was erroneous. As we have seen, the act in terms provides that the court in such an action, brought "to enjoin and prohibit them from the transaction of any further business," if it finds that the corporation is insolvent, "shall order the commissioners to surrender the property * * * to a receiver appointed by the court for the purpose of liquidation in such proceeding," etc. This authorized the court to appoint the receiver as a part of the relief sought by the action, in the event of a finding of insolvency, without any allegation of the necessity therefor in the complaint. The appointment of a receiver for purposes of liquidation was a part of the method provided by the act for the winding up of the affairs of the corporation, and, under the terms of the act, necessarily followed the adjudication of insolvency. It cannot be said that this is a case of the appointment of a receiver without notice to the corporation. The act itself constitutes full notice that such an appointment will be made in the event of determination of insolvency by the court in an action wherein the corporation is a party, and as to which it has notice and an opportunity to defend.

The foregoing are all the objections made by appellants to the judgment that merit consideration, except such as go to the question of the validity of the provision as to the taking such control by the commissioners prior to suit of the corporation and its property and effects as may be necessary to prevent waste or diversion, and the holding of such possession pending the litigation. As said before, we do not consider it essential to an affirmation of the judgment that this provision should be upheld, and a consideration of these objections is therefore unnecessary. We do not desire, however, to be understood as intimating that we doubt the validity of the provision. Our failure to consider the question of its validity is due to the fact that, as a general rule, we deem it better to decide constitutional questions only where their decision is essential to a disposition of a pending proceeding. The provision in question has been a part of our law ever since March 26, 1895, and so far as we are advised no question has ever been made as to its validity, except as the same has been made in this case. In view of the well-settled doctrine that the business of banking is a proper subject of legislative control by the state in the exercise of what is known as the "police power," and in view of the decisions as to what constitutes the judicial power that is vested exclusively in the courts under our

Constitution, and what constitutes due process of law under our federal and state Constitutions, we are not strongly impressed by the argument of learned counsel for defendant against the validity of this provision; but, as already stated, we consider it preferable not to decide the question in a case where such a decision is clearly unnecessary. The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

154 Cal. 220

PEOPLE ex rel. PECK v. CITY OF LOS ANGELES (L. A. 2,156.)

(Supreme Court of California. Aug. 28, 1908.)

1. MUNICIPAL CORPORATIONS—ANNEXATION—STATUTORY PROVISIONS.

Act March 19, 1889 (St. 1889, p. 358, c. 247), provides that new territory may be annexed to any incorporated town by certain proceedings. The council or legislative body of any such municipality upon petition must submit to the electors of the corporation and to the electors residing in the territory proposed by the petition to be annexed the question whether the new territory shall be annexed. *Held*, that the power to alter the municipal boundaries and to decide upon the shape, size, and locality of annexed territory is conferred directly upon the voters of the territory to be annexed and the annexing municipality, and no authority is conferred on any legislative body or judicial tribunal to review or interfere with their action merely because of the form or extent of the territory annexed, which is purely a political, and not a judicial, question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 66-71.]

2. SAME—POWER OF COURTS TO REVIEW.

The courts may only interfere where some substantial provision of the law has been violated, or where fraud was perpetrated in the matter of the boundaries or the extent of the annexed district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 66, 71.]

3. SAME.

Since the law contemplates that cities may become contiguous (St. 1883, p. 97, c. 49, § 7), providing for the consolidation of cities only when so situated, and as existing municipalities can usually be made contiguous only by the extension of their boundaries, the fact that the annexation of outside territory to a municipality accomplishes that result is no objection to the validity of the annexation.

4. SAME.

It is no objection to the annexation of territory to a municipality that the effect of the extension of the city's boundaries will be to compel at some future time the consolidation of smaller cities with the extended city, since under the law the consolidation could not be affected without the consent of the smaller cities.

5. SAME.

It is no objection to the annexation of territory to a municipality that it might prevent future expansion of another municipality in the direction of the annexed territory.

6. SAME—"MUNICIPAL AFFAIR."

Proceedings for annexation of territory to a city are had under Act March 19, 1889 (St. 1889, p. 358, c. 247), a general law providing a complete scheme for annexation which, under the Constitution, controls and is superior to city charter provisions, except in "muni-

pal affairs," annexation of territory to a city being in no sense a "municipal affair" within the Constitution; and hence an annexation was not void because the ordinance calling the special election on that question and ordering notice thereof to be given, published as provided by the act of 1889, was not published for 10 days as prescribed by the city charter for ordinances calling elections.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

7. SAME—ORDINANCES.

The city charter provision for the publication of ordinances ordering elections for 10 days relates only to elections had entirely in the city, and not to annexation elections held partly within the city and partly without.

8. SAME—NOTICE OF ANNEXATION ELECTION—SUFFICIENCY—STATUTORY PROVISIONS.

A notice of an annexation election given according to the express requirements of the annexation act of March 19, 1889 (St. 1889, p. 358, c. 247), is not void because too short to permit some electors to register, because registration under Pol. Code, § 1094, is forbidden for a period of 40 days prior to an election, as under the registration law general registration for all elections, which is in progress at all times except for 40 days prior to elections, offers electors ample opportunity to register and vote, and the law makes no provision for special registration for elections.

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Quo warranto by the people, on the relation of George H. Peck, against the city of Los Angeles to test the legality of the annexation of certain territory to the city. From a judgment sustaining a demurrer to the complaint, relator appeals. Affirmed.

Frank Karr and U. S. Webb, Atty. Gen., for appellant. Leslie R. Hewitt and Lewis R. Works, for respondent.

LORIGAN, J. This is a proceeding in quo warranto questioning the legality of the annexation of certain territory to the city of Los Angeles. The appeal is taken by plaintiff from a judgment entered against him after declining to amend upon demurrer sustained to his complaint, and the only question is as to the correctness of the order sustaining the demurrer.

From the complaint it appears: That at a city election held November 12, 1906, under the annexation act of March 19, 1889 (St. 1889, p. 358, c. 247), upon a favorable vote of both the electors of the city of Los Angeles and certain unincorporated territory contiguous to said city, such territory was annexed to, and became a part of, the city of Los Angeles. The annexed territory consisted of a wide strip, immediately adjacent to and along the southerly boundary line of the corporate limits of said city, together with a strip about 16 miles in length and about half a mile in breadth, connecting with this wider strip, and extending southerly therefrom to a junction with the municipal territory of the cities of San Pedro and Wilmington, and extending along the western

boundary of the latter at San Pedro Bay. That each of said last-named cities were at the time of said annexation municipal corporations of the sixth class situated within the county of Los Angeles near the Pacific Ocean and near San Pedro Bay. That, except the portion of said wider strip of territory immediately adjacent to said city of Los Angeles, all the territory intervening between said city and the cities of San Pedro and Wilmington, including said narrow strip of land annexed to the city of Los Angeles, is agricultural, and not urban, in character. Under this allegation it is insisted by appellant that the annexation as made is void in toto, because contrary to the purposes and intent of the annexation act. He concedes that the annexation as made falls within the letter of the statute, but claims that it is not within its spirit; that the annexation act was intended to provide for ordinary, reasonable changes in the boundaries of a city; that the annexation in question was wholly abnormal and obviously made for the purpose of blocking the expansion of the cities of San Pedro and Wilmington, and particularly to hem in the latter city on its western boundary and prevent its expansion in that direction, and to ultimately absorb both of said smaller cities by consolidation with the greater municipality. The claim of respondent is that it is fairly inferable from the form and extent of the annexation that the extension of the limits of the city of Los Angeles along the westerly boundary of the city of Wilmington was only made to give it a frontage on San Pedro Harbor; that the city of Los Angeles is a large inland city, distant from the seacoast at San Pedro by the length of the territory annexed; that Wilmington and San Pedro are two small cities upon San Pedro Bay, which is a port of commerce that takes its source and life wholly from the city of Los Angeles and the great population in and about that city; that under these conditions it was natural and reasonable that the boundaries of the city of Los Angeles should be extended so as to give it a frontage on San Pedro Harbor, with all the attending commercial and political advantages, and that the extension of its limits for that purpose was both within the letter and spirit of the act. We have stated the position of counsel upon both sides as to the purposes and objects of this annexation, which each claims is reasonably deducible from the facts alleged in the complaint. We make no comment on them because we are satisfied that whether the territory in question, and of the shape, extent, and character fixed, should be annexed to the city of Los Angeles, was purely a political question, which, under the act, was left to the exclusive determination of the voters of the municipality and the territory sought to be annexed.

Counsel for appellant do not assail the shape of the annexation, but only its situa-

tion relative to the two municipalities of San Pedro and Wilmington and the purpose and effect of such annexation, particularly upon the city of Wilmington. In this connection it will be observed that the plaintiff relator does not attack the annexation on any grounds personal to himself. He does not claim that any fraud or injustice affecting his rights as a resident or taxpayer in the annexed territory was involved in the proceedings for annexation. It does not appear that he is a resident or taxpayer of the city of Wilmington, or in any manner concerned with the effect that annexation will have on the expansion of that municipality. His plain contention is that the annexation is itself void because no municipality can expand its territory so as to interfere in any direction with the territorial expansion of another city. This position is not tenable. The language of the statute on the subject of annexation is: "The boundaries of any incorporated town * * * may be altered and new territory annexed thereto * * * upon proceedings being had and taken as in this act provided. The council * * * or the legislative body of any such municipal corporation, upon receiving a written petition containing a description of the new territory asked to be annexed to such corporation, * * * must, without delay, submit to the electors of such municipal corporation and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such new territory shall be annexed to and incorporated in and made a part of said municipal corporation." And it is provided that, should the electors of the municipality and the outside territory vote in favor of annexation, such territory shall be annexed to and become a part of the municipality.

It will be observed from these provisions of the act that there is no limitation whatever expressed in the statute as to the extent or form of the territory to be annexed, and there is nothing from which any limitation can be implied. It has plainly left the matter of the annexation of any territory to a municipality to be determined by the people—the voters of the municipality and the territory proposed to be annexed. The Legislature itself in the very nature of things could not lay down any rule as to the extent, shape, or character of territory which might be annexed to any given municipality. This must necessarily depend on very many reasons—questions of expediency and policy—affecting the various municipalities, and adjacent territory to be annexed, in different ways. Hence it was doubtless concluded by the Legislature in conferring a power of annexation in the general terms used in the statute that the voters in a municipality could best determine whether its growth and the conditions surrounding it called for an extension of its municipal limits by the in-

crease of additional territory and its extent, and that the voters of the territory proposed to be annexed could with equal wisdom determine whether it was of advantage to them to become a part of the municipality to the extent and in the form as proposed. With the wisdom of their determination in the matter the courts cannot interfere. They only interfere where some substantial provision of the law has been violated or where fraud was perpetrated in the matter of the boundaries or the extent of the annexed district. That the extent and shape which the annexed territory shall take is a political, and not a judicial question, is clear from the conclusion announced by this court in the case of *People v. Town of Loyaltown*, 147 Cal. 774, 82 Pac. 620. In that case it is true that the court had under consideration a question as to the incorporation of a city under the general municipal incorporation act (St. 1883, p. 93, c. 49), but the principle decided there, that it was exclusively a matter for the Legislature to say what tribunal or how these boundaries should be fixed, is equally applicable to the fixing of the boundaries of territory to be annexed to an existing municipality under the annexation act. It is there held that under the Constitution all questions as to population and extent and character of territory to be included in the incorporation of cities or towns is left entirely to the Legislature, and that, under its power to provide for the incorporation of such municipalities, the question of the extent and character of territory proposed to be incorporated is left, under the general municipal incorporation act, as the Legislature was authorized to leave it, exclusively to the board of supervisors of the county in which the city is to be incorporated, and that the courts have no control of the subject. Under the annexation act the determination of the question is equally left to the voters of the municipality and the territory proposed to be annexed. If, in the one instance, the courts cannot interfere with the action of the board of supervisors on the question as to the territory to be incorporated, it cannot interfere in the other, with the determination of the voters as to the boundaries of territory to be annexed. The authority of the Legislature to provide for the annexation of territory to existing municipalities is derived from the same constitutional provision (article 11, § 6), which authorizes it to provide by general laws for the incorporation of cities. Under the Constitution it is left to the Legislature to determine the mode in which either incorporation or annexation shall be accomplished. What mode should be adopted was, therefore, purely a question of policy and expediency. It could have left the matter of extent and character of territory to be incorporated or annexed either to the determination of some city or county legislative body, or directly to the voters of the locality to be affected. Under the gener-

al incorporation act, it left it to the inhabitants of the territory proposed to be incorporated into a city, in the first instance, the right to determine the extent of such territory, limited only by authority granted the board of supervisors to change the boundaries proposed before submission of the matter to the voters by excluding some part of the proposed territory. To this legislative body alone was left the power to finally determine the extent of said incorporation boundaries, and, having done so, no right to interfere with such selection existed in the courts. So in the case of the annexation of territory the power to fix its boundaries is conferred by the Legislature directly upon the voters of the territory to be annexed and the annexing municipality, and no authority is conferred on any legislative body or judicial tribunal to review or interfere with their election upon the subject merely because of the form or extent of the territory annexed. See, also, *People v. Ontario*, 148 Cal. 625, 84 Pac. 205.

The language used in the annexation act is equally as broad as that contained in the general incorporation act with respect to the territory which may be annexed or incorporated. The size and shape of territory, its adaptability for municipal purposes, its extent and contiguity to another municipality, are all matters which are left to be determined by the people of the territory to be annexed and the annexing municipality. In the annexation act the territory which may be annexed is referred to in general terms "as territory proposed to be annexed" or "the annexed territory," and the only limitation which is imposed as to such territory proposed to be annexed is that no territory which, when the petition for annexation is presented to the legislative body of the city, forms any part of any incorporated city or town, shall be annexed under the provisions of the act. St. 1889, p. 360, c. 247. There is no other limitation. Aside from this there is no limitation as to the size, shape, or character of territory. There is certainly no provision against the annexation of territory so as to make it contiguous to the boundaries of another municipality. Neither is there any rule which requires the annexation act to be construed as prohibiting it. In fact, instead of prohibiting the contiguity of cities, the law contemplates that they may become so because it provides for their consolidation, but only permits it when they are contiguous. St. 1883, p. 97, c. 49, § 7. As existing municipalities can usually be made contiguous only by the extension of municipal boundaries, the simple fact that the annexation of outside territory accomplishes that result can be no objection to the validity of such annexation.

As far as the claim is made that the effect of the extension of the limits of Los Angeles, as accomplished, will be to compel

the consolidation of the smaller municipalities with the larger city, the answer is that under the law such consolidation cannot be effected without the consent of the smaller cities, and, if they consent, as the law says they may, no one has any ground of complaint. It may be said, too, that the claim of plaintiff that the effect of the extension of the limits of Los Angeles along the westerly boundary of the city of Wilmington is to prevent the natural expansion of the latter city is, in fact, more fanciful than real. San Pedro Bay naturally prevents expansion southward, but there is nothing to prevent its expansion to the northward and eastward. It has still unlimited power of extension in those directions. And, while it is restricted in its extension to the westward, there is no law which prohibits another municipality, when its present municipal necessities require it, from extending its boundaries by annexation because such extension may possibly prevent future expansion of another municipality. The contiguity of the boundaries does not affect the integrity of the present city of Wilmington, and that it might in the future, if not restricted by proximity to another city, extend in a given direction, is no reason why that other city, one of larger and increasing growth, whose practical and political necessities call for an extension of territory so as to bring it in touch with the seacoast, should be precluded from doing so merely, because at some future time the natural extension of the smaller city might possibly trend in the direction of the annexed territory. While it is claimed that the voters of the annexed territory did not constitute a fair and competent body to pass upon the question of the annexation as made, it is sufficient to say that it was the body to which, with the voters of the municipality, the Legislature left the determination of the matter. There were 213 votes cast in favor of the annexation in question here. In the Loyalton Case, to which we have referred, 79 votes constituted a body sufficiently competent to include in the incorporated city of Loyalton 52 square miles of territory. Certainly 213 voters were a competent body to determine the matter of annexation of a comparatively much smaller territory. If it be unwise legislation to grant the power to voters in the respective localities as broadly as it is conferred under the annexation act, appeal must be made to the Legislature itself. That body has the constitutional power to confer the authority on them to do so and has done it, and, whether it was wise or not, the courts cannot inquire into. Counsel for appellant would have us construe the statute as conferring such power on the court, but it is capable of no such construction. All matters of size, extent, form, and character of territory are committed to the popular vote under the act, and, unless some substantial provision of the law has been violated, as appellant further contends, his at-

tack upon the annexation itself cannot be sustained.

In that line it is insisted that the annexation was void because the ordinance calling the special election on that question and ordering notice thereof to be given was published but once and not for 10 days, the period for which the charter of Los Angeles prescribes that all ordinances calling elections shall be published. There is no merit in this point. The proceedings for annexation were had under the act of 1889, which act provides a complete scheme for annexation, and the provisions of the charter have no bearing on it. The act is a general law and controls and is superior to charter provisions, except only in "municipal affairs." Annexation of territory to a municipality is not, in any view, a municipal affair, as that term is used in the Constitution. It could not be accomplished under any provisions of the charter of Los Angeles, but solely under the general law. *People v. City of Oakland*, 123 Cal. 598, 602, 56 Pac. 445; *People v. Ontario*, supra. While it is true that the charter provides that all elections shall be ordered by ordinance, which shall be published 10 days, this only has relation to elections which are had entirely in the city. It cannot have application to an election held at once within and without the city, and which has relation to matters outside of municipal affairs. An annexation election is an election held in the city only to the extent that the city is one of the parties whose electors have a voice in determining the question of annexation. Authority to hold an election at all for that purpose is granted solely by the annexation act, which prescribes the terms, conditions, and mode to be followed in submitting the question to both the voters of the municipality and the territory to be annexed, and, as it provides a perfect scheme for that purpose, its provisions alone govern. All that the act prescribes as to notice of the election is that such notice shall be given by publication for four weeks in one newspaper published in the city and one in the outside territory, if one be published there. It does not direct any method by which the election shall be ordered. The legislative body of the city might have ordered it by either ordinance or by resolution. It was not required to do it by ordinance. It might adopt that method, not on account of any provision of the annexation law requiring it, but because, in the absence of any prescribed method, it could elect to avail itself of such method as it deemed advisable. It could, of course, not be claimed that the publication of the ordinance for 10 days was necessary so as to give legal notice to the voters in the outside territory. As to them, it must be conceded that the provisions alone of the annexation act had application, and the publication of the ordinance as made was all that was necessary. The claim is only that, in order to give legal notice to the electors

of the city, the ordinance should have been published for 10 days. It is not pretended that the charter provides any machinery (because it does not) whereby the annexation election could be held entirely under it, but only that this particular provision of it had application and must govern. This, however, would present an anomalous condition of affairs, arising from the application of two different laws; the annexation law governing the procedure as far as the electors in the outside district are concerned, and the charter governing it as to electors in the city. We are satisfied that no such situation is presented. The charter provisions as to elections have relation only to elections held solely in the city. They have no application to an annexation election, which is in no respect a "municipal affair," but a matter entirely outside of such affairs. Such elections are governed by the provisions of the annexation act alone, and in the matter of notice its provision was complied with.

The last point made by appellant is that the notice given of the election was not sufficient, reasonable, nor legal. The notice was published for four weeks prior to the election, as provided by the annexation act. It is conceded that the notice as given filled the express requirements of the act taken by itself, with respect to length of time, but it is claimed that as under section 1094, Pol. Code, in force when the election was held, registration for any election is forbidden for a period of 40 days prior thereto, it was incumbent on the city council of Los Angeles, which called the election, to give notice thereof long enough prior to such period of 40 days, so as to afford every qualified elector a reasonable opportunity to register in the interim; that there is nothing in the annexation act preventing the giving of such a notice as would afford an opportunity to register; and that the act and the section of the Political Code must be construed together as requiring a notice which will give sufficient time for electors to do so. We do not think the point as made has any force. The registration law makes no provision for registration for any particular election. It provides that on the 1st of January of the even numbered years a new registration of voters shall take place. The new register so made is to be used for any election which may be had during these two years, whether it be special or general, and no one may vote at any election held during such time, unless he is registered. No provision is made for a registration for any special election, but simply a general registration, under which the voters may participate in any election which may occur, whether it be special or general, and every voter has notice, because the law so provides, that for any election which may be called during that period, no matter how called or for what purpose, no registration within 40 days preceding it

is permitted. Every voter is given the same opportunity to be registered, and so be prepared, at any election which may happen, to exercise his voting privilege. It is of no moment to say that electors do not know that a special election will be had at any particular time. They do know, however, that special elections are had, and in contemplation of law are charged with notice that special elections for annexation of territory and for many other purposes are provided for by law, and may be held at any time, and within a period which will not give them an opportunity to vote thereat, unless registered when the election is called. The registration law makes no distinction as to elections, and does not take at all into consideration special elections as such. Its policy is that electors shall be prepared by previous registration to vote at any election which occurs, whatever its character, and there can be no valid reason presented why a special election called in express conformity to the statute should be annulled merely because notice of it was too short to permit some electors to register and participate in it, when they were already given under the registration law ample time and opportunity to be prepared to do so.

There are very many statutes in force in this state on the subject of special elections for various purposes, some passed prior, and some subsequent, to the amendment to section 1094 of the Political Code requiring registration to cease 40 days before elections, and all permitting elections to be held in much less than 40 days from the date of the notice. Many of these statutes provide for such special elections in order to authorize the issuance of municipal and other bonds for various purposes, and it may be safely said that bonds of the value of millions of dollars are now outstanding the issuance of which have been authorized at such special elections. Many cases have been presented to this court involving the validity of such elections, but the point has never been asserted, which is asserted now, that these elections were invalid on account of insufficiency of notice. If the point was deemed of any special merit, it is hardly to be supposed that in the different cases counsel attacking the validity of such elections would have overlooked it. This, of course, is no reason why, if there is any merit in the point, it cannot be availed of now; but in view of the fact that such point has never been deemed of sufficient importance to be heretofore presented for determination by this court, in cases which involved it as fully as it is involved here, and considering further, the vast present interests to be disastrously affected by now sustaining it, some authority, persuasive in its reasoning, would have to be presented before we would feel constrained to do so. None has been. Counsel for appellant cite and quote from some cases which they claim support this conten-

tion. Our reading of them compels a different conclusion. They are all cases relating to violations of plain provisions of statute as to notice, or involving provisions of law which so limited the time within which an elector might register, as to amount to a practical denial of the right to register and vote, or cases where no general registration was provided for and the right to vote could only be given by special registration. They have no bearing on the matter under consideration, where general registration for all elections offers electors ample opportunity to register and vote, and where no provision for special registration for elections is provided for.

The judgment appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

154 Cal. 209

FOGG v. PERRIS IRR. DIST. (HUTCHINGS, Intervener.)

PEOPLE v. SAME. (L. A. 2,032.)

(Supreme Court of California. Aug. 28, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—ORGANIZATION OF DISTRICT—JURISDICTION OF COURT—SUFFICIENCY OF PETITION AND NOTICE.

A writing as follows: "Notice is hereby given that the following petition for the organization of an irrigation district in the counties of San Bernardino and San Diego, to be known as the Perris Irrigation District, will be presented to the board of supervisors of San Bernardino county, state of California, at the court house in the city of San Bernardino, at a regular meeting of said board on the 7th day of April, 1890, at 10 o'clock a. m. Petition for Perris Irrigation District"—followed by a petition, in regular form for the organization of the proposed district subscribed by a requisite number of freeholders in the district, legally performed the double office of notice and petition for the organization of the district; the document being sufficient in form to answer both purposes, and there being nothing in the statutes forbidding such a combination of uses, or prescribing any particular form either for the petition or for the notice.

2. SAME—FRAUD IN PETITION—EFFECT AFTER CONFIRMATION.

The fact that most of the persons who signed the petition to the board of supervisors for the organization of an irrigation district were not bona fide freeholders, but were temporarily given nominal undivided interests in land for the express purpose of qualifying them to sign the petition, while a fraud upon the board if concealed from it, and upon the law and the property owners of the district even if disclosed to the board, and a sufficient cause for declaring the organization of the district invalid if shown to the court on a proceeding for confirmation, would not make the organization absolutely void so as to deprive the court of jurisdiction in that proceeding, but only voidable, and persons dealing with the district after the organization was perfected upon the face of the record would not be presumed to know of the fraud, and, if ignorant thereof, would be protected against it, the purpose of the act of 1889 (Laws 1889, p. 212, c. 178), providing for an adjudication of the validity of such a district, being to furnish a barrier against subsequent attacks upon the

ground of such frauds, and thereby to protect its bondholders.

3. SAME—NOTICE OF HEARING OF CONFIRMATION—PROCEEDINGS—SUFFICIENCY—DESCRIPTION OF PROPERTY AFFECTED.

Notices of a hearing for confirmation of proceedings for the organization of an irrigation district, stating that the board of directors of the Perris irrigation district had filed a petition praying that the proceedings theretofore had for the issue and sale of bonds of said Perris irrigation district be confirmed, and that any person interested in the organization of the district, or in proceedings for the issue and sale of the bonds, might appear and answer or demur to the petition, sufficiently described the real estate to be affected by reference to the district by name, inasmuch as Laws 1887, p. 30, c. 34, § 3, requires that the board of supervisors in organizing an irrigation district shall by minute order "declare such territory duly organized as an irrigation district," and shall "cause a copy of such order, duly certified, to be immediately filed for record" in the county recorder's office of each county in which its lands lie, and, the proceedings for the organization of the district being regular on the face of the record, the district thereby became prima facie a quasi municipal corporation, with defined boundaries, established and recorded, and the record constituted constructive notice of the location of the boundary lines to the inhabitants of the district, as well as to all others.

4. SAME—CHANGE OF DISTRICT BOUNDARIES.

The fact that, after the original organization of the district, changes were made in its boundaries, did not render the mere name of the district insufficient as an identification; since, if the proceedings to change the boundaries were regular and valid on their face, they were matters of record which could be ascertained by examination.

5. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ERROR NOT CAUSING SUBSTANTIAL INJURY.

Where a decree of court confirming, not only original proceedings for the formation of an irrigation district, but also subsequent proceedings eliminating and adding certain territory, and approving bond sales, which was rendered after a prior decree, is valid, any error in the prior decree which confirmed the proceedings up to the order for the sale of the bonds was cured and will not cause reversal; Code Civ. Proc. § 475, providing that no judgment can be reversed for error unless by reason thereof appellant has suffered substantial injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4240.]

6. WATERS AND WATER COURSES—IRRIGATION DISTRICTS—CONFIRMATION OF PROCEEDINGS TO SELL BONDS—SUFFICIENCY OF NOTICE AND PETITION.

Laws 1889, p. 212, c. 178, § 1, provides that the board of directors of an irrigation district may commence a special proceeding by which the proceedings of the board and the district authorizing the issue and sale of bonds may be confirmed. Section 2 provides that the prayer of the petition shall, in effect, be that the proceedings may be examined, approved, and confirmed by the court, and shall state generally that the district was duly organized. Section 5 declares that, upon the hearing of the petition framed as aforesaid, the court shall have jurisdiction to determine the validity of, and confirm all the proceedings for, the organization of the district and all other proceedings which may affect the legality of the bonds, the order of sale, and the sale thereof. *Held*, that a petition and notice asking for the confirmation of the proceedings to issue and sell the bonds were sufficient to support a decree confirming the proceedings to organize the district, though such confirmation was not asked.

7. APPEAL AND ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence upon a phase of the case is conflicting, a finding thereon is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

8. TRIAL—FINDINGS OF FACT—FAILURE TO FIND ON PARTICULAR QUESTIONS.

In an action to set aside decrees of a court, where the facts found by the court conclusively showed the validity of the decrees, findings on other issues were immaterial and unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 941.]

In Bank. Appeal from Superior Court, San Diego County; H. S. Torrance, Judge.

Consolidated actions by F. J. Fogg against the Perris Irrigation District, and by the people against the same defendant, in both of which actions J. C. Hutchings intervened. From judgment in each case for defendant and intervener, and orders denying a new trial, plaintiffs in each case appeal. On appeal both cases were by stipulation decided upon the record in the Fogg Case. Affirmed.

Works, Lee & Works, for appellants. John F. Crowe, for respondent. Oscar C. Mueller and William M. Hiatt, for respondent intervener.

SHAW, J. The above-entitled cases were before this court on former appeals from judgments in favor of the defendant and intervener in each case, given upon sustaining a demurrer to the complaint. Those judgments were reversed. *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381; *Fogg v. Perris Irr. Dist.*, 142 Cal. 18, 76 Pac. 1127. Upon the going down of the remittitur the defendant and the intervener, respectively, filed answers in each case. The two cases were tried and submitted on the same evidence, findings and judgment in each case were made and given for the defendant and intervener, and motions of the respective plaintiffs for a new trial were denied. Appeals were then taken to this court in each case from the judgment and from the order. By stipulation all these appeals have been presented and are to be decided upon the record in the case of *Fogg v. Perris Irrigation District*, and we will in this opinion refer solely to that case.

The object of the action, as shown in the complaint, is to set aside two decrees of the superior court of San Diego county approving, confirming, and declaring valid the proceedings for the formation and organization of the Perris Irrigation district, under the act commonly known as the "Wright Act" (St. 1887, p. 29, c. 34). The first decree was made on December 13, 1890, and it confirms the proceedings up to the order for the sale of certain bonds. The second was made on December 8, 1892, and it purports to confirm, not only the original proceedings for the formation of the district, but also subsequent proceedings eliminating and adding certain

territory, and to approve bond sales made after the first decree. Both decrees appear to have been made in pursuance of the act of 1889, St. 1889, p. 212, c. 178. The attacks upon these decrees are based in part on the ground that the court did not possess or acquire jurisdiction to try the actions and give the judgments. As to the second decree it is also claimed that it was obtained by fraud.

Upon the question of jurisdiction to pronounce the decrees, the first contention of the appellant is that the proceedings for the organization of the district were absolutely void in the extreme sense, that they were of no effect whatever, hence, that there was at the time no such district in existence, no subject-matter upon which the court could act in confirmation proceedings, and, therefore, that there could be no jurisdiction or power to confirm the proceedings or declare the validity of a district which had no legal existence. It is argued that if the court had power, in confirmation proceedings under the act of 1889, to make a lawfully organized district out of a wholly void previous attempt to form such a district, it would, in effect, be creating a district by a mere decree of confirmation, a thing which the act of 1889 does not contemplate or authorize; that the purpose of that act was merely to confirm proceedings and cure irregularities, errors, and omissions in the record thereof; but that, if the original proceeding was void for lack of jurisdiction in the board of supervisors, it is beyond the power of cure by means of a judgment confirming and declaring it valid. So far as this argument applies to a lack of jurisdiction of the original proceeding which appears upon the face of the record thereof, we can perceive no good answer to the argument. Respondent makes no attempt to answer it. Without deciding whether it is sound or not, we will for the purposes of the case assume the contention to be thus far correct. We are of the opinion that the record of the original proceeding does not on its face disclose a want of jurisdiction. The only defect claimed rests upon the assertion that no petition for the organization of the district was ever presented to the board of supervisors, and that no notice of the time when a petition would be presented was ever given. This assertion depends upon the force and effect of the papers that were presented to the board. It appears that the petition and notice for the organization of the district were both contained in a single document. This document began as follows:

"Notice is hereby given that the following petition for the organization of an irrigation district in the counties of San Bernardino and San Diego, to be known as the Perris Irrigation District, will be presented to the board of supervisors of San Bernardino county, State of California, at the court house in the city of San Bernardino, at a

regular meeting of said board on the 7th day of April, 1890, at 10 o'clock a. m.

"Petition for Perris Irrigation District."

Then follows a petition, in regular form, for the organization of the proposed district, at the end whereof is subscribed the genuine signatures of 55 persons who in the petition declare that they are freeholders owning lands in the district. A copy of this document was published, as the law requires, in a newspaper of the county for two weeks before the time named for its presentation. At the time thus fixed for the presentation, the original document in its entirety was presented to the board as a petition for the organization of the district, and as such it was received and acted on by the board, and the district was formed upon that as a foundation. The contention is that this document could not legally perform the double office of notice and petition; that it was either the one or the other, but could not be both. It is urged that, to constitute a valid notice and petition, there must be two documents, one constituting the notice and the other the petition, and each signed by the petitioners. The argument is that, as this document begins as a notice, it cannot be construed to be anything else, and that, as it has been held that the notice published must bear upon its face the signatures of the petitioners, or show that it was issued by them or given under their authority (In re Central Irr. Dist., 117 Cal. 392, 49 Pac. 354), it can constitute nothing but a notice, and that, having served that purpose, it could not afterwards be used as a petition. This argument appears to us to have little force. We can see no legal objection to this method of embodying the notice and petition in one document and using it for each purpose successively. The only notice required is a notice to be published in a newspaper. Necessarily this publication must consist of numerous printed copies, not of the one original. There is nothing in the statutes forbidding such a combination of uses, or prescribing any particular form, either for the petition or for the notice. The document was sufficient in form to answer both purposes. Its contents sufficiently show that the parties who signed it intended that it should be so used. After copies of it were published as a notice, there could be no substantial objection to the presentation of the original to the board as a petition.

The other objection to the jurisdiction of the board did not appear upon the record. It was alleged on the one hand and denied on the other that 42 of the persons who signed the petition were not bona fide freeholders, but were made freeholders, temporarily and nominally only, by a conveyance to them of undivided interests in two or three five-acre tracts of land in the district, upon the agreement that they were to take the deeds, sign and present the petition, and reconvey to the grantor after the organization was

effected, and that the other freeholders who signed the petition did not constitute a majority of the freeholders in the district. The court made no finding upon this issue. We must therefore consider its materiality, if true. We do not doubt that this was a fraud on the board, if concealed from it, as is alleged, or that it would be a fraud upon the law and upon the property owners of the district, even if disclosed to the board, and that, when shown to the court on a proceeding for confirmation, it would be sufficient cause for declaring the organization of the district invalid. It did not, however, make the organization of the district absolutely void, but only voidable. Persons dealing with the district after the organization was completed and perfected upon the face of the record would not be presumed to know of this fraud, and, if ignorant thereof, would be protected against it. The purpose of the act of 1889, in providing for an adjudication as to the validity of the district, was to furnish a barrier against subsequent attacks upon the ground of such frauds in the organization of the district, and thereby to protect its bondholders. It could not have been contemplated or intended that the existence of such fraud would always be open to inquiry, notwithstanding such adjudication, nor that, if subsequently shown, it would prove that the court in the confirmation proceedings had no jurisdiction to act at all, and that its decree was void. We think, therefore, that upon the face of the record jurisdiction of the original proceeding was shown to exist, and that the fraud alleged, although sufficient to have made the organization invalid if shown upon the hearing of the proceedings for confirmation, was not sufficient to deprive the court in that proceeding of jurisdiction to make the adjudication which is here sought to be vacated.

It is further contended that both of the decrees of confirmation were void because no notices of the hearing thereof were given. The record in each case shows that the notices were duly published for the prescribed time. It is claimed that they were each void for the reason that they did not contain any description of the real estate of the district, or that of any owner thereof, nor in any manner indicate its boundaries, so that a landowner therein would be warned thereby that his land would be affected or incumbered as a result of the decree sought. The statute requires that "the notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the date fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ——— irrigation

district [giving its name], praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved and confirmed by said court." The notices fully complied with these provisions. Appellant claims that this is not sufficient; that there must be some description of the land that would give notice to the owner that his land was involved; that otherwise the act would be unconstitutional, in that it would allow a person to be deprived of his property without due process of law. Conceding that the latter proposition is the law for the purposes of this discussion, we think the notices given were sufficient. Each notice stated that the board of directors of the Perris Irrigation district had filed a petition praying that the proceedings theretofore had for the issue and sale of bonds of said Perris Irrigation district be examined, approved and confirmed, and that any person "interested in the organization of said district, or in proceedings for the issue and sale of said bonds," might appear and answer or demur to the petition. The law requires that the board of supervisors of the county in organizing an irrigation district shall by minute order "declare such territory duly organized as an irrigation district," and shall "cause a copy of such order, duly certified, to be immediately filed for record" in the county recorder's office of each county in which its lands lie, and that from the date of such filing the organization of the district shall be complete. St. 1887, p. 30, c. 34, § 3. The proceedings for the organization of the district, as we have seen, were regular on the face of the record. The district thereby became *prima facie* a quasi municipal corporation, with defined boundaries established and recorded, and this record constituted constructive notice of the location of the boundary lines to all the inhabitants of the district and to the world. The existence of the Perris irrigation district and the location of its boundaries being matters of record, the statement in the notice that the petition was for the purpose of confirming the proceedings for the sale of the bonds of the Perris irrigation district was sufficient to inform any owner of lands situated in the district that his lands would be affected, and that he was interested in the matter to be adjudicated. It was equivalent to a declaration that the lands in the Perris irrigation district would be affected, and any landowner could, by reference to the official records of his county, ascertain whether or not his land was included therein. The name of the district, it having by that name a *prima facie* legal existence as such, evidenced in the manner prescribed by law by the necessary official record of the proceedings and order upon which it was declared organized, was a sufficient identification of its boundaries. It constituted a *prima facie* political subdivision of the state for the purposes of an irrigation district, and all per-

sons were required to take notice of the facts shown in the record of its organization.

It is suggested that after the original organization of the district certain changes had been made in its boundaries, and that this rendered the mere name of the district insufficient as an identification. These changes would not make the boundaries of the district, as changed, less definite and certain than before. If the proceedings to change the boundaries were regular and valid on their face, they were matters of record, and the exact extent of the changed boundaries could easily be ascertained by an examination thereof. It is not claimed that they were not regular on the face of the record; hence the description in the notice was sufficient. The argument that the changes in the boundaries were void because the original organization was tainted by concealed fraud is answered by the same considerations upon which we reached our foregoing conclusion that such concealed fraud does not destroy the *prima facie* legal existence of the district. We have reached the conclusion, as will hereafter be seen, that the second decree, that of December 8, 1892, is valid, and that it conclusively adjudicates and establishes the validity of the proceedings to organize the Perris irrigation district and to issue and sell the bonds thereof, as well as its legal existence as an irrigation district under the "Wright Act" at least so far as is necessary for the protection of the bondholders. See *People v. Linda Vista I. D.*, 128 Cal. 480, 61 Pac. 86. This conclusion makes it unnecessary to consider alleged errors of the court relating solely to the first decree of confirmation. If we concede that decree to be void, the second decree, if valid, will protect the district and the bondholders against any attack by the plaintiff upon the validity of the district organization or the issuance of the bonds as effectively as would the first decree, and will render harmless any error of the court below in holding the first decree valid. No judgment or order can be reversed for error, unless, by reason of the error, the appellant has suffered substantial injury. Code Civ. Proc. § 475. We will proceed to consider the objections to the validity of the second decree.

It is suggested that the petition and notice upon which the second decree was made asks for the confirmation of the proceedings to issue and sell the bonds, and for nothing else, and hence that so far as that decree purports to confirm and validate the proceedings to organize the district, it went entirely beyond the issues and the matter before the court, and was consequently void. The statute and the record in the case do not sustain this contention. The statute (St. 1889, p. 212, c. 178) provides that the board of directors of the district may commence a "special proceeding in and by which the proceedings of said board and of said district, providing for and authorizing the

issue and sale of the bonds of said district" may be judicially approved and confirmed. Section 1. Section 2 provides that the prayer of the petition, in effect, shall be "that the proceedings aforesaid may be examined, approved and confirmed by the court." We have heretofore stated the provisions regarding the contents of the notice. The notice is not required to state that the legal existence of the district, or the validity of the organization proceedings, is to be determined. The petition is required "to state generally that the irrigation district was duly organized"; but need state nothing further in the way of detail on that subject. It is plain, nevertheless, that the question of the validity of the proceedings to issue and sell the bonds necessarily involved and required an inquiry into the validity of the original organization of the district. The statute itself recognizes this necessity and provides for it. Section 5 declares that upon the hearing of the petition, framed as aforesaid, "the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of the proceedings for the organization of said district * * * and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof."

The petition and notice in question conformed in all particulars to the requirements of this statute. It appears that, after the first decree, numerous sales of bonds had been made. The petition recited these sales at length, and in that respect only it differed from that upon which the first decree was based. The second petition and notice were therefore sufficient, under the statute, to give the court jurisdiction to adjudge the validity and legal existence of the district.

The complaint alleges that the second decree was procured by fraud, in this: that the attorney who had been employed by certain persons owning lands in the district to appear and contest the proceeding was bribed by the directors of the district to absent himself from court at the time of the hearing, and to suffer the decree to be entered by default. The record shows that no one appeared at the hearing on behalf of any objector, and that no objection was filed. Upon the question of the employment of the attorney to appear for the proposed contestants and his alleged bribery by the directors, the evidence was direct and in substantial conflict, and the finding was against the appellant. Under such conditions the finding cannot be reversed on appeal. It is conclusive upon this court. The question whether or not the bond sales set forth in the second petition and which the second decree of confirmation expressly purports to confirm were thereby rendered immune against subsequent attacks based on the ground that they were sold or exchanged in violation of

the statute of 1887, as construed in *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120, *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. 496, 1034, and *Leeman v. Perris Irr. Dist.*, 140 Cal. 540, 74 Pac. 24, is not involved in this case, and we need not decide it. It may be observed, however, that the decision in *Stimson v. Alessandro Irr. Dist.*, supra, appears to hold that such a decree does not make such bonds valid.

The complaint is made that the court failed to find on all the issues. The findings cover the issues relating to the want of notice on the hearing of the first petition, and also those in regard to the alleged fraud in procuring the second decree; the decision on each issue being against the plaintiff. These facts so found showed conclusively that the decrees were valid, and that the plaintiff was not entitled to judgment and rendered any finding on the other issues immaterial and unnecessary. We need not here determine whether or not the decrees of confirmation, or either of them, were or would be conclusive as to the due organization of the district in any controversy that may arise involving the validity of such organization, but not involving the rights of any bondholder. Even if we should reach the conclusion that these decrees could be of no force except to protect bondholders, they could not be set aside on that ground alone. The force and effect of the decrees, when such other matters alone may be involved, in any action, is to be determined when the question arises in such action. The alleged errors of law in the exclusion of evidence are not in our opinion of sufficient importance to require notice. It is reasonably certain that the excluded evidence could not have affected the decision upon any material fact.

The judgments and orders appealed from in each case are affirmed.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

8 Cal. App. 563

Ex parte HALLAWELL. (Cr. 98.)

(Court of Appeal, Second District, California.
July 18, 1908.)

1. POISONS—SALE—REGULATION.

The act to regulate the sale of poisons and providing a penalty thereof (St. 1907, p. 126, c. 102, § 8), prohibiting the sale of opium, its compounds, and preparations except on a prescription, is within the police power.

2. STATUTES—INVALIDITY IN PART.

Even if the act to regulate the sale of poisons (St. 1907, p. 125, c. 102, § 3), delegating to the board of pharmacy the power to revise the list of antidotes and to further restrict or prohibit the sale of poisons, be void, it being clearly separable from section 8, prohibiting the sale of certain poisons, except on prescription, does not invalidate it.

3. FINES—EXCESSIVE FINES.

The act to regulate the sale of poisons (St. 1907, p. 125, c. 102, § 7), fixing the punishment at a fine of not less than \$30 or by

imprisonment for not less than 15 days, does not, because fixing no maximum, contravene Const. art. 1, § 6, as to excessive fines; it not providing for the imposition of such fines.

Application by J. L. Hallawell for writ of habeas corpus. Denied.

L. E. Dadmun, for petitioner. Lewis R. Kirby, Dist. Atty., H. S. Utley, Asst. Dist. Atty., and Wright, Schoonover & Winnek, for respondent.

SHAW, J. It appears that petitioner is committed to jail under an information filed by the district attorney of San Diego county charging him with the crime of selling a preparation of opium, the purchaser thereof not having a prescription therefor, as required by section 8 of "An act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof." St. 1907, p. 126, c. 102.

Petitioner contends that said act is unconstitutional, and hence the sale of the opium compound could not constitute a public offense. Section 8 of the act in question provides: "The sale of morphine, codeine heroin, opium and cocaine, their salts, compounds or preparations is hereby prohibited, unless upon the prescription of a physician, dentist, or veterinary surgeon, licensed to practice in this state, except preparations of opium containing less than two grains of opium to the fluid ounce." The act does not purport to prohibit, but, as indicated in its title, regulates the sale of the medical drugs specified therein by requiring the seller to comply with certain conditions deemed necessary for the protection of the public safety and welfare. Opium and its compounds and preparations are recognized as medicinal drugs of a poisonous nature, the use of which often tends to moral, mental, and physical destruction. Its sale and disposition, therefore, is a proper subject of legislation under the police power of the state, even to the extent of absolutely prohibiting the sale and disposal thereof. Section 11, art. 11, Const. Cal.; Ex parte Yung Jon (D. C.) 28 Fed. 308; State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; section 93, Freund on Police Power; Ex parte Hong Shen, 98 Cal. 682, 33 Pac. 799. Having the power to prohibit the disposal of such drugs altogether, the governing power may impose such restrictions upon the sale or distribution thereof as it pleases. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Murphy (Cal. App.) 97 Pac. 199. By section 3 of the act it is provided that the board of pharmacy of the state of California shall have the power to revise and amend the list of antidotes from time to time, as to them may seem advisable; and, by section 4, that: "When in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict, or prohibit the retail sale of any poisons by rules, not inconsistent with the provisions of

this act, by them to be adopted." Petitioner contends that this delegation of power to the state board, being void, vitiates the entire act. Conceding said provisions to be void for the reasons assigned, and as to which we express no opinion, it is also true that "nothing is better settled than that if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected." Ex parte Christensen, supra; City of San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. 694. The part of the law here attacked as being a delegation of legislative authority is clearly separable from section 8 of the act, and may, therefore, be rejected, so far as petitioner's rights are concerned.

Section 7 of the act fixes the punishment for a violation thereof by a fine of not less than \$30, or by imprisonment for not less than 15 days, or by both fine and imprisonment. By reason of the fact that no maximum punishment is specified, petitioner contends that excessive fines may be imposed, contrary to section 6 of article 1 of the Constitution of California. As the act itself does not provide for the imposition of excessive fines, it is not obnoxious to the Constitution on that account. And we cannot assume the court will do violence to the constitutional provisions invoked (applicable alike to both the legislative and judicial departments. Tucker's Constitution of the United States, p. 686) by inflicting a penalty, in case of conviction, wholly disproportionate to the offense charged. As bearing upon the question, see State v. Williams, 77 Mo. 310; People v. Tom Nop, 124 Cal. 150, 56 Pac. 786; People v. Haagen, 139 Cal. 115, 72 Pac. 836.

An examination of other points urged as grounds for entertaining petitioner's application discloses no merit.

The application is denied.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 576

FOCHA et al. v. FOCHA'S ESTATE.
(Civ. 505.)

(Court of Appeal, First District, California.
July 28, 1908. Rehearing Denied Aug. 24,
1908; Denied by Supreme Court Sept. 24,
1908.)

WILLS—PROBATE—PROCEEDINGS TO REVOKE
PROBATE—WANT OF PROSECUTION.

Under Code Civ. Proc. § 1337, authorizing the filing of a petition within one year after the probate of a will to contest it, and section 1338, prior to the amendment of 1907, requiring the issuance of citation to named parties without specifying the time therefor, one who files three days before the expiration of a year after the probate of a will a petition to revoke the probate, but who does not for more than six months thereafter take any steps to issue citation nor take any proceedings in the matter, is prima facie guilty of want of diligence, authorizing the dismissal thereof on motion of the executor.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Petition by John Focha and others for the revocation of the probate of the will of Frank J. Focha, deceased. From an order dismissing the petition, plaintiffs appeal. Affirmed.

R. E. Hewitt, for appellants. D. Kinsell, for respondent.

KERRIGAN, J. This is an appeal from an order dismissing a petition to revoke the probate of a will for lack of prosecution. Frank J. Focha died, leaving a will, which was probated November 27, 1905. On November 24, 1906, John Focha and others filed a petition for the purpose of procuring the revocation of the probate of said will, but no citation was issued at that time, or at any time thereafter, to the executrix or to any other person. May 17, 1907, the executrix filed a motion to dismiss the petition, upon the ground that there had been an unreasonable delay in its prosecution.

The Code of Civil Procedure (section 1337) provides that a contest of the probate of a will may be commenced by filing a petition in writing "at any time within one year after such probate." The next section, as it existed at the time of these proceedings and prior to the amendment of 1907, provided that a citation must be issued to certain named parties, but mentions no specified time within which it must be issued; and appellant contends that a citation might issue at any time within one year after the filing of the petition for revocation. In support of this contention he cites the case of *Bacigalupo v. Superior Court*, 108 Cal. 92, 40 Pac. 1055, where it is said that "a citation in its general character is a summons, and under the provisions of the Code, giving section 1328 the widest latitude possible, the power to issue a citation would beyond all question cease one year after the petition for revocation was filed." But the court also added: "Whether it would cease in less than a year we need not here decide." That case, notwithstanding the language just quoted, is authority only to the point that no citation could be issued after the expiration of one year from the filing of the petition. The comparison there made between a citation and a summons was unnecessary for the decision of the case, and the view of the court in that regard was criticised in the case of *S. F. Prot. O. A. v. Superior Court*, 116 Cal. 446, 43 Pac. 379.

Respondent relies to some extent upon the case of *Estate of Sbarboro*, 63 Cal. 5. In the case at bar the petition for revocation of the probate of the will was filed but three days before the expiration of the year after probate. Neither then nor more than six months thereafter, when the motion to dismiss was granted, had any citation been issued, nor had proceedings of any kind been

taken. The law contemplates a speedy administration and settlement of estates. The facts in this case, unexplained as they are, make a prima facie case of a lack of diligence on the part of the appellant, and furnished ample ground for the dismissal of the petition.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 559

STIMSON MILL CO. v. HUGHES MFG. CO. (Civ. 504.)

(Court of Appeal, Second District, California. July 18, 1908. Rehearing Denied Aug. 17, 1908; Denied by Supreme Court Sept. 17, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

Findings of fact, made by a trial court on testimony which is directly conflicting, will not be disturbed by an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. ACCOUNT STATED—PERSONS BETWEEN WHOM ACCOUNT MAY BE STATED—PREVIOUS INDEBTEDNESS.

An account stated cannot be made the instrument to create a liability, but only determines the amount of the debt where liability previously existed.

3. SAME.

Where defendant corporation succeeded a partnership, one of the partners becoming president and the other general manager, the delivery at the office of defendant of accounts in which the partnership was charged as debtor for goods furnished by plaintiff to a third party, although no objection was made thereto, cannot charge defendant with liability for the goods as on an account stated.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by the Stimson Mill Company against the Hughes Manufacturing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. G. Scarborough and Scarborough & Bowen, for appellant. George P. Adams, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendant and from an order denying a new trial. The action is to recover for building material alleged to have been sold and delivered to defendant at an agreed price. It is alleged in the complaint that the material was delivered in lots on various dates between November 5, 1904, and January, 1905; that upon delivery of each lot an itemized account was furnished defendant, showing the amount and price and that the same was sold by plaintiff to defendant; that at various dates after the final delivery an account was rendered by plaintiff to defendant, showing the transaction in detail, which defendant retained, and never made objection thereto until May, 1905; and it is alleged that by reason thereof said

account became stated, and defendant had agreed and assented thereto, and is accordingly indebted. Nonpayment is alleged. The second count in the complaint is for goods sold and delivered. An issue was raised by the answer as to each and all of the allegations of the complaint. The court found in favor of defendant upon all the issues.

It appears from the record that prior to September, 1903, Hughes Bros. were engaged in conducting a planing mill in Los Angeles; that about the date last mentioned the defendant corporation was organized and took over the business, one of the brothers remaining as general manager of defendant, while the other brother became president. The evidence in relation to the transactions and the contract and agreement with reference to the delivery of the lumber is very conflicting—it being asserted by witnesses for plaintiff that there was an express contract on the part of Grant Hughes, the general manager of the defendant, to buy and pay for the lumber, and he agreed that it might be delivered to one Coffey, a contractor engaged in building certain schoolhouses; that before delivery Grant Hughes agreed for the defendant to pay for such lumber upon a representation to him by plaintiff that it would not deal with Coffey. Upon the other hand, defendant's witnesses testified that no such agreement or contract was made or entered into, and that defendant had no knowledge that plaintiff objected to selling to Coffey; that the only connection that Grant Hughes had with the transaction was in procuring Coffey's consent that plaintiff might bid on the furnishing of lumber, but that at no time was any agreement or arrangement made by which the defendant, or Hughes Bros., ever agreed to become responsible for the material so delivered. The court accepted as true the statements of the defendant's witnesses, and upon this appeal the action of the court, under the well-established rule, will not be disturbed.

Appellant relies chiefly upon the proposition that the itemized account rendered Hughes Bros., by reason of its retention for a long time without objection, makes a stated account; that this stated account became a new contract, and as none of its items were impeached by the answer the same became conclusive against defendant. The doctrine of *Terry v. Sickles*, 13 Cal. 427, is invoked, where it is said by the court: "If the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated." This is approved in *Mayberry v. Cook*, 121 Cal. 590. 54 Pac. 95, and many other decisions cited. It will be observed, however, that in these, as in all cases where such a rule is applied, it is necessary that the relation of debtor and creditor should be shown to exist at some period. "An account stated must be

founded on previous transactions of a monetary character. * * * It cannot be made the instrument to create a liability where none before existed, but only determines the amount of a debt where liability exists. *Austin v. Wilson* (Super.) 11 N. Y. Supp. 565." *Chase v. Chase*, 191 Mass. 556, 78 N. E. 115. That no monetary transaction between plaintiff and defendant existed, in relation to the lumber in controversy previous to the sending of these statements, is found by the court. It should follow, then, that the itemized statements could not be made to create an indebtedness. This is true, had the statements been received by the corporation defendant. The record shows that no account of any kind was rendered defendant; but, on the contrary, on their face the statements purported to state an indebtedness of Hughes Bros., the firm formerly engaged in the business, and from whom the corporation acquired a part of its property.

We find nothing in the complaint or record amounting to a plea or proof of an estoppel. There is no claim that plaintiff was induced to deliver subsequent lots of lumber, relying upon former accounts rendered, retained and acquiesced in, but, upon the contrary, that each and every delivery was based upon an express contract to pay the value thereof, which contract, the court finds, did not exist. In addition, there is nothing in the account as rendered to call the defendant's attention to any claim against it. All the itemized bills appearing in the record were made out to Hughes Bros. for Coffey, or words of similar import. There was, therefore, nothing in this itemized account calling the attention of the corporation to the fact that any claim was being asserted against it. No reasons are suggested why any of the errors of law assigned as occurring at the trial should receive attention, except, perhaps, specification 4 which relates to the omission of the court to make a finding in relation to the delivery of the itemized account to defendant and its retention of the same. As we have before stated we find no evidence of a delivery to the defendant corporation of any such account. The mere fact that it was delivered at the office of the corporation, or may have come into the possession of the general manager of the defendant, would not amount to such delivery to the corporation where upon the face thereof the bill purported to be against Hughes Bros., a copartnership, especially in view of the fact that there is evidence tending to show an agreement between Hughes Bros. and plaintiff through which the former were to act as collectors of the Coffey accounts. A finding is not necessary unless evidence appears in the record warranting the same.

We perceive no prejudicial error in the record and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

8 Cal. App. 572

SELIGMAN et al. v. CARR et al. (Civ. 502.)
(Court of Appeal, Third District, California.
July 24, 1908. Rehearing Denied by Supreme
Court Sept. 21, 1908.)

1. DEEDS — CONSTRUCTION — "EXCEPTIONS" — "RESERVATIONS."

Civ. Code, § 1069, providing that a reservation in any grant is to be interpreted in favor of the grantor, refers to exceptions made in deeds, as well as reservations; the words "exceptions" and "reservations" being used synonymously in grants.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2539-2542; vol. 8, p. 7656; vol. 7, pp. 6140-6144; vol. 8, p. 7787.]

2. SAME.

S., W., and J. each owned an undivided one-third interest in a tract of land. They conveyed two acres thereof for a schoolhouse, and, if the same should cease to be so used, it was to revert to the grantors. W. and J. conveyed all their interests in the tract, "excepting the portions" sold to others. S. conveyed to defendant all his interest in the tract. Subsequently W. and J. conveyed all their interests in the school land to S., who took as trustee of a resulting trust in favor of plaintiff, who furnished the purchase money, and, in furtherance of the trust, S. conveyed to plaintiff all his interest in the entire tract. *Held*, that under Code Civ. Proc. § 1864, providing that, when different constructions of a provision are otherwise equally proper, that is taken which is most favorable to the party in whose favor the provision is made, and Civ. Code, § 1069, providing that a reservation in a grant shall be interpreted in favor of the grantor, two-thirds of the reversionary interest in the school land belonged to plaintiff and one-third to defendant, the exception in the deed from W. and J. to S. excepting from the conveyance their interest in the school land.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. Seligman and another against T. W. Carr and another. From a judgment for plaintiffs, defendant J. R. Webb appeals. Affirmed.

Webb, Strother & Strother, for appellant.
M. B. and E. M. Harris, for respondents.

CHIPMAN, P. J. Action to quiet title. Plaintiffs had the judgment. Defendant Carr disclaimed all interest in the cause. Defendant Webb appeals from the judgment, and from the order denying his motion made under sections 663 and 663½ of the Code of Civil Procedure. The appeal is upon the judgment roll which by stipulation includes the findings of the court and its conclusions of law, as well as the judgment. The facts necessary to the decision sufficiently appear in the findings without setting forth the averments of the pleadings.

It appears from the findings that on January 24, 1881, Samuel, William, and John Frey were the owners each of an undivided one-third interest in a certain 20-acre tract of land situated in Fresno county, and on that day conveyed by grant deed to Valley View school district certain two acres of said tract, "as and solely for the purpose of erecting a public schoolhouse for the use of said dis-

trict." The deed provided that, "in case said land shall cease to be used for school purposes, it shall revert to the grantors herein." On January 30, 1884, William and John Frey conveyed by grant deed to Samuel Frey "all of our interest in and to the undivided one-half of that lot [describing the 20-acre tract], excepting the portions now sold by us to other parties." On November 10, 1884, Samuel Frey conveyed to defendant Carr by grant deed all his interest in the entire 20-acre tract, which the court found included only one-third interest in the school land. Subsequently, January 7, 1904, William and John conveyed all their interest in the school land to Samuel, but the latter took as trustee of a resulting trust in favor of plaintiffs, who furnished the purchase money, and, in furtherance of the trust, Samuel shortly thereafter, January 26, 1904, conveyed to plaintiffs by grant deed, not only all the trust estate, but also all interest he then had in the 20-acre tract. After all these deeds had been executed and recorded, to wit, April 30, 1906, and with full knowledge thereof and of plaintiffs' rights thereunder, defendant Carr conveyed, without any present consideration, all his interest in the 20-acre tract to defendant Webb, appellant.

No controversy arises as to the fee; the only question being: In whom is vested the reversionary interest in the two acres conveyed to the school district, which is designated as the school land? The court found that a two-thirds interest belongs to plaintiffs and that one-third is vested in defendant Webb. The court decided that, in view of the exception or reservation in the deed of William and John to Samuel Frey of January 30, 1884, they conveyed to Samuel only an undivided half of their interest in that part of the 20-acre tract that was not conveyed to the school district, that the school land was excepted from the operation of the deed and hence when Samuel Frey, in November, 1884, conveyed to Carr, his deed conveyed no greater reversionary interest in the school land than he reserved when he deeded to the school district, which was one-third, and this the court awarded to defendant Webb.

Appellant claims that by their deed of January 30, 1884, William and John conveyed to Samuel an additional one-half interest in the land, "making a five-sixths interest in the reversion of the school land." This deed purports to convey, as we have stated, "all of our interest in and to the undivided one-half of that lot [the 20-acre tract] * * * excepting the portions now sold by us to other parties." Appellant contends that the reversionary interest was not excepted by the clause above quoted, but that "the plain and obvious intent of that deed was to convey one-half of all the estate John and William Frey had in the 20-acre tract to Samuel Frey"; that "the only object of the exception was to protect themselves from the warranty

against previous conveyances implied by their grant" to the school district; citing, as strongly supporting his contention, the case of *Derby v. Hall*, 68 Mass. 236. Section 1069 of the Civil Code provides as follows: "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor." We must give some effect to the provision in question, if we can, and the obvious meaning, if it be obviously certain, should be adopted. If, however, there be uncertainty or doubt as to the meaning of the exception and it still be capable by construction of receiving some reasonable meaning, the code rule is that it "is to be interpreted in favor of the grantor." Here the grantors granted all their interest in the undivided one-half of the entire 20-acre tract, and but for the exception the deed would clearly have conveyed a like proportion of the reversionary interest in the school land. Why was the excepting clause inserted if not to reserve some interest in the grantors or to take some interest out of the operation of the deed? Some technical distinction is drawn by law writers and in the cases between an exception and a reservation, but the distinction is not material here, for we think the statute refers to exceptions made in deeds as well as to reservations. *Sears v. Ackerman*, 138 Cal. 579, 586, 72 Pac. 171. It was said in *Bowman v. Wathen*, 3 Fed. Cas. 1076, 1082, No. 1740: "The words 'exception' and 'reservation' are used synonymously in grants, and have the same effect. The effect does not depend upon the use of one or the other of these terms, but on the facts which they represent." To the same effect is *Stockwell v. Couillard*, 129 Mass. 231, 233, holding that the words "excepting" and "reserving" are often used indiscriminately, and whether a particular provision is an exception or reservation depends not upon the use of one or other of these terms, but upon the nature and effect of the provision itself. See *Adams v. Hopkins*, 144 Cal. 19, 37, 77 Pac. 712. Code Civ. Proc. § 1864, provides that, "when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision is made." It seems to us that the natural meaning derivable from the language used is that the parties did not intend to include in the deed the land previously sold or conveyed to the school district. But, if this be not so and the language must be regarded as ambiguous or uncertain, calling for construction, we must, under the code rule, interpret it in favor of the grantors. Applying this rule, it seems to us that the learned trial judge was fully warranted in his conclusion.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 550

PEOPLE v. HUTCHINGS et al. (Cr. 86.)

(Court of Appeal, Second District, California.
July 16, 1908.)

1. LARCENY—"GRAND LARCENY"—INDICTMENT—SURPLUSAGE.

Grand larceny, the felonious stealing of property of another, being committed when the property exceeds \$50 in value, and is taken from the person of another, or is one of a number of things, among which is a "steer," it is not necessary in case of a steer that it be taken from the person of another or the possession of the owner; so that the allegation of the indictment that it was taken from the possession of the owner is surplusage.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3149-3150.]

2. SAME—DESCRIPTION OF PROPERTY.

The allegation in the indictment for grand larceny of a steer that it was taken from the possession of the owner is not description of the property, requiring to be proved.

3. SAME—VARIANCE—CONFLICTING EVIDENCE.

It cannot be contended that there was a variance because of the allegation in the indictment that the steer taken was a large brindle one; there being a mere conflict in the evidence as to its being such.

4. SAME—EVIDENCE.

On a prosecution for larceny of a branded steer, it was proper to permit the prosecution to introduce a diagram of the brand of the owner, and also a brindle hide; there being evidence to identify the hide as that of the owner's steer, and also as that of the steer killed by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 135, 136.]

5. CRIMINAL LAW—APPEAL—DISCRETION OF COURT.

The admissibility of evidence which depends on the sufficiency of its weight to entitle it to be submitted to the jury rests largely in the discretion of the trial court.

6. LARCENY—EVIDENCE—CONSENT TO TAKING.

The father of the owner of a steer being in control of it when it was stolen, his testimony that he had given no one permission to take it is admissible, as a taking with his consent would have been no crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 132.]

7. CRIMINAL LAW—APPEAL—SHOWING INJURY.

The matter of instructing the witnesses, excluded, by order of court, from the court room while not under examination, not to talk with each other or others as to their testimony, rests in the sound discretion of the court, so that complaint of its refusal may not be made, in the absence of a showing of prejudice.

8. SAME—HARMLESS ERROR.

While testimony for the prosecution on a trial for larceny of a branded steer that witness had never seen the brand introduced in evidence, and did not know who used it, though he had been in the cattle business for years, and was acquainted with the cattle ranges of the country, and had observed the different brands used all over the county, should have been excluded, it was harmless; its only possible effect being to discredit the alleged owners of the steer that they had cattle branded with such a brand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

9. SAME.

Failure to strike out testimony for the prosecution was harmless; the same fact ap-

pearing elsewhere in the evidence, besides being testified to by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3144.]

10. LARCENY—EVIDENCE—RELEVANCY.

Testimony of F. on prosecution for larceny of the steer of W. of a certain brand as to witness being in the habit of making mistakes in branding his cattle, and as to mistakes as to the identity of cattle having been made by others in the neighborhood, was irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 136.]

11. CRIMINAL LAW—DISTINCTION BETWEEN CONFESSIONS AND DECLARATIONS—INDUCEMENT.

Statements made by defendant to officers not having been confessions, but admissions or declarations in conflict with his testimony, were admissible, even if the suggestion of the sheriff to him that it would be best for him to make a clean statement of the entire transaction be regarded as an inducement.

12. SAME—LIMITING EFFECT OF EVIDENCE—NECESSITY OF REQUEST.

The attorneys for defendants not having asked that the statements of defendant H. be limited to his case on the admission thereof, nor asked the court to instruct to such effect, the other defendants may not complain that there was no such limitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2646.]

13. WITNESSES—IMPEACHMENT—LAYING FOUNDATION.

To introduce statements of a witness as impeaching evidence, he should first be asked if he had made the statements before the impeaching witnesses are allowed to testify thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233-1236.]

14. SAME—DEFENDANT AS WITNESS.

A defendant by presenting himself as a witness in his own behalf subjects himself to the same rules for testing the truth of his statements as any other witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1211.]

15. CRIMINAL LAW—APPEAL—HARMLESS EVIDENCE.

The impeaching evidence of one witness introduced without proper foundation, being practically the same as that of another witness, properly admitted, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3138.]

16. SAME—PRESUMPTIONS.

It will be presumed that, had objection been made to testimony that it was not rebuttal evidence, the objection would have been sustained, so far as proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3014.]

17. SAME—EVIDENCE IN SURREBUTTAL.

A ruling that evidence sought by questions calling merely for a repetition of the testimony of witness when first on the stand was not in surrebuttal is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1615.]

18. WITNESSES—IMPEACHMENT—REBUTTAL.

When the prosecution has introduced part of a conversation with defendant to impeach him, he may introduce all of it in surrebuttal; he not being limited to such other parts of it as he can elicit from the impeaching witnesses by cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1263.]

19. CRIMINAL LAW—APPEAL—NECESSITY OF SHOWING INJURY—EXCLUSION OF EVIDENCE.

Though the objection or the ground on which evidence was excluded was not good, reversal may not be had if for any reason the ruling was right, or if the evidence could not affect the verdict; and one complaining of a technical error at the trial must show his substantial rights were injured thereby, so that complaint may not be made of the sustaining of objection to a question calling for all of a conversation testified to by impeaching witnesses; it not being shown that anything else was said on the subject that could have modified or affected what was testified to by such witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3095.]

Appeal from Superior Court, Inyo County; Walter A. Lamar, Judge.

W. H. Hutchings and others were convicted of grand larceny, and appeal. Affirmed.

White Smith, Frank V. Drake, and P. W. Forbes, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appellants were charged, jointly with one John Gray, with the crime of grand larceny. The charge was dismissed as to Gray, and appellants were each and all convicted as charged. They appeal from the judgments entered against them, respectively, and from an order denying their motion for a new trial.

It is contended in support of the appeal that the verdict is contrary to law and the evidence, that the court erred in its rulings upon the admission and rejection of evidence at the trial, and in giving and refusing to give certain instructions to the jury. The information alleges that the defendants "did * * * steal, take, and drive away [from the possession of one George L. Wallace] one large brindle steer branded, * * * said steer was and being then and there the personal property of said George L. Wallace," etc. It is urged by appellants that, because of the allegation that the animal was taken from the possession of the owner they were entitled to have the jury instructed that, unless the evidence established that the steer was taken from the possession of George L. Wallace, a verdict of "not guilty" should be returned. For the same reason it is contended that it was error for the court to give an instruction to the jury to the effect that if the defendants found the animal running in a field belonging to the mother of one of them, knowing that it was not their property or the property of either of them and intending to steal it, and converted it to their own use, the crime was established. Grand larceny is the felonious stealing of the property of another, and is committed when the property stolen exceeds \$50 in value, is taken from the person of another, or is one of a number of things specifically enumerated, among which is a "steer." The property stol-

en being alleged and proven to be one of a kind named by the statute, it was not necessary that it should have been taken from the person of another in order that its taking should be grand larceny. Neither is it necessary that it should have been taken from the possession of the owner. If this were true, there could be no larceny of an animal temporarily out of the possession of its owner. The allegation in the information that the animal was taken "from the possession of one George L. Wallace" may be treated as surplusage. The rule applied in *People v. Handley*, 100 Cal. 370, 34 Pac. 853, to the identity and description of the property affected, has no application to this question. The possession of the owner here was neither a necessary element of the offense nor any part of the description of the property alleged to have been taken. *People v. Geiger*, 116 Cal. 442, 48 Pac. 389. Its presence in the information neither added to nor detracted from the force and effect of that pleading. *People v. Cleary*, 1 Cal. App. 52, 81 Pac. 753. Invoking the rule that though the allegation in the information that the steer taken was a large brindle one was not essential to a statement of the offense, yet having so described it the prosecution were required to prove the animal as described, appellants contend that there is a variance between the allegation and proof, and it is in this respect it is claimed the evidence does not sustain the verdict.

There is no merit in the contention that the evidence discloses that the steer killed by defendants was a red, and not a brindle, one. The animal was clearly identified by the evidence of the prosecution. It was shown by the owner and his father that a brindle steer was missing from their cattle about the time that it is admitted by defendants they killed a steer at the home of one of them, on a ranch adjacent to the pasture where the brindle steer was running when last seen by the owner. It is also admitted that the hide of the steer killed by defendants was given to Gray, one of the defendants, and proven that the latter gave this hide to an Indian, in whose possession it was found a few days afterwards by the sheriff and identified by the father of the owner. The ears, which on the brindle steer were marked, were cut off at the time of the killing and the explanations of one of the defendants as to the animal killed were contradictory, and the jury was justified in discrediting their statements as to the color of the steer killed. That defendants testified that the steer which they killed was a red one only operated to create a conflict in the evidence, and the conflict was conclusively resolved and settled by the verdict of the jury and order of the court denying the motion for a new trial.

Specifications of error Nos. 1, 2, 4, and 8 relate to the reception of testimony over defendants' objections. It was proper to per-

mit the prosecution to introduce in evidence a diagram of the brand of the owner, and also to introduce the brindle hide, as there was sufficient evidence tending to identify it as that of the steer belonging to Wallace and also as that of the steer that was killed by defendants. The admissibility of evidence which depends upon the sufficiency of its weight to entitle it to be submitted to the jury is a question which rests largely in the determination of the trial court. *People v. Frank*, 28 Cal. 518; *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398. The father of the owner of the steer being in control of the cattle at the time of the larceny, owing to the illness of his son, it was proper that he should be permitted to testify that he had not given permission to any one to take the steer. If it had been taken with his consent, there would have been no crime committed.

The witnesses not under examination were excluded from the courtroom by order of the court made at the beginning of the trial, and at a subsequent recess defendants requested the court to instruct the witnesses not to talk to other parties about their testimony, or to tell others what their testimony had been, and it was particularly requested that they be instructed not to talk with other witnesses. The court refused to comply with this request, and its refusal is assigned as error. While in a proper case such instructions to witnesses ought to be given, this is a matter which rests in the sound discretion of the trial court, and in this instance it has not been shown that defendants were in any manner prejudiced by the refusal of the court to give the instructions requested.

A witness named Webb was permitted to testify on behalf of the prosecution that he was a stockman and for 18 years was acquainted with the cattle ranges in Inyo and Mono counties, and had observed the different brands used on cattle all over the country; that he never saw the brand introduced in evidence, and did not know who used it. Defendants moved to strike out this testimony. The motion should have been granted, but we are unable to see wherein the defendants were prejudiced by the evidence. The only possible effect it could have had was to discredit the testimony of the Wallaces that they had cattle branded with such a brand, and thus weaken the case for the people.

The voluntary statement of the witness Gray that the other hide which he gave to the Indian Piper at the same time he gave him the brindle hide was received from the defendant "Hambleton quite awhile before" should also have been stricken out upon defendants' motion; but, as this same fact appears elsewhere in the evidence and is testified to by Hambleton himself, its admission in this manner could not have prejudiced the appellants.

Objections to the questions addressed to the witness Ford were properly sustained.

Whether or not the witness was in the habit of making errors and mistakes in branding his cattle, and that mistakes as to the identity of cattle had been made by others in the neighborhood, were alike irrelevant, and the rulings of the court excluding testimony of that character were proper.

The statements made to the officers by the defendant Hambleton were not confessions, but admissions or declarations in conflict with the testimony which he gave upon the witness stand. If the suggestion of the sheriff, that it would be best for him to make a clean statement of the entire transaction, be regarded as an inducement, this would not render the declaration inadmissible. *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141. As original evidence against the defendant Hambleton, his statements to Collins and Bradshaw were admissible as a part of the case of the prosecution in chief, and need not have been limited to the purposes of impeachment. Attorney for defendants, however, did not ask that the testimony be limited to Hambleton's case upon its admission; nor did he ask the court to instruct the jury to this effect. In order to introduce the statements of the witness as impeaching evidence, it was necessary that Hambleton should have been first asked if he had made these statements before the impeaching witnesses were permitted to testify to the statements. Section 2052, Code Civ. Proc. When a defendant presents himself as a witness on his own behalf, he thereby subjects himself to the same rules for testing the truth of his statements as any other witness. *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Bishop*, 134 Cal. 689, 66 Pac. 976; *People v. Oliver* (Cal. App.) 95 Pac. 172. It is apparent that the trial court considered the evidence as impeaching evidence only, and for this reason struck out all of the testimony of the witness Collins and admonished the jury to disregard such testimony, and required the prosecution to reintroduce Collins' testimony limited to the statements which were called to Hambleton's attention. The testimony of Bradshaw was not stricken out, but it covered practically the same ground as the impeaching evidence of Collins which was properly admitted, and could not have been prejudicial. It was competent evidence in the case for the people, as above stated, and, considered as rebuttal testimony, should have been restricted in its scope to the same subject-matter as that of Collins. No objection was made to it upon the ground that it was not rebuttal testimony, and we must assume that, had there been, the trial court would have sustained such objection to it in so far as it was not proper for the purpose of impeaching Hambleton's testimony.

On surrebuttal it was sought to reintroduce and repeat the testimony of the defendant Hambleton in relation to the statements made by him to the witnesses Collins and

Bradshaw. Objections to two questions addressed to the specific language covered by the testimony of Collins were sustained on the ground that the evidence sought was not in surrebuttal. The witness was then asked: "Q. State all the conversation between yourself and Sheriff Collins and D. A. Bradshaw on the occasion of your arrest, and on your way to Bishop, touching the matter with which you were charged under that warrant of arrest?" To this question an objection was sustained on the same ground. The rulings of the court as to the first two questions were undoubtedly correct, as they called merely for a repetition of the testimony given by the witness when first on the stand. That the defendants were entitled to introduce evidence as to all the conversation that was material, when a portion of it had been given, is beyond question. Section 1854, Code Civ. Proc. The objection to the introduction of the testimony made by the respondent, to wit, that the testimony "was not in surrebuttal," was hardly a proper reason for its exclusion, as the conversation sought to be introduced only became material to defendants' case, if it ever did so, when what appellants now claim was but a portion of it was introduced for purposes of impeachment. To hold the evidence inadmissible on the ground that it was not surrebuttal might be to deprive them of evidence to which they were entitled. The prosecution's contention that the defendants were limited to such other portions of the conversation as they could elicit from the impeaching witnesses upon cross-examination cannot be sustained. But, when a ruling rejecting evidence is relied upon to reverse a judgment, we are not confined to a consideration of the objection made by respondent alone. If for any reason the ruling was proper, even though no objection was made at all, appellants cannot complain because deprived of improper or illegal evidence, or evidence that could not affect the verdict of the jury or prejudice their case. *Davey v. Southern Pacific Co.*, 116 Cal. 325, 48 Pac. 117. Again, we must consider the rule: "That a technical error has intervened at the trial is (therefore) not of itself enough to warrant a reversal. The defendants must go further, and affirmatively show in some way that their substantial rights have been injuriously affected by the error complained of. The burden is upon them to do so." *People v. Brotherton*, 47 Cal. 388; *People v. Clark*, 106 Cal. 32, 40, 39 Pac. 53; Pen. Code, § 1258. There is nothing in the record to show that all the conversation between Hambleton and Collins and Bradshaw had not been given, and that the two conflicting versions of it before the jury were not all of the conversation that was material to the subject-matter. Had Hambleton been asked if there was any other conversation relating to the matter in question, he might have replied that there was not. If it had been made to appear by

the record that there was anything else said on the subject that could in any manner have modified or affected that which was testified to by Collins and Bradshaw, then error and prejudice might be said to affirmatively appear, but this was not done. On his cross-examination Hambleton denied each and all of the statements testified to by both of the impeaching witnesses; thus negating all conversation purporting to be given by them. In this sense and upon this view of the evidence, it might be said that the subsequent attempt to re-examine him in regard to the conversation was not surrebuttal. But, which ever view is taken of the ruling, we do not think it discloses such error as to justify a reversal of the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 582

LYNCH v. SWEETLAND et ux. (Civ. 451.)

(Court of Appeal, First District, California.
July 27, 1908.)

**FRAUDULENT CONVEYANCES — CONFIDENTIAL
RELATIONS—CONVEYANCE BY HUSBAND TO
WIFE.**

A man, over 70 years of age and in poor health, conveyed land to his wife, who had advanced out of her separate funds more than three-fourths of the price for the land. He did not then have any creditors, nor did he contemplate incurring indebtedness. The deed was recorded about three years after its execution. *Held*, that the conveyance was not fraudulent as against a creditor who became such about three years after the execution thereof.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by George R. Lynch against William Sweetland and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

James H. Campbell, for appellant. E. D. Crawford and B. A. Herrington, for respondents.

KERRIGAN, J. This is an action to set aside a conveyance made by defendant William Sweetland to his wife, Emma, on the ground that it was made with intent to defraud the plaintiff and other existing and subsequent creditors. Judgment went for the defendants, from which judgment this appeal is taken.

On February 14, 1895, a deed to the property described in the complaint was made to William Sweetland; the purchase price therefor being \$1,500, \$400 of which was paid by William Sweetland, \$500 by his wife out of her separate funds, and the balance, \$617, was secured by a mortgage. On December 30, 1897, William Sweetland made and executed a deed of gift to the property to his wife. At that time she was in the state of Kansas attending her father in his last illness. A few days later William Sweetland delivered the deed to his daughter Edith, with instructions to deliver it to her mother upon her mother's return from Kansas. The following month, January, 1898, Emma Sweetland returned, and in accordance with said instructions Edith delivered the deed to her in her father's presence. Subsequently, and with money inherited from her father's estate, Emma Sweetland paid off the mortgage of \$617. The deed in question remained in her possession from the time of its delivery until it was recorded in the month of March, 1901. William Sweetland testified as fol-

lows: "I am nearly 75 years of age, and am the husband of the other defendant. I made the deed in question on December 30, 1897, because my wife had put in more than I at the purchase of the land and my health was poor." The note referred to in the complaint was given upon the 15th day of December, 1900, and defendant William Sweetland was a co-maker thereof with H. H. Farnham, and was so merely as an accommodation to the said Farnham. From the issues framed by the pleadings, and upon the evidence introduced, the court found in part that the deed was executed and delivered in consideration of love and affection and of large sums of money, and that it was not made with intent to defraud plaintiff or any other person.

There are circumstances in the case which are sometimes indicative of fraud, such as the long delay in the recording of the deed, the assessment of the property for several years after the date of the conveyance in the name of William Sweetland, and the permitting of the insurance on the improvements to stand in his name. But all other circumstances in the case tend strongly to establish the good faith of the transaction. The deed was made by a man over 70 years of age and in poor health to his wife, who had advanced out of her separate funds more than three-fourths of the purchase price. There is no evidence that at the time of the execution of the deed the grantor had any creditors, or contemplated incurring indebtedness; and as far as this plaintiff is concerned his note was not executed until some three years after the deed was made. This case presented a question of fact for the trial court, and we think it was the duty of the court under all the circumstances of the case to find, as it did, for the defendants.

In some of its features this case is like the case of *Joy v. Helbing* (Cal. App.) 94 Pac. 863, recently decided. The facts there made a stronger case against the conveyance than do the facts in this case, and yet the judgment of the trial court, sustaining the validity of the deed, was affirmed by this court. There Helbing made two gift deeds to his wife of property in San Francisco. At that time and for more than a year thereafter he was out of business. The deeds were not recorded for more than two years after they were made; and in the meantime Helbing, on the representation that he was the owner of the property described in the deeds, bought goods on credit. After the execution of the deeds, and before their recordation, he exercised acts of ownership over the property. He insured part of it in his own name, and on the occasion of a fire which destroyed it he swore to a proof of loss wherein he stated that he was the owner of the property, and he obtained and receipted for the insurance money in his own name. He tried to sell one of the parcels to raise money for his own use. In that case the court said: "The intent of Helbing in making the deed to his wife was

for the trial court to determine from all the facts and circumstances in the case. The deed was made at a time when Helbing was solvent, and more than two years before the indebtedness to W. W. Montague & Co. was incurred. There is no direct evidence even tending to show that it was made with intent to defraud any creditor who was such at the time of the execution of the deed. Helbing had the right to execute a deed of gift to his wife, provided by so doing he did not intend to defraud any present or future creditor. The burden was upon the plaintiff to show that the deed was made with the intent to defraud creditors of Helbing. While fraud is sometimes difficult to prove, and while courts grasp at all the facts and circumstances in order to arrive at the ultimate fact as to whether or not fraud was intended, yet it must be proved. The fact that the deed was not recorded for more than two years after it was made is a circumstance tending to cast suspicion on the good faith of the transaction; yet it is not sufficient of itself to show that the deed was made with fraudulent intent. The court, in the absence of testimony clearly showing the fraudulent intent, was in duty bound to find that the deed was executed with no such intent. There is no evidence in the remotest degree, with the exception that the deed was not recorded until long after it was executed, tending in any way to show any fraudulent intent or purpose on the part of Louise Helbing, the wife of Louis Helbing."

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

8 Cal. App. 514

LOS ANGELES PRESSED BRICK CO. v
HIGGINS et al. (Civ. 506.)

(Court of Appeal, Second District, California. July 9, 1908. Modified Opinion, July 23, 1908. On Rehearing, Aug. 8, 1908. Rehearing Denied by Supreme Court Sept. 7, 1908.)

1. MECHANICS' LIENS—NATURE AND GROUNDS—CONSTRUCTION OF LIEN LAW.

Const. art. 20, § 15, gives mechanics, etc., a lien upon property upon which they have bestowed labor, or furnished material for the value thereof, and requires the Legislature to provide for the speedy and efficient enforcement of such liens. Code Civ. Proc. § 1183, gives a lien to contractors, materialmen, etc., and provides that, in case of a contract between the owner and contractor, the lien shall extend to the entire contract price, such contract to operate as a lien to all persons, except the contractor, to the full contract price, and after such liens are satisfied, as a lien for the balance to the contractor. The contract is also required to be in writing when the price is over a certain sum and to state the amounts payable, time, etc., and be filed for record, otherwise the contract to be wholly void and no recovery had thereon by either party. In such case the materials furnished by all persons, except the contractor, are to be deemed furnished at the personal instance of the owner, and materialmen shall have a lien for their value. *Held*, that the provision in section 1183, making the contract wholly void if not filed, should be construed

with the rest of the section, and with Const. art. 20, § 15, and, being penal in its nature, and an arbitrary provision, should not be extended to any contract not expressly within its letter, and that no technical construction should be indulged in to impose a penalty on the owner unless there was a substantial failure to comply with it, but that the lienors should have the benefit of any reasonable doubt as to whether they have complied with it, or as to its construction.

2. CONTRACTS—BUILDING CONTRACT — FAILURE TO FILE—EFFECT.

The failure to file the contract, as required by section 1183, Code Civ. Proc., only renders it wholly void as to materialmen, subcontractors, etc., having valid liens, who thereby become entitled to liens for the full value of their material, but, as between the contractor and the owner, the unrecorded contract determines their substantial rights and remains as the measure and test of the contractor's right to recover.

3. SAME—ENFORCEMENT—ACTIONS TO ENFORCE PERSONAL LIABILITY—SUFFICIENCY OF ALLEGATIONS—REASONABLE VALUE.

In an action by a contractor against an owner upon a contract, not recorded as required by statute, allegations in detail of the labor and materials furnished and required by the contract, the completion of the work according to its terms, and that a certain sum was the reasonable value of the labor and materials were sufficient against attack on appeal, if an allegation of reasonable value was necessary.

4. SAME—FINDING OF REASONABLE VALUE—NECESSITY.

In an action by a contractor against an owner upon a contract, not filed as required by statute, a finding of the contract price agreed upon and the value of labor and materials furnished was a sufficient finding as to the amount the contractor was entitled to recover, and an express finding of the reasonable value of the materials and labor was unnecessary, as the unrecorded contract was not void as between the parties, but remained the measure of their compensation.

5. MECHANICS' LIENS—RIGHT TO LIEN—PERSONS FURNISHING MATERIALS TO CONTRACTORS.

While proceedings to foreclose mechanics' liens may be termed statutory proceedings of an equitable nature, equity raises no lien in favor of the mechanic or materialman, the debt created by furnishing the materials, and the lien given therefor, being distinct matters; and the debt may be enforced as any other debt, while the lien exists only by statute, and must be enforced under the general procedure for foreclosing liens, as expressly required by Code Civ. Proc. § 1198.

6. SAME—ENFORCEMENT—PERSONAL JUDGMENT ON DEBT.

Under Code Civ. Proc. § 1197, providing that nothing in the chapter on mechanics' liens shall be construed to affect the right of any person to whom a debt is due for work or materials to maintain a personal action therefor, a separate action on the debt for materials furnished by materialmen may be maintained.

7. SAME—PERSONAL LIABILITY ON FAILURE OF LIEN—LIABILITY OF CONTRACTOR.

A lien claimant whose lien has been declared invalid may, in an action to foreclose the lien, obtain a personal judgment against the contractor to whom the materials were furnished.

8. SAME—ACTIONS TO ENFORCE PERSONAL LIABILITY—PARTIES—CONTRACTORS.

Since a lien claimant whose lien has been declared invalid may, in an action to enforce the lien, obtain a personal judgment against the contractor, the latter should be made a defendant in the action.

9. SAME — PERSONAL JUDGMENT AGAINST OWNER—RIGHT OF MATERIALMEN.

The owner is rendered liable to materialmen, subcontractors, etc., only by reason of a valid lien and neither is entitled to a personal judgment against him; he being under no obligation to pay for labor, etc., furnished the contractor.

10. DEPOSITS IN COURT—APPLICATION—SUFFICIENCY OF TENDER.

In a consolidated action by contractors, materialmen, etc., to foreclose mechanics' liens, the owner paid a sum claimed by the contractors into court, the tender reciting that the owner "offered to pay into court any sum found justly due from him to the contractors, under the contract, for the benefit of the contractors, and lien claimants," upon discharge of the liens against the property, and the prayer was no broader than the tender. The finding recited that at the commencement of the trial the owner deposited in court a certain sum to be applied in satisfaction of the judgment. *Held*, that the tender and finding were broad enough to justify the application of the deposit to the payment of a personal judgment in favor of the contractors on failure of their lien.

11. MECHANICS' LIENS — SATISFACTION—APPLICATION OF PAYMENTS—ORDER OF PREFERENCE.

In an action by contractors, materialmen, etc., to foreclose a mechanics' lien, where the owner paid into court the sum claimed by the contractors to pay any sum found due from him to the contractors for the benefit of the contractors and lien claimants, the fund was properly applied, first, to the payment of the valid liens, with the costs properly allowable to such claimants; and, second, to payment of the personal judgment obtained by the contractors on failure of their lien.

12. APPEAL AND ERROR — DETERMINATION — MATTERS NOT NECESSARY TO DECISION.

Where the owner deposited the sum claimed by contractors into court to pay any sum found due to the contractors and lien claimants, and the amount found due the contractors was paid and the liens discharged, the distribution of the sum awarded the contractors among persons obtaining a personal judgment against them was immaterial on appeal by the owner; his right being then only to have the balance of his deposit returned to him after the liens were discharged.

13. MECHANICS' LIENS—ENFORCEMENT—COSTS —ATTORNEY'S FEES.

In proceedings to foreclose mechanics' liens, the payment of attorney's fees to successful lien claimants was erroneous; and the direction that they be paid from the sum deposited for discharging the liens was void.

14. DEPOSITS IN COURT — WITHDRAWAL BEFORE FINAL JUDGMENT—RIGHT.

Where an owner deposited money into court to pay any sum found due to contractors and lien claimants, the terms of the deposit being general, it served the purpose of saving him from costs, and must remain in the court's custody to abide the final judgment on appeal; and the statutes relating to appeals and stay of execution do not authorize the withdrawal of such deposits before that time.

On Petition for Rehearing.

15. MECHANICS' LIENS — CONSTRUCTION OF LIEN LAW.

The statute giving a mechanic's lien to contractors, materialmen, etc., for labor and material furnished, is intended to supply the means of enforcing the lien given by Const. art. 20, § 15, giving liens to such persons, and requiring the Legislature to provide for their enforcement, and will not be considered a general law relating to contracts, but a means whereby a laborer, etc., may exercise his constitutional

right and enforce his lien, and will be construed so as to accomplish that purpose.

16. SAME — ENFORCEMENT — PERSONAL JUDGMENT ON FAILURE TO ESTABLISH LIEN.

Where a mechanic's lien fails, it is only in the absence of an express contract that the right of a contractor against the owner, and of the materialmen against the contractor, to a personal judgment, depends upon a quantum meruit, quantum valebant, or implied contract; and the right to recover judgment in such case does not depend upon the constitutional provision giving a lien or upon the mechanic's lien law.

17. SAME—PROCEEDINGS TO PERFECT — FAILURE TO FILE CONTRACT—EFFECT.

Under Code Civ. Proc. § 1183, giving a mechanic's lien to contractors, materialmen, etc., and providing that, in case of a contract between an owner and contractor, the lien shall extend to the entire contract price, and that such contract shall operate as a lien to all persons, except the contractor, to the full contract price, but, after such liens are satisfied, it shall operate as a lien for the balance of the contract price to the contractor, and providing, further, that, unless the contract is recorded, it shall be wholly void, and no recovery can be had by either party, the failure to record the contract only renders it void as to all valid lien claimants, they then having a right to a lien to the full value of the property, but the failure to record it does not affect the contract rights of the parties or the amount of recovery, but only the funds from which the payments may be paid after the lien is established.

18. SAME — SET-OFF — LIENS SATISFIED BY OWNER—ACTION BY CONTRACTOR.

The statute having provided for the payment out of the owner's property of all valid liens established against it, in an action against the owner by the contractor, the owner may set up such payments as credits in the same manner as he may any defense in an ordinary action.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Consolidated actions by the Los Angeles Pressed Brick Company against Thomas Higgins and others to establish mechanics' liens. From a judgment for plaintiff, and orders denying a motion to vacate the judgment and amend conclusions of law, and to withdraw a deposit in court, defendant Higgins appeals. Judgment affirmed as modified, and orders affirmed.

R. L. Horton, for appellant. Chas. L. Batcheller, Percy B. Lloyd, Scarborough & Bowen, W. D. McConnell, Munson & Barclay, Jones & Weller, and Hutton & Williams, for respondents.

TAGGART, J. Consolidated actions on mechanics' liens. Appellant Higgins is the owner of a six-story brick building erected for him in the city of Los Angeles by respondents Alpeter, Hall & Alpeter as contractors, in accordance with three separate contracts in writing, to wit: (1) One to construct a four-story building for the sum of \$40,500; (2) another to furnish labor and materials for walls, roof and interior bearing partitions of two additional stories, for the sum of \$4,700; and (3) the third to complete the fifth and sixth stories of the building according to the plans and specifications therefor, for the sum of \$9,200. As found by the court, Al-

peter, Hall & Alpeter completed all work and furnished all materials required by said contracts, except as modified by agreement of the parties, which modification entitled the owner to a credit of \$220 for bath tubs not furnished, and except as to painting and polishing the floors, upon which the owner expended the sum of \$2,354.75 for work not done by the contractors. The contractors also furnished extra labor and material to the value of \$2,857. The aggregate value of all labor performed and material furnished was found by the court in the following words and figures: "That the total amount of all of said materials and labors agreed to be furnished in the construction of said building and appurtenances thereto, including the contract prices in said contract and the contract price and reasonable value of such additional labor and material, and less the credit for said bath tubs of \$220, is the sum of \$57,037." In addition to the \$2,354.75, paid for painting and polishing the floors, the owner, prior to the filing of the liens of plaintiffs against the property, had also paid to the contractors the sum of \$38,689.01, and was entitled to a total credit on contracts and extras of \$41,043.76, leaving a balance unpaid from the owner to the contractors of \$15,993.24. The contractors filed a lien against the building for an alleged unpaid balance of \$18,617.99, and 13 other persons claiming to have furnished labor and material in the construction of the said building filed liens aggregating an amount in excess of that sum. The several actions brought to foreclose these liens were consolidated for the purpose of trial. The defendant-owner, Higgins, deposited in court the amount of the balance alleged by said contractors to be due to them, to wit, \$18,617.99, to abide the order and judgment of the court.

The court finds that contract No. 1 was never filed for record, but that contracts 2 and 3 were regularly filed; that notice of completion of the work under the second contract was filed February 27, 1905, and under the first and third July 10, 1905. The claim of lien of the contractors is declared invalid because the amount due under each contract is not segregated and separately stated, and the same finding is made as to all the lien claimants, except Howe Bros., the Consolidated Lumber Company, and Harry C. Bowers; and, as to the latter, it is found that his assignor, whose lien he is seeking to foreclose, is not entitled to recover because of failure to comply with his contract. The liens of Howe Bros. and the Consolidated Lumber Company are declared valid and entitled to be enforced, and an allowance of attorney's fees made in each of said cases for foreclosure. As conclusions of law, the court finds that Alpeter, Hall & Alpeter are entitled to judgment against Higgins for the sum of \$15,993.24, with interest, and that each of the other lien claimants, except Harry C. Bowers, is entitled to a judgment

against said contractors for a certain sum stated. Judgment was given in accordance with these conclusions, and it was directed by the judgment that the attorney's fees allowed be paid out of the \$18,617.99 deposited in court by the owner, and that the \$15,993.24 found due from the owner to the contractors be applied, first, to the payment of the two valid liens, with costs, and the residue applied pro rata in payment of the personal judgments in favor of the other claimants against the contractors. Appellant moved to vacate the judgment and to amend the conclusions of law because not supported by the findings of fact; and also moved the court to permit him to withdraw the deposit made by him and to substitute an undertaking to stay execution in lieu thereof, both of which motions were denied. He appeals from the judgment and the order of the court denying these motions.

His principal contentions on appeal are that, the first contract being void for failure to record it, the contractors must recover from the owner, if they recover at all, for the reasonable value of the materials furnished and labor performed, and that there is neither allegation in the complaint nor finding by the court to support such a recovery; that the claimants who failed to establish valid liens are not entitled to have their personal judgments against the contractor paid in whole or in part out of the fund deposited in court by appellant; and that the allowance of attorney's fees to the two valid lien claimants is void. The clause in section 1183 of the Code of Civil Procedure providing that the failure to file a building contract in the county recorder's office shall render it "wholly void" is penal in its nature. It is to be construed in connection with the rest of the section in which it is found, as well as with regard to the section of the Constitution creating the mechanic's lien, for the enforcement of which the lien law was provided. Article 20, § 15. It is an arbitrary provision, and is not to be extended to any contract not falling strictly within its letter. *Kiessig v. Allspough*, 99 Cal. 454, 34 Pac. 106. No (merely technical) construction can be indulged for the purpose of visiting a penalty upon the owner, unless there has been a substantial failure to comply with the law, which (such as) if continued would defeat the remedial purposes of the statute; but, if there be a reasonable doubt as to the construction of the statute, or as to whether the defendants complied with it, they should have the benefit of it. *Joost v. Sullivan*, 111 Cal. 296, 43 Pac. 896.

Appellant's position that the contract is void, even as between the owner and contractors, is sustained by some of the earlier cases in this state; but in the later cases it has been demonstrated that such a construction of the lien law is not essential to the purpose of the constitutional provisions creating the right of lien. *Laidlaw v. Marye*

133 Cal. 176, 65 Pac. 391. Certain provisions of the statute, formerly considered as effective, have been declared to interfere with the constitutional rights of an owner of property to make contracts relating to its use and enjoyment (Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150), while others have been said to be not necessary to carry out the constitutional requirements as to liens for labor bestowed upon and material furnished to construct or improve property, and have been held to exceed the legislative power (Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681). Every provision of the law which the Legislature may enact must be subordinate to and in consonance with the constitutional provision. Hampton v. Christensen, 148 Cal. 737, 84 Pac. 200.

Speaking of the clause of section 1183 here under consideration the Supreme Court, in the opinion in Laidlaw v. Marye, supra, says: "When the statute declares that the contract shall be wholly void, it means * * * it is wholly void as to the third class above designated (subcontractors, materialmen, artisans, and laborers), who thereupon become entitled to liens for the full value of their material and service, and are deemed to have furnished them to the owner at his special request. * * * As between him (the contractor) and the owner, the contract must remain, *if* not the basis of his recovery, (but) the measure and test of his right to recover." (We have inserted the word in italics "*if*," and eliminated the word in parentheses, "*but*." In distinguishing the case of Kuhlman v. Burns, 117 Cal. 469, 49 Pac. 585, it is said by Cooper, J., of the Court of Appeal for the First District: "But as it has since been held that such contract is not void as between the parties, and is the measure of compensation in an action brought upon it, the doctrine of Kuhlman v. Burns is no longer the law." Camp v. Behlow, 2 Cal. App. 699, 84 Pac. 251. This declaration of the law is rested upon the opinion in Laidlaw v. Marye, and a petition for a rehearing of the case in which it was made was denied by the Supreme Court. The Supreme Court in Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767, an action brought by the owner to have an unrecorded contract cancelled because void, also says: "For the reasons fully given in the late case of Laidlaw v. Marye, 133 Cal. 176, 65 Pac. 391, the plaintiff cannot claim the contract to be void as between the parties to it. The statute was intended for the protection of subcontractors, materialmen, artisans, and laborers, and to preserve to them the right to liens." The complaints in both the Laidlaw and the Camp Cases contained two counts, one stating a cause of action in assumpsit, and the other one based upon the contract. While the complaint of the contractors in the case at bar does not state these two causes of ac-

tion separately, it alleges in detail the furnishing of the labor and materials required by the several contracts and a completion of the work in accordance with their terms, and this is followed by the allegation that "said sum of \$57,307 was, at the time, the reasonable value of said materials and labor so furnished as aforesaid." This was sufficient against the attack made upon the complaint here, if an allegation of reasonable value was necessary. There was, however, no express finding of the reasonable value of the material furnished and labor performed; but since the contract is not void between the parties, but is the measure of compensation, and the measure and test of the contractors' right to recover, this was not necessary. The finding of the contract prices agreed to be paid and of the value of the materials and labor furnished by the contractors in accordance therewith is a sufficient finding of the amount which Alpeter, Hall & Alpeter were entitled to recover.

It is contended by appellant that, to the extent that it attempts to execute the personal judgments of the laborers and materialmen against the fund deposited in court by the owner, Higgins, the decree or judgment finds no warrant in the statute or under the practice in the courts of this state; that these judgments are in no respect different from the ordinary money judgment for services rendered or merchandise sold and delivered, and, as there is no statutory provision authorizing the application of a deposit so made to the payment of such judgments, the direction to that effect therein is void. While for various purposes the proceeding to foreclose a mechanic's lien in this state has been said to be a suit in equity, and may be termed a statutory proceeding of an equitable nature, equity itself raises no lien on behalf of the mechanic or materialman. Ellison v. Jackson, 12 Cal. 555. The debt created by furnishing labor or materials for a building and the lien given therefor are two distinct matters. The former may be enforced, as any other debt, while the lien exists only by statute and must be enforced by the special proceeding provided for that purpose. McNiel v. Borland, 23 Cal. 149. When the case last cited was decided, a "special proceeding" was provided by statute for the enforcement of such liens, while under the Code the general procedure for the foreclosure of liens is made applicable (Code Civ. Proc. § 1198), but a separate action on the debt may still be maintained. Section 1197. A lien-claimant, whose lien has been declared invalid, may, in the action brought to foreclose the lien, obtain a personal judgment against the contractor to whom he furnished materials or at whose instance he rendered service. Marchant v. Hayes, 120 Cal. 137, 52 Pac. 154. For this reason the contractor may and should be made a defendant in the action. Giant Powder Co. v. Flume Co., 78 Cal. 193,

20 Pac. 419. The owner, however, is rendered liable to a materialman, laborer, or subcontractor only by reason of the lien, and neither of these persons is entitled to a personal judgment against him. He is under no obligation to pay such claimants for material or labor furnished by them to the contractor. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640. It has been held that a general creditor is not entitled to a judgment providing that the remainder of the fund due from the owner to the contractor, after the payment of the valid liens, if there be any, shall be distributed to him to the extent of his lien (*Kennedy-Shaw L. Co. v. Priet*, 113 Cal. 291, 45 Pac. 336); also, that such a general creditor cannot be deemed to be included in an offer of the owner to pay to the persons claiming to be lienholders, in proportion to their respective claims, the amount admitted to be due from him to the contractor, whenever the respective amounts due to each lienholder is determined (*Kennedy-Shaw L. Co. v. Priet*, 115 Cal. 98, 46 Pac. 903).

The tender in appellant's pleading here (answer to complaint of Alpeter et al.) is: "Said owner hereby tenders and offers to pay into court any sum that may be found justly due from him to said contractors under the terms of the said contracts, for the benefit of the said contractors and the lien claimants, upon a proper discharge and full satisfaction of the said claims of lien and demands as against his said property." The same tender is made in the answers to the complaints of the various plaintiffs, and the prayer, which is substantially the same in this respect in the several answers to the various complaints, is no broader than the tender made. The recital in the finding is: "And at the commencement of the trial the defendant Higgins having deposited in court the sum of \$18,617.99 to abide the judgment of the court in these causes, and to be applied in satisfaction of such judgment as the court may direct." It is apparent that the terms of both tender and finding are sufficient to justify the application of the fund to the payment of the personal judgment obtained by the contractors, Alpeter, Hall & Alpeter, notwithstanding the failure of their lien, and that it was competent for the court to impress the fund with the payment, first, of the valid liens with the costs properly allowable to the parties filing them, and, next, with the judgment of Alpeter, Hall & Alpeter after deducting the amounts of the liens of Howe Bros. and the Consolidated Lumber Company, with such costs as the court allowed to them. This would apply the entire \$15,993.24 in a manner to which the appellant Higgins under his deposit could not object.

The right of the court, then, to distribute that portion of the sum awarded to the contractors among the persons obtaining a personal judgment against them became a mat-

ter which concerned the contractors only, and for the purpose of deciding this appeal it is unnecessary for us to determine whether the trial court was or was not authorized, either by statute or the terms of the deposit, to so apply the fund to which the contractors were entitled. After the ascertainment by the court that there was due to the contractors from the owner of the building the sum of \$15,993.24, the only interest of appellant in the sum deposited by him was to have the balance returned to him after paying said sum, with interest thereon from the date of the judgment. The \$15,993.24 was applied strictly within the terms of the deposit, to the payment of what was due to the contractors and the discharge and satisfaction of liens regularly established against the property. The allowance of attorney's fees to the successful lien claimants was erroneous (*Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193), and the direction that the same be paid from said sum deposited was void. In all other respects in which the judgment affects the rights of appellant, it appears to be supported by the findings, but in this respect he is entitled to have the judgment modified.

It is, therefore, ordered that the words and figures, "together with the additional sum of \$400 as a reasonable attorney's fee for foreclosing their lien," in paragraph 13; "together with the additional sum of \$100 as a reasonable attorney's fee for foreclosing their lien," in paragraph 14; "and then to the payment of \$400 attorney's fees adjudged to the said Howe Brothers, and \$100 attorney's fees adjudged to the said Consolidated Lumber Company, pro rata, until all of said attorney's fees are paid; * * * and said attorney's fees," and "other than the attorney's fees," in paragraph 16; and "and the clerk of this court is directed and ordered to pay therefrom to said Howe Bros. the sum of \$400 attorney's fees allowed to them, and to the Consolidated Lumber Company the sum of \$100, attorney's fees allowed to them, and," in paragraph 20—be stricken out of said judgment, and the words "out of" inserted in line one of said paragraph 20 after the word "That," and that, as so modified, the said judgment be affirmed. The order denying appellant's motion to vacate the judgment and to amend the conclusions of law, and the order denying the motion to withdraw the deposit, should both be affirmed—the former upon the same grounds as those assigned in the affirmance of the judgment; and the latter for the same reasons and also those assigned by this court in *Higgins v. Keyes*, 5 Cal. App. 482, 90 Pac. 972, for denying the mandamus there sought. The terms of the deposit being general, the deposit served the purpose of saving the appellant-owner from costs, and must continue to remain in the custody of the court to abide the final judgment in the cause. To

permit a deposit so made to be withdrawn pending appeal would be to take away the very support and condition of the court's judgment. No such right is deducible from the statutory provisions relating to appeals and stay of execution, or from the cases upon the authority of which it is claimed the deposit was made. *De Camp v. Tolhurst*, 99 Cal. 631, 34 Pac. 438; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008; *Stimson v. Dunham*, 146 Cal. 281, 79 Pac. 968. In addition to this it might be said that, in view of the decision above rendered on the appeal, the question is one of no moment in this case.

Judgment, as above modified, and the orders appealed from, affirmed.

We concur: ALLEN, P. J.; SHAW, J.

PER CURIAM. It being made to appear to the court that, by inadvertence, the modification of the judgment herein was made without an appropriate order with reference to the costs on appeal, it is therefore ordered that, in addition to the modification of the judgment as in the opinion designated, a further order be entered, as follows: Costs on appeal to be paid, five-tenths ($\frac{5}{10}$) by Thomas Higgins, defendant and appellant; one-tenth ($\frac{1}{10}$) by the Consolidated Lumber Company; and four-tenths ($\frac{4}{10}$) by Howe Bros.

On Rehearing.

The petition for rehearing should be denied. The law of interpretation relating to mechanics' liens in this state being, or recently having been, in a stage of transition, it may not be amiss for us to restate more in detail our view of the logic of the recent declarations of the Supreme Court in respect to unrecorded building contracts wherein the amount agreed to be paid exceeds \$1,000.

The Constitution establishes a right of lien for the benefit of the persons named in section 15 of article 20, and requires the Legislature to provide for a speedy and efficient enforcement of "such liens," that is, the liens provided for by the preceding clause. The statute is intended to supply the means for such enforcement, and will be construed with a view to accomplish the constitutional purpose. In so far as the act affects the right to contract, it will be limited in its operation to the persons whom the Constitution and the statute were intended to protect by giving a lien, and to such contracts of these persons as relate to and affect the lien. In interpreting the mechanics' lien law, it is not to be considered as a general law relating to contracts and contractual relations, but a means provided whereby a laborer, mechanic, or materialman may declare his intention to exercise his constitutional right, and enforce his lien. If an action be brought to foreclose a lien and the lien fail, a contractor may recover a personal judgment against the owner, and the laborer or materialman may recover a personal judgment against the contractor

or subcontractor to whom the labor or material was furnished. In both instances, if there be a contract, the recovery depends upon the terms of the contract, and it is only in the absence of an express contract that the right of action rests upon a quantum meruit, quantum valebant, or implied contract. The right to recover the judgment in either case is in no way dependent either upon the constitutional provision or the mechanics' lien law.

The effect, then, of the failure of the contractor or owner to record the contract, is to render the contract void as a limitation of the liability of the owner. The obligation of the owner to pay the laborer and materialman is no longer limited by the contract price if he fail to record, and the penalty as to him is the exercise by lien claimants of a right of lien coextensive with the value of the property. The failure to record the contract does not affect the contractual rights of the parties in any manner. It only affects the funds from which their demands may be paid after a judgment is obtained and a right of lien established. The mechanics' lien law does not enable a lien claimant to recover judgment for any more or any less than the amount which he expressly agrees to take. It has nothing to do with the amount of the judgment which he is entitled to recover, but makes effective the judgment by a lien upon the property upon which he has bestowed his labor or material. Therefore, when the Supreme Court says that the contract is not void as between the parties (because not recorded), we understand that the contract is valid except as to lien claimants establishing their rights under the law, and that the end and purpose of the law and of the provision of section 1183 "that they shall be wholly void" is accomplished by a construction which adds the words, "as to all valid lien-claimants," and thereby prevents the lien provided for laborers and materialmen from being defeated by any act or omission upon the part of the owner or contractor. The right of the contractor to a lien is removed from consideration by the failure to record the contract, but this does not change the basis, measure, or test of recovery of the contractor from the owner. There being no lien to foreclose, the parties are relegated to their legal rights. To say that the contract is the "measure of recovery" and the "test of the right to recover" is to say that we must look to the contract to determine the substantial rights of the parties. This being true, then the recovery must be in an action "brought on the contract" (*Camp v. Behlow*, 2 Cal. App. 699, 84 Pac. 251), and the contract becomes the "basis of recovery." The law having provided for the payment out of the owner's property of all valid liens established against it, of course, these become credits which the owner is entitled to set up, as he may any defense pleadable in an ordinary action on a contract. Such being the effect of the cas-

es as we read them, we have, in response to a suggestion in the petition for a rehearing that there is an uncertainty in our declaration of the law, restated it so that there can be no misunderstanding of our views on this point.

Petition for rehearing denied.

8 Cal. App. 514

LOS ANGELES PRESSED BRICK CO. v. HIGGINS et al. (L. A. 2,061.)

(Supreme Court of California. Sept. 7, 1908.)

1. MECHANICS' LIENS — ENFORCEMENT — ACTION TO ENFORCE — PERSONAL LIABILITY — REASONABLE VALUE OF WORK — NECESSITY OF FINDINGS.

A contractor cannot recover in an action on a contract not filed and recorded as required by the mechanics' lien law, unless there is a finding under the allegation and proof of the reasonable value of the work done.

2. PLEADING — ANSWER — FAILURE TO DENY — ADMISSIONS — REASONABLE VALUE OF MATERIALS.

Where the contractors' complaint in a consolidated action by contractors, materialmen, etc., against the owner to enforce mechanics' liens alleged that the contracts were recorded, and the answer not only failed to deny this allegation, but averred that they were duly recorded, that fact was established by the pleadings, and no findings of the value of materials, etc., was necessary, as between the contractor and owner, and a finding that the contract was not recorded did not destroy the effect of the admissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 270-275.]

3. ACTION — CONSOLIDATION — EFFECT.

The consolidation, for the purpose of trial, of actions by contractors, materialmen, etc., against the owner to enforce a mechanic's lien, did not change the issues in the respective cases, or render ineffectual admissions in the pleadings between the contractors and owner that the contracts were recorded, and the finding of the trial court to the contrary would apply only to the other actions.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Consolidated action by the Los Angeles Pressed Brick Company against Thomas Higgins and others to foreclose a mechanic's lien. From a judgment for plaintiff, one defendant appealed. Affirmed.

R. L. Horton and J. Wiseman MacDonald, for appellant. Chas. L. Batcheller, Percy B. Lhoyd, Scarborough & Bowen, W. D. McConnell, Munson & Barclay, Jones & Weller, Hutton & Williams, and T. C. Ridgeway, for respondents.

PER CURIAM. The refusal of this court to order this cause transferred to this court for rehearing must not be understood as an approval of the remarks in the opinion of the District Court of Appeal, to the effect that a finding as to the reasonable value of the work done on the building was unnecessary to support the judgment in favor of the original contractor against Higgins, the owner, and that he could recover on an unrecorded con-

tract. That judgment was fully supported without such finding, because such finding was unnecessary under the issues presented by the answer of the owner to the complaint of the contractor. That complaint alleged that the contracts were each duly recorded. The answer of the owner thereto not only failed to deny this allegation and therefore admitted its truth for all the purposes of the case, as between those parties, but it also affirmatively averred that they were duly recorded. So far as these parties were concerned, that fact was established, and no finding on the subject was necessary. The finding that the contract, or one of them, was not recorded, was addressed to the issues arising between the other parties, and it could not destroy the effect of the admission to the contrary to support the judgment between the owner and the original contractor. The consolidation for the purpose of trial, of all the cases, did not change the issues in the respective cases, nor render the admissions of the pleadings ineffectual when applied to the particular cases in which they were made. It is unnecessary to express any opinion with regard to the right of the original contractor to recover on his contract notwithstanding the fact that the contract may not have been, in fact, recorded.

154 Cal. 246

KORNBLUM v. ARTHURS et al. (L. A. 2,066.)

(Supreme Court of California. Sept. 2, 1908.)

1. VENDOR AND PURCHASER — RESCISSION OF CONTRACT — LACHES.

Where plaintiff purchased property for speculative purposes, held, advertised, and offered it for sale at a price above that which he was to pay for it, during a time when the real estate market was feverishly active and he might reasonably expect a sale at an increased price, and after the market suffered a partial collapse and became somewhat stagnant attempted to rescind the contract of purchase because of an alleged misrepresentation made in connection therewith, though he had full knowledge of the facts months before, he was precluded by his laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 212, 213.]

2. SAME — CONTRACT TO PURCHASE — FORECLOSURE OF PURCHASER'S RIGHTS — ALLOWANCE OF TIME TO PAY AMOUNT DUE.

Upon a foreclosure of the rights of a contract purchaser of land, it is consonant with equity to allow the purchaser 10 days' time in which to preserve his rights in the property upon payment of the moneys provided in his contract.

3. SAME.

Where the purchaser in a contract for the sale of land had been allowed extensions of time for the making of payments, and had been guilty of laches in bringing an action to rescind the contract, in which a foreclosure of his interest was decreed, a 10-day period in which to preserve his rights to the property by paying the amount due under the contract was not an unjustly short limit of time.

Department 2. Appeal from Superior Court, Los Angeles County; J. S. Noyes, Judge.

Action by M. S. Kornblum against Mary

M. Arthurs and another. From an order and a judgment for defendants, plaintiff appeals. Affirmed.

Goldberg & Melly, for appellant. Tanner, Taft & Odell, for respondents.

HENSHAW, J. Plaintiff sued to rescind a contract for the purchase of real estate and to recover the portion of the purchase price which he had paid, upon the ground that he was induced to enter into the contract by the false and fraudulent representations made by the vendor. Lot 23 in "Venice of America Tract," which is the subject-matter of this controversy, is one of a series of 12 lots, identical in size, constituting the southwesterly portion of block 2, a business block of the town. The fraudulent representation relied on as the basis for rescission was the alleged statement to plaintiff by defendant Arthurs and her agent that all of these other lots, excepting lot 23, were incumbered by a building restriction which compelled purchasers to begin the erection of buildings thereon within 60 days from the date of purchase, but that lot 23 was free from such building restriction and time limit. The contract made by the agent of said defendant with the plaintiff contained the following: "It is understood that restrictions on this lot place no limit on time bldg. must be completed; otherwise, no sale." The written contract between the parties thus contained no representation as to the status of the other lots, and the representation actually made as to lot 23 was true. It was equally true, however, of the other lots of the block.

Upon conflicting evidence the court found that the representation alleged had not been made. It found, moreover, that extensions of time had been granted to plaintiff at his request for the making of payments on the purchase price of the lot, and that during this time plaintiff advertised the lot for sale at a price greater than that for which he had engaged to purchase it; that the lot was worth at the time of sale, and at the time of the commencement of suit, the amount which the plaintiff had contracted to pay for it; that plaintiff at the time of entering into the contract had every opportunity to inquire into the condition of the title of the other lots in the block, and in fact did make inquiries concerning the same, and that, even if he did not know the fact before, in August he became fully aware of the condition of the title of the other 11 lots; that, notwithstanding this knowledge, he did not claim rescission or offer to rescind until November 1, 1905, the date upon which, under the extension of time which he had asked for and obtained, an additional payment had become due. As has been said, the court found against the alleged fraudulent representation upon sharply conflicting testimony.

Appellant offered to prove that defendants

had made the same representations to another agent in placing the property in that agent's hands for sale, and the testimony was refused admission. It may be assumed that this should have been received in evidence, on the ground that, where fraud in the purchase and sale of property is in issue; evidence of other frauds or fraudulent representations of like character committed by the same parties at or near the same time is admissible. *Bancroft v. Heringhi*, 54 Cal. 120; *Kelley v. Owens* (Cal.) 30 Pac. 596; *Lincoln v. Clafin*, 7 Wall. 138, 19 L. Ed. 106; *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323.

But to this and other alleged errors, not necessary here to consider, the sufficient answer is made by respondents that they are one and all, immaterial in this case under the finding of laches, which the court, upon sufficient evidence, declared the plaintiff to be guilty of. The circumstances as found by the court are that the property was purchased by plaintiff for speculative purposes; that he held it, advertised it, and offered it for sale at a price above that which he was to pay for it, during a time when the real estate market was feverishly active and the plaintiff might reasonably expect a sale of the property at this increased price; and that only after the market suffered a partial collapse, and became somewhat stagnant, did the plaintiff make any complaint or effort to rescind, though he possessed full knowledge of all the facts months before. All these matters, as found by the court, justify its refusal upon the ground of laches to award the plaintiff any relief.

The court decreed a foreclosure of plaintiff's interest, allowing him, however, 10 days in which to preserve his rights to the property upon payment of the moneys provided in his contract. This was in consonance with equity. *Keller v. Lewis*, 53 Cal. 113. Nor can it be said that the 10 days was an unjustly short limit of time, considering the extensions of time and indulgences which had been shown to the plaintiff, and his laches in commencing the action which he finally brought.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; SLOSS, J.

154 Cal. 261

DONNELLY v. TREGASKIS. (Sac. 1,632.)
(Supreme Court of California. Sept. 4, 1908.
Rehearing Denied Oct. 2, 1908.)

1. HUSBAND AND WIFE — PROPERTY — HOMESTEAD.

Plaintiff and his wife being in possession of land under a contract of purchase, which was afterwards completed, she recorded a declaration of homestead on the property. Later he deeded to her his interest for a money consideration and removed to another state, and she procured a divorce; the decree awarding her

the property. *Held* that, if the declaration of homestead was invalid, so that the property did not become a homestead, plaintiff's deed divested him of all title, regardless of the court's award in the divorce suit.

2. HOMESTEAD—DECLARATION — DESCRIPTION — ESSENTIALS.

Under Civ. Code, § 1263, requiring a declaration of homestead to describe the premises, the description must be such as will serve to identify the property, and a description locating land by reference to a map made by a specified surveyor is insufficient, in the absence of the production and identification of the map.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 61.]

3. ADVERSE POSSESSION — POSSESSION UNDER DEED.

Defendant having taken possession of land under a recorded deed from a divorced wife, who had legal title and power to convey, subject to the homestead, the deed afforded defendant more than color of title, and she acquired title as against the husband by adverse possession maintained for the statutory time and under statutory conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 415-429.]

Department 2. Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action to quiet title by James Donnelly against Elizabeth J. Tregaskis. From a judgment for defendant, plaintiff appeals. Affirmed.

See 94 Pac. 383.

Paul C. Harlan, for appellant. Frank R. Devlin, for respondent.

HENSHAW, J. Plaintiff brought this action to quiet title to a lot of land in the city of Vallejo. Upon January 7, 1869, plaintiff and his wife were living upon the property in question under a contract of purchase, and subsequently the purchase was completed. Upon that date the wife executed a declaration of homestead upon the property, which was recorded upon the 11th day of the same month. Differences arose between plaintiff and his wife, and in 1891 he executed a deed to her of all his interest in the property; she paying him a money consideration therefor. He left California and took up his residence in the city of New York. Subsequently his wife instituted an action for divorce, and service of summons upon the husband was obtained by publication. She secured her divorce upon September 20, 1897. The affidavit of service by publication declared that the defendant (this plaintiff) resided at No. 695 First avenue, New York City, state of New York. The return of service showed that a copy of the summons, attached to a true copy of the complaint, had been deposited in the post office, directed to "James Donnelly, the said defendant, at No. 695 Fifth avenue, New York City, New York." In the decree awarding Mrs. Donnelly her divorce, the property here in controversy was set apart to her. On the 5th day of October, 1897, Mrs. Donnelly executed to this defendant a deed to the property, receiving therefor its full monetary value. Mrs. Tregaskis

has remained in possession of the property ever since, claiming it against the world; her possession being undisputed until this action was commenced November 22, 1905. Appellant bases his claim to the property upon his construction of the provisions of section 1474, Code of Civil Procedure, and section 4 of the homestead act (St. 1860, p. 312, c. 320), as amended in 1862 (St. 1862, p. 519, c. 396), the provisions of which laws he contends give him, as the survivor of the marital community, the absolute title to the homestead. In this connection he argues that the decree of divorce was void for insufficiency of proof of service appearing upon the face of the judgment roll as above noted; that the homestead character impressed upon the land was not destroyed, and could not be destroyed, excepting by joint act of the parties; and that it remained in full force and effect, notwithstanding his deed to his wife and her deed to this defendant.

All of this presupposes the recordation of a valid declaration of homestead. If, however, the declaration of homestead was invalid, so that the property did not become a homestead, then, indisputably, appellant's deed to his wife divested him of all title to the property, regardless of the court's award to her of the property in the divorce proceeding. The declaration of homestead made by the wife recited as to description that she resided with her family "on the lot of land and premises situate, lying and being in the city of Vallejo, county of Solano, state of California, bounded and described as follows, to wit: Being lot No. 14, in block No. 266, according to the map of said Vallejo made by C. W. Rowe, surveyor." A description of the premises is required by the Code as an essential to a valid declaration of homestead. Civ. Code, § 1263; *Jones v. Gunn*, 149 Cal. 687, 87 Pac. 578. A description of the premises necessarily means such description as will serve to identify the property. To uphold homesteads, which are favored by the law, great liberality in this respect will be allowed; but the rule nevertheless obtains in full force that the description must be sufficient, so that the property may be identified in some legitimate manner. Here the sole description of the property is that it is a numbered lot in a numbered block in the city of Vallejo, which numbered lot and block are located solely by reference to "a map of said Vallejo made by C. W. Rowe, surveyor." No such map was produced in evidence, and the negative was shown by the defense to the effect that no such map was of record. In the absence of the production and identification of the map, it would be impossible for any person to locate the premises sought to be described. It differs essentially in this respect from the description considered by this court in the *Matter of the Estate of Caroline Ogburn*, 105 Cal. 95, 38 Pac. 498. There the location

of the land was fixed as "being the western part of lot No. 5 of said village, as laid out by F. S. Freeman's division of said village, the same being 37 feet front on Main street of said village, and extending back with parallel lines 190 feet deep, it being a part of the southeast quarter of section 21, in township No. 10, of range 2 east." There, besides the reference to the map, the size of the lot is given, its location upon Main street fixed, and its situs as a part of a government subdivision set forth with particularity. In this discussion we do not mean to be understood as holding that to make a sufficient description a deed must refer to a map actually of record. We do mean, however, to declare the unquestioned rule that where a description is dependent for its sufficiency upon some other instrument, such as a map, the map, properly identified, must be produced, or in some manner established, or the description must fail. So it is said in *Caldwell v. Center*, 30 Cal. 540, 89 Am. Dec. 131: "Although the parties to a deed may describe the property therein conveyed by a reference therein to another deed or map which contains a description, yet the deed and the instrument referred to, when taken together, must be as certain in respect to the description as a description contained in the deed itself." So in *Cadwalder v. Nash*, 73 Cal. 45, 14 Pac. 385, it is said: "The deed and the map or instrument, however, when taken together, must be as certain in respect to the description as a description contained in the deed itself, and the identity of the map referred to, must be clearly established."

But upon another consideration, equally beyond question, the judgment of the trial court was sound. The defendant pleaded title by adverse possession and the statute of limitations. These pleas were abundantly supported by evidence. As against them, appellant argues that, the decree of divorce being void, the wife's possession was his possession, and that the wife's deed to this defendant, under which she entered, being based upon a void decree, would not serve to initiate an adverse possession under section 323, Code of Civil Procedure. But this defendant founded her claim upon a written instrument—a deed—and took possession of the property under this instrument; the wife at the time indisputably having legal title to the property and (assuming a valid homestead) having power to convey this legal title, subject to the homestead. There can be no doubt that such a deed afforded more even than color of title. The deed was immediately recorded, and possession was taken under it. That possession so taken under such a deed, maintained for the statutory time and under statutory conditions, can ripen into a title by adverse possession may not be questioned, and, indeed, has been decided in *McCormack v. Silsby*, 82 Cal. 72, 22 Pac. 874, where it is adjudicated that adverse possession

for the requisite time and character will extinguish a homestead.

For which reasons, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; SHAW, J.

154 Cal. 249

BURNETT et al. v. GLAS et al. (Sac. 1,485.)
(Supreme Court of California. Sept. 3 and 10, 1908.)

1. MECHANICS' LIENS—CONTRACT TO PREVENT LIENS—STATUTORY REQUISITES—"FILING OF THE CONTRACT."

Where a written building contract provides that the building shall be constructed in accordance with plans, drawings, and specifications, referred to as attached or as kept in the office of an architect named therein, such plans, etc., are an essential part of the contract, and must be filed with it, in order to constitute a "filing of the contract," within Code Civ. Proc. § 1183, which will protect the property from mechanics' liens; and the contract must also provide, as required by section 1184, that "at least 25 per cent. of the whole contract price shall be made payable at least 35 days after the final completion of the contract," otherwise in either case the property will be subject to liens in favor of those doing labor or furnishing materials to the same extent as though there had been no contract and the labor and materials had been furnished at the personal instance and request of the owners.

2. SAME—RIGHT TO LIEN—PERSONS ENTITLED TO LIEN.

The fact that a member of a partnership is surety on the bond of a building contractor conditioned for the delivery of the building to the owner free from liens will not debar the firm of which he is a member of the right to a mechanic's lien on the building for labor or materials furnished, unless it is shown that he signed the bond on behalf of the partnership and with the consent or ratification of his partner.

3. SAME—PRIORITY AS BETWEEN LIEN CLAIMANT AND MORTGAGEE—DATE OF LIEN.

Under Code Civ. Proc. § 1186, which provides that, where there is no valid contract between the owner and a building contractor, the priority of mechanics' liens is to be determined by the time the work was done "or the materials commenced to be furnished," the time when a materialman commenced delivery fixes his rights as a lien claimant, as between him and a mortgagee, as well as other lien claimants.

4. SAME—FORECLOSURE — SALE — MORTGAGED PROPERTY.

On a foreclosure of mechanics' liens, some of which are paramount to a mortgage and others subject thereto, the decree may properly direct a sale of the property in fee and the application of the proceeds to the payment of all liens in the order of priority, including the mortgage, although it is not due.

5. SAME—INTEREST.

In a decree foreclosing mechanics' liens for labor or materials furnished at an agreed price, the court may properly allow interest prior to judgment; but where the amount due is unliquidated until fixed by the judgment, as where materials were furnished to be paid for at the reasonable market price, interest should not be allowed prior to the judgment.

Department 1. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by J. H. Burnett and others against Frank Glas, Jr., and others. Judgment for

plaintiffs, and defendants appeal. Modified and affirmed.

W. H. Larew, for appellants. F. A. Fee, L. L. Cory, and Stanton L. Carter, for respondents.

ANGELLOTTI, J. This is an appeal by defendants, the owners of a lot of land in the town of Madera, 77½ feet on Yosemite avenue by 150 feet in depth on C street, from a judgment given in several actions for the foreclosure of the liens of certain mechanics and materialmen arising in and about the construction of a building on said land, which actions were consolidated under section 1195, Code of Civil Procedure, and tried as one action. The findings show the material facts to be as follows:

On November 9, 1903, the appellants, as owners, entered into a written contract with one W. J. Sircy, as contractor, for the erection on said land of a one-story and basement brick store building; the contractor agreeing therein "to furnish the necessary labor and materials * * * and perform and complete in a workmanlike manner all the brick work, iron work, plastering, and carpenter work, and other works shown and described in and by and in conformity with the plans, drawings and specifications for the same, made by Julien Mourot, the authorized architect employed by the owner, and are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto and others concerned in said erection." In the contract it was further provided that said building was to be a "one-story and basement brick store building, with corrugated galvanized iron roof, said building to be 77' 6"x80 ft." It was expressly found that the plans, drawings, and specifications mentioned in said contract were a material, important, and necessary part thereof; and this conclusion was manifestly correct. The plans, drawings, and specifications were never filed in the county recorder's office. The remainder of the contract was so filed on November 19, 1903. According to the terms thereof, the consideration of \$7,320 was to be paid in five installments of \$1,464 each, the fourth installment to be paid when the building was completed and accepted, and the last installment, which was only 20 per cent. of the whole contract price, was to be retained for 35 days after completion. On November 17, 1903, the contractor gave a bond upon said contract, with M. R. Madary and C. J. Craycroft as sureties, by which the sureties guaranteed the performance of said contract and the delivery of the building free of liens. Work was commenced by the contractor in November, 1903, and continued to December 24, 1903, when a further written agreement was entered into by appellant and Sircy, whereby Sircy agreed to construct for \$1,318 a second story to said

building, the same to be paid when "the story is up ready for the ceiling joists." This writing was never filed in the county recorder's office. The work was continued under these two writings to April 9, 1904, when the building was completed and delivered to and accepted by the appellants. Appellants have paid on account of the contract price \$7,387.50, leaving in their hands a balance of \$1,250.50.

The various lien claimants, whose liens were allowed by the trial court, furnished to the contractor materials to be, and which were, used in the construction of said building, or performed labor thereon, as follows: J. H. Burnett furnished materials at an agreed price, namely, \$300. J. A. Sircy, whose claim was assigned to plaintiff Barrett-Hicks Company, a corporation, performed labor at an agreed price of \$3.50 per day, to the extent of \$86.70. J. A. Dyer furnished materials under contract with the contractor, for which the contractor agreed to pay "the reasonable market price thereof from time to time as the same were furnished and as the work on said building progressed"; the amount of his allowed claim therefor being \$585.45. J. A. Dyer and C. J. Craycroft, copartners under the name and style of J. A. Dyer, furnished the contractor, under contract with him, brick at a fixed price per thousand brick, to be paid for as the same were placed in the building; the balance of their claim, which was allowed, being \$717.65. Watkins & Thurman furnished materials "to be paid for at the regular and usual market price in cash upon delivery of the same"; such price being found to be \$276.64. The claims of lien of these parties were all filed for record in the office of the county recorder of Madera county within the proper time and were all in proper form. In the claim of Watkins & Thurman, so filed, there was included separately a claim for an amount due them, in addition to the \$276.64, for one-half the cost of constructing a party wall; and as to this the court found they should be paid by the other owners of the party wall, and were not entitled to a lien against appellants' property. It, however, found that such claim was made without any wrongful intent, but with an honest belief that they were entitled to a lien for the amount. This finding is not attacked. On November 17, 1903, appellants borrowed from defendant Commercial Bank of Madera the sum of \$8,000, and gave their mortgage covering said property to secure payment thereof, with interest at 11 per cent. per annum. This mortgage was duly recorded on the day of its execution. As appears from the mortgage introduced in evidence, the note given for this loan was dated November 19, 1903, and was payable "five years after date." The mortgagee appeared in the actions, and in its answers set up said mortgage, alleged that "no part of the principal sum mentioned * * * has been paid," and that the

same, with interest, is wholly unpaid, and is a valid and first lien on said property; but it did not ask foreclosure of its lien. The interest on this note was paid to May 19, 1905. The court found that claimants J. A. Dyer and Dyer & Craycroft both commenced to furnish the materials furnished by them, respectively, on November 13, 1903, a date prior to the attaching of the lien of defendant bank's mortgage. This finding is not attacked. The other liens were confessedly subject to said mortgage. There were claims of lien on behalf of some other parties, which were rejected by the trial court; but these parties have not appealed, and that matter is immaterial here. It was further found that of said land on which the building was constructed, the amount necessary for the convenient use and occupation of the building was 77½ feet on Yosemite avenue by 100 feet in depth on C street. This finding is not attacked.

The trial court concluded upon these facts that the contract between the appellants and Sircy was void for failure to comply with the provisions of sections 1183 and 1184, Code of Civil Procedure, and that under the terms of said sections the labor done and materials furnished by the claimants must be deemed to have been done and furnished at the personal instance of the appellants, and they were entitled to a lien therefor, regardless of the amount due from appellants to the contractor. It found the amounts due such claimants, allowing interest on all the claims prior to judgment, and also attorney fees. Judgment was given accordingly directing the sale of the portion of the lot found to be necessary for the convenient use and occupation of the building, and the building thereon, and the application of the proceeds as follows, viz.: (1) To the payment of the costs, etc., of sale; (2) to the payment of the amounts due claimants J. A. Dyer and Dyer & Craycroft; (3) to the payment of the amount of the mortgage lien of defendant the Commercial Bank of Madera, being \$8,000, with interest from May 19, 1905; (4) to the payment of the amount due on claim of J. A. Sircy (held by plaintiff Barrett-Hicks Company); (5) to the payment of the amounts due on the claims of Watkins & Thurman and J. H. Burnett; (6) any surplus remaining after such payments to be delivered to the appellants. It was further adjudged that the cause of action of Watkins & Thurman for the amount claimed on account of the party wall be dismissed, without prejudice to their right to maintain proper proceedings against the persons liable to collect the amount due thereon.

From this judgment the owners alone appeal.

1. It cannot be doubted, in view of our decisions, that the trial court was justified in its conclusion that by reason of the failure of the parties to the building contract to substantially conform to the requirements of

sections 1183 and 1184, Code of Civil Procedure, parties doing labor or furnishing materials must be deemed to have done and furnished the same at the personal instance and request of the owners, and were entitled to a lien for the value thereof. The plans, drawings, and specifications must be held to have constituted an essential part of the written building contract. Where this is so, it is firmly established by our decisions that they must be filed in the county recorder's office with the contract, in order to constitute a filing of the contract under section 1183, Code of Civil Procedure. This is true, even though the contract itself does not refer to them as being annexed, but refers to them, as in the case at bar, as being kept in the architect's office, or in some other place. See *Pierce v. Birkholm*, 115 Cal. 657, 47 Pac. 681; *Holland v. Wilson*, 76 Cal. 434, 18 Pac. 412; *S. F. L. Co. v. O'Neill*, 120 Cal. 455, 52 Pac. 728; *West Coast L. Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533; *Wood v. O. & B. Transit Co.*, 107 Cal. 500, 40 Pac. 806; *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765; *Willamette, etc., Co. v. College Co.*, 94 Cal. 229, 233, 29 Pac. 629. Where there is a failure to comply with the requirement as to filing, the section in terms provides that the contract "shall be wholly void," and that "the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." This penalty has been uniformly enforced by the courts, and there can now be no question as to the validity of the provision. The statute now permits a memorandum of the contract containing certain matters to be filed in lieu of the contract; but it is not claimed or pretended that any memorandum was filed or attempted to be filed. The case of *Joost v. Sullivan*, 111 Cal. 294, 43 Pac. 896, relied on by appellants, was a case where a memorandum was filed, and this memorandum contained no reference to any plans and specifications, and did not even disclose the fact that there were plans and specifications. It did comply with the requirements of section 1183, Code of Civil Procedure, as to such a memorandum, and was held sufficient. In the case of *Willamette, etc., v. College Co.*, 94 Cal. 234, 29 Pac. 629, speaking of the amendment allowing the filing of a memorandum in lieu of the contract, the court says: "After this amendment was made, the owner or the contractor could satisfy the statute by filing either the contract or such memorandum; but, if he filed the contract, he must still file the whole of it, including the drawings and specifications, if they were made a part thereof, while, if he preferred to file the memorandum, such memorandum must contain all the matters which are prescribed in the statute as the equivalent of the contract."

There was also a substantial departure

from the provisions of section 1184, Code of Civil Procedure, which requires that "the contract price shall, by the terms of the contract, be made payable in installments at specified times; * * * provided that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract." Here, as has been seen, under the terms of the contract, only 20 per cent. of the original contract price was to be so retained. It has always been recognized by this court, in line with the express declaration of the section, that where there is a substantial departure in the contract from the provisions as to the times of payment and the reservation of at least 25 per cent. of the contract price for at least 35 days after the completion of the building, the property is subject to liens in favor of those doing labor or furnishing materials to the same extent that it would have been had there been no contract, and the labor and materials had been furnished at the personal instance and request of the owners. See *Willamette, etc., Co. v. College Co.*, 94 Cal. 235, 29 Pac. 629; *Yancy v. Martin*, 94 Cal. 561, 29 Pac. 1111; *San Diego L. Co. v. Wool-dredge*, 90 Cal. 574, 27 Pac. 431; *Brill v. De Turk*, 130 Cal. 241, 62 Pac. 462. In the recent case of *Merced Lumber Co. v. Bruschi*, 92 Pac. 844, this matter was considered at length, and the rule of the section applied in a case where by the terms of the contract no part of the contract price was to be retained after the completion of the work.

2. It is contended that claimants *Dyer & Craycroft*, as copartners, were not entitled to a lien by reason of the fact that C. J. Craycroft, one of said partners, was a surety on the bond given by the contractor to the owners, as hereinbefore noted. This fact was alleged by way of defense in the answer of appellants to the complaint of *Dyer & Craycroft*, as copartners, with the further allegation that said Craycroft was indebted to appellants on said bond in the sum of \$2,000; but there was no allegation tending to show that Craycroft, in executing said bond, acted other than in his individual capacity, or on account of said partnership, or with the knowledge or assent of his copartner, *Dyer*. In the absence of any evidence on the subject, other than the bond itself, which is the condition appellants claim is shown by the record, the trial court was warranted in concluding that Craycroft became a surety on said bond in his individual capacity, and not on account of said copartnership, and without any relation thereto or connection therewith. It has been held that a surety on a building contractor's bond who has guaranteed the delivery of the building free of liens cannot enforce a lien against the building (see *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *Boisot on Mechanics' Liens*, § 753); but we do not understand that the partnership firm of which

such a surety may be a partner is necessarily barred from a lien for materials furnished by it, especially where the surety does not assume to act in his capacity as a member of the firm. "If a partner does an act for a purpose which is apparently not connected with the firm's ordinary course of business, he is not acting in pursuance of any apparent authority, and the firm will not be bound unless such partner in fact had authority, or unless his unauthorized act, so performed is subsequently ratified. * * * The burden of proving such authority is on the creditor." 22 Am. & Eng. Ency. of Law, p. 114. See, also, 1 *Bates on Law of Partnership*, §§ 452 to 454 and 349 and 350; *Parsons on Partnership*, §§ 83 and 144. We are of the opinion that the record discloses no reason why the firm is barred from its right of lien by reason of Craycroft's presence on the bond as a surety. The remedy of appellants against Craycroft for any breach of the bond is to be found elsewhere.

3. It is contended by appellants that the liens of claimants *J. A. Dyer and Dyer & Craycroft* should not have been held to be paramount to the mortgage of the bank. Assuming that appellants have some interest in this matter, it is clear on the record that the contention is not well founded. The findings showing that the materials furnished by these claimants under contract with the contractor were commenced to be furnished several days prior to the giving of the mortgage are not attacked. Under section 1186 of the Code of Civil Procedure, in cases where there is no valid contract between the owner and the contractor, the priority of the liens is to be determined "by the time the work was done, or the materials commenced to be furnished." *McClain v. Hutton*, 131 Cal. 144, 61 Pac. 273, 63 Pac. 182, 622.

4. A question, new in this state, is presented by the fact that the decree requires the payment from the proceeds of the sale of a debt of appellants secured by mortgage on the premises, although the note evidencing such indebtedness is not yet due and payable. As already noted, the mortgagee has not appealed, and we are therefore not concerned with any question as to a violation of its right under the note and mortgage. The appellants claim their rights are violated by such a course. It is apparent that, under the circumstances of this case, it was essential to the protection of the respective rights of the various lienors, including the mortgagee, that the property should be sold for the purpose of paying all liens existing thereon. If all the mechanics' liens had been paramount to the mortgage, or if all had been subject thereto, the case would have been very different, and appellants might well have insisted that no provision be made in the decree for the payment of the mortgage. In the first case, the mortgagee would have to redeem from the lien sale to preserve its claim, and in the

second case the property would be sold subject to the mortgage. But here we have certain liens which have priority over the mortgage, and certain others which are subject thereto, and all the claimants are entitled under the statute to a judgment for the sale of the entire building with so much land as is necessary for its convenient use, that the proceeds may be applied so far as applicable to the payment of their respective liens. Learned counsel for appellants has not pointed out any practicable way, other than that adopted by the trial court, by which this could be accomplished. There must be a sale under such terms as to preserve the relative rights of all the parties to the action having liens on the property. This, we think, our statute clearly contemplates; and if, in order to accomplish this, it is absolutely necessary to pay certain debts not yet due which constitute liens on the property, we entertain no doubt as to the power of the court to make such provision in such a manner as may be equitable. In such a case the debtor and mortgage creditor must be deemed to have acted subject to the contingency that such a disposition may be necessary, and the debt, therefore, required to be paid from the proceeds of the sale of the property before it becomes due; their being a rebate of interest allowed, whenever such a rebate is proper. The case is somewhat similar to that of the foreclosure of a mortgage payable in installments which are not all due, and the court is authorized, where the property cannot be sold in portions without injury to the parties, to order the whole of it sold in the first instance, and the entire debt and costs paid, with rebate of interest where proper. Code Civ. Proc. § 728. In *Boisot on Mechanics' Liens*, § 663, it is declared that where some liens are superior to a mortgage, and also to other liens, and the rest are inferior to the mortgage, the decree should provide that prior claimants should be paid as if there were no mortgage, and the residue applied, first to the mortgage, and then to the inferior liens, citing *Choteau v. Thompson*, 2 Ohio St. 114. That was exactly the procedure here. In *Croskey v. N. W. Mfg. Co.*, 48 Ill. 481, it was held that in a suit to enforce mechanics' liens the decree might direct a sale of the premises in fee, though a mortgage thereon is not then due, and the application of the proceeds to the liens and mortgage according to their respective rights of priority. See, also, *North Pres. Church v. Jevne*, 32 Ill. 214, 83 Am. Dec. 261; *Grundeis v. Hartwell*, 90 Ill. 324; *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288; *Kohler v. Carruthers*, 18 Tex. Civ. App. 216, 223.

5. There was nothing prejudicial to appellants in the dismissal of the claim of Watkins & Thurman as to the amount due on account of the party wall, without prejudice to their rights to maintain proper proceedings against the parties personally liable therefor.

6. In both their opening and closing briefs appellants concede the rights of all the lien claimants, except J. A. Dyer and Watkins & Thurman, to the interest allowed by the trial court, if their liens should be sustained. This concession was warranted by the authorities; it being settled that, where the amount is so fixed by agreement that it may be made certain by calculation, interest may be allowed prior to judgment. *Hines v. Miller*, 126 Cal. 683, 59 Pac. 142; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312, and cases there cited. The claims of all except J. A. Dyer and Watkins & Thurman were of this character. In *Pacific Mutual, etc., Co. v. Fisher*, 106 Cal. 233, 39 Pac. 758, it was said, in holding the claimants entitled to interest under such circumstances, that the lien which the statute gives is as extensive as the claim which it is intended to protect. This construction of our statute does not render it unconstitutional, as is suggested for the first time in the petition filed herein for a rehearing after decision by the District Court of Appeal.

7. We are of the opinion that the claim of appellants that claimants Dyer and Watkins & Thurman were not entitled to interest prior to judgment is well founded. As to each of these claims, the amount due was unliquidated and not capable of being made certain by calculation until fixed by the judgment. The rule applied to such claims in *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312, namely, that interest prior to judgment cannot be allowed, was applicable. See, also, *Stimson v. Dunham, etc.*, 146 Cal. 285, 79 Pac. 968. The judgment must be modified in this respect.

8. The learned judge of the trial court, acting in accord with what was the universal practice up to the time he gave judgment herein, allowed each of the claimants an attorney fee. Since the judgment this court has held section 1195, Code of Civ. Proc. which purports to authorize such allowance, to be unconstitutional. *Builders' Supply Co. v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193. The judgment must also be modified in this respect.

We have now considered all the points made by appellants which require consideration. Some findings that are immaterial are attacked; but, so far as the findings are material under our view of the case, they are either not attacked at all, or are fully sustained by the admissions of the pleadings or by the evidence.

It is ordered that the judgment be modified, by deducting and striking therefrom the allowance in favor of J. A. Dyer of \$61.47 interest, and the allowance in favor of Watkins & Thurman of \$29.04 interest, and also by deducting and striking therefrom each and all of the allowances made for attorney fees to the various claimants, and that, as so modified, the judgment is affirmed. Appellants shall not recover any costs of appeal as against respondents Dyer & Craycroft, as co-

partners, Barrett-Hicks Company, or J. H. Burnett.

We concur: SHAW, J.; SLOSS, J.

154 Cal. 232

GARVEY WATER CO. v. HUNTINGTON LAND & IMPROVEMENT CO.

(L. A. 2,049.)

(Supreme Court of California. Aug. 31, 1908.)

1. WATERS AND WATER COURSES—WATER CONTRACTS—CONSTRUCTION—"DEVELOPMENT WORK."

Defendant granted to plaintiff the full, uninterrupted, and perpetual flow of 30 inches of water from the former's ranch, but did not warrant a flow of that quantity; but the contract provided that the defendants would not by any act diminish the flow, but stated that they intended to continue developing the flow, and reserved the privilege of doing so by boring, driving tunnels, and such other means as were necessary, and that if the water thereafter decreased because of any unforeseen agency, so as to be insufficient to supply the 30 inches, defendant would do any further work towards restoring the flow which any competent engineer selected by plaintiff should direct, the expense of such work by developing to be advanced by plaintiff. The flow of water subsequently decreased below 30 inches, but there was more than sufficient water under the surface to supply that quantity, and plaintiff selected an engineer, who reported that it was necessary to install a pumping plant in one of the wells to restore the flow. *Held* that, even if the means of restoring the water must be of the same general character as "boring wells or driving tunnels," which defendant reserved the privilege to do, the use of pumps as recommended by the engineer was "development work" within the contract and a proper means of restoring the flow, and the fact that pumps had never been used on the ranch or in the county for that purpose was immaterial.

2. WORDS AND PHRASES—"TUNNELS"—"WELLS."

"Tunnels" are practically horizontal wells, differing from ordinary "wells" only in that the waters from the former find their way to the surface by gravity, while in the latter pumping must be resorted to to bring the water to the surface; both disturbing the natural flow of the subterranean waters, and both being artificial means of reaching and controlling the natural subterranean flow to develop water power.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7429-7430.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Garvey Water Company against the Huntington Land & Improvement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher and Edward E. Bacon, for appellant. Hut-ton & Williams, for respondent.

LORIGAN, J. This action was brought by plaintiff to enforce a right to 30 inches of water under a contract made with the predecessors of defendant. Judgment went for plaintiff, and this appeal is taken by defendant from the judgment on the judgment roll.

The facts found were that on February 29, 1892, J. De Barth Shorb and his wife, own-

ers of the Shorb ranch, in Los Angeles county, and predecessors in interest of the defendant, entered into a contract with one Richard Garvey, to whose interest plaintiff succeeded, relative to certain waters on the ranch. The contract, which applies to the heirs and assigns of both parties, is quite lengthy, and its provisions, as far as they relate to the present proceedings, were that in consideration of \$25,000 the Shorbs granted to Garvey the right to the full, uninterrupted, and perpetual flow of 30 inches of water, miner's measurement, under a 4-inch pressure (each inch of water to be a flow of one-fiftieth of a cubic foot of water per second), said water to be taken entirely from the Shorb ranch, and the right thereto to be the first or prior right to any waters now or hereafter to be developed or flowing upon or from the said lands, subject only to the right to 1 inch of water theretofore granted for the cemetery at San Gabriel. It was mutually covenanted and agreed that the Shorbs did not warrant the continued flow of said 30 inches of water from said lands, although they did covenant and agree that water was then there, and that they would do no act or deed which would diminish its flow, but, on the other hand, declared that it was their intention to continue developing the flow of water therefrom (and they reserved the privilege of so doing by boring wells, driving tunnels, and such other means as engineering skill shall suggest); it being understood that the right of the party of the second part to have and take the 30 inches of water hereinbefore sold to him is (subject to the flow of 1 inch sold to the cemetery) the first or prior right to any waters now or hereafter developed on, flowing upon, or from the said lands. It was further covenanted and agreed by the Shorbs that in case the flow of water then or thereafter developed by them upon the lands described should be decreased by any act of Providence, or from any unforeseen or uncontrollable causes or agencies, to such an extent that Garvey would not or should not receive the quantity of water to which he might at that time be entitled, then the Shorbs would, at the expense of Garvey, do and perform such further work towards restoring the flow of water from said land as any competent engineer that Garvey might select should direct to be done, the money necessary to carry on such work of development to be advanced by Garvey from time to time as such work progressed; it being always understood that the Shorbs were to do all such work of further development, and the party of the second part was to pay therefor in the manner before indicated in the contract. It was further covenanted and agreed that all of the waters in said instrument alluded to were waters either then arising upon, or already developed or to be hereafter developed upon, said tract of land, and that nothing therein contained should be construed to be a limitation upon the rights

of the Shorbs to carry water from any other lands they might own to a reservoir situated on the said Shorb ranch and store waters therein, and that all waters so carried from those lands should not be deemed a portion of the waters granted to Garvey.

When this contract was entered into the Shorb ranch consisted of about 500 acres, and at that time there was some 80 inches of water, miner's measure, flowing from natural springs and cienegas, and from artesian wells, on the portion thereof (about one-third of the whole) which the contract described, and from which land the 30 inches of water were to be taken. For about eight years after the making of this contract there were on the Shorb ranch five wells, located on a slope above the measuring box of plaintiff, from which, at different periods during that time, the 30 inches of water called for were supplied. Originally the supply was furnished from two wells, but at the expiration of about a year, these failing to furnish the requisite amount, connections were successively made with the other wells in order to secure it. This water was supplied to the measuring box of plaintiff by gravity flow through tunnels and pipes from 8 to 21 feet below the surface of the ground connecting with the wells. No pumping was used on the ranch for supplying water at the time said contract was made, nor till some years thereafter was water raised by pumps or pumping for irrigation in said county. A drouth had prevailed in Southern California from 1895-96 to 1899-1900, which caused the flow from springs, cienegas, and artesian wells on the Shorb ranch, and elsewhere in Los Angeles county, to materially decrease, and in some instances to cease to flow. During January, 1900, the plaintiff, who had succeeded to the interest of Garvey under the contract, could obtain its supply of water from but three of the wells referred to. At that date the supply of water from all sources on the whole of the Shorb ranch had so far diminished that there was no water flowing for use on the ranch, after deducting the 30 inches of water supplied under the Garvey contract, and, in order to obtain water for irrigating the Shorb ranch itself, George S. Patten, the receiver of the Shorb ranch, pending foreclosure proceedings, temporarily installed and connected with the three wells from which water was being obtained by plaintiff an air compressor plant, which continued to supply the amount required by plaintiff, and the surplus obtained thereby was used on the Shorb ranch. This compressor was used for about two years and abandoned, whereupon it was discovered that the flow of water in said wells had so decreased that the plaintiff did not receive any more water than one-half the amount to which it was entitled. At the time the compressor was abandoned the Farmers' & Merchants' Bank of Los Angeles had become the purchaser of the Shorb ranch under fore-

closure proceedings, and on September 15, 1902, the plaintiff complained to said bank that it was not receiving its 30 inches of water, and contended that it had a right to place a pump in one or more of the wells upon the ranch under the terms of its contract, and by means of said pump to develop and take 30 inches of water. The bank denied the right of plaintiff to develop or take any water from said wells, except by the natural flow from said wells passing through tunnels which had theretofore been driven. However, the plaintiff and said bank entered into an agreement by which the plaintiff was allowed at its own expense to install a pumping plant temporarily in any or all of the wells on said lands. This agreement by its terms was terminable by either party on notice after one year from its date, and it was expressly stipulated that it should not affect the question between the parties as to their respective rights under the original contract between the Shorbs and Garvey. Under this agreement a pump was inserted in one of the wells on the Shorb ranch, and by means thereof plaintiff received, and continued to receive, its full 30 inches of water.

Thereafter defendant became the owner of said Shorb ranch by purchase from said bank, and a similar contract was entered into between it and the plaintiff relative to the use of said pump; but about the 21st of April, 1905, defendant notified plaintiff (as the agreement between them provided might be done) that it would no longer permit said pump to remain in said well, and demanded that it be taken out. Upon receipt of this notice and demand the plaintiff, by an order of its board of directors, and claiming the right to do so under a provision of the contract between the Shorbs and Garvey, selected Gervaise Purcell, an engineer, and directed him as such engineer to ascertain and report what further work upon the Shorb ranch was necessary in order to restore the flow of water to which plaintiff was entitled, and the amount of money necessary to carry on any work of development to attain that end. Purcell made an examination for the purpose desired, and reported that it was necessary to install a pumping plant of sufficient power and capacity to raise from one of said wells the amount called for in the contract. The report specified the character of engine and pump and the depth to which it should be submerged in the well in order to insure the delivery of said 30 inches of water. Upon receiving the said report, the plaintiff notified defendant of its selection of said Purcell as its engineer, accompanying the notice with a copy of the report of Purcell and a demand on defendant that it should do the work towards restoring said flow of water as was directed in the report of said engineer, with an offer on the part of plaintiff to advance the money necessary to carry on such work of development from time to time as the work progressed. De-

fendant refused to comply with this demand, and denied the right of plaintiff to develop or restore by means of any pump any portion of said 30 inches of water. There is flowing under the surface of the land on the Shorb ranch much more water than is sufficient to supply plaintiff with its 30 inches of water; and the only method or way by which water can be developed from said Shorb ranch, so that plaintiff can receive its said water, was by means of a pump placed in a well, or wells, in the manner stated in the report of said Engineer Purcell. Upon the said refusal of defendant to comply with its demand, plaintiff immediately commenced this action to have it decreed that under the terms of the contract it was entitled to have the flow of 30 inches of water restored to it in the manner indicated in the report of said Purcell by means of a pump placed in one or more of the wells on said Shorb ranch.

The court found the above facts and entered its decree in harmony with the relief asked by plaintiff. It decreed that the plaintiff was entitled to have said flow of water restored to it from the said Shorb ranch by means of a pump placed in one or more of said wells thereon, in the manner indicated in the report of Gervaise Purcell, and directed that, upon the furnishing and supplying of the money required to carry on the work necessary to develop and restore said flow of water from the Shorb ranch as the work progressed, the defendant do and perform such work necessary for such purpose as directed in the report of said Purcell. It was further decreed that at the present time and under present conditions, and until it should become necessary for the plaintiff under the terms of its contract to change the location of the pumping plant, the plaintiff was entitled to use for its pumping plant to obtain its 30 inches of water that certain described portion of the Shorb ranch, upon which at the commencement of the action, and at the time of the decree, there was a house in which was installed the pump and other necessary machinery constituting the pumping plant, at and surrounding a well mentioned in the report of said Gervaise Purcell heretofore referred to. The only question on this appeal is relative to the proper construction to be placed on the contract between the Shorbs and Garvey of February 29, 1902. Does that contract give to plaintiff, as successor in interest of Garvey, the right to obtain the 30 inches of water called for therein, by means of pumping, or is it entitled to take only such waters as naturally flow from the land, or may be caused to do so by means of the boring of wells or driving of tunnels?

It is insisted by the appellant that this latter is the construction which should have been given to the contract, and that the trial court erred in construing it as conferring a right to obtain such water by means of pumping. It is unnecessary to discuss to any ex-

tent the various provisions of the contract which we have referred to. It is true, as contended by appellant, that the contract does not expressly provide that the Shorbs will supply to Garvey and his assignees 30 inches of water; nor do they warrant a continued flow from the Shorb ranch of water in that amount. They do, however, grant a full, uninterrupted, and perpetual flow of water, which they covenanted was, at the time of the making of the contract, in and under the ranch; that they would not do anything to divert the flow, but declared an intention to provide for further development, reserving a right to do so, by "boring of wells, driving of tunnels, and such other means as engineering skill may suggest." They also contract that, should the flow of water then or thereafter to be developed upon the land, and from which Garvey was to be supplied his 30 inches, decrease on account of any unforeseen or uncontrollable cause or agency, they would "do and perform such other work towards restoring the flow of water from such land as any competent engineer that the party of the second part (Garvey or his assigns) may select shall direct to be done, the necessary money to carry on such work of development to be advanced by the party of the second part." Under these provisions of the contract it was, undoubtedly, contemplated by the parties that there might be a decrease in, or even an entire cessation of, the flow of water from which Garvey was at any time receiving his 30 inches; that the sinking of wells or driving of tunnels would be inadequate to supply the quantity to which he was entitled; that neither the laws of gravity nor of nature could be relied upon to do so; and that to meet such a contingency resort would have to be had to a competent engineer, who would possibly be able to suggest some other means or method by which the flow might be restored, and which would have to be adopted for that purpose.

It is insisted by appellant that, while this may all be true, still that the means which might be resorted to under the familiar rule of ejusdem generis must be of the same character as those referred to specifically in the provisions of the agreement in which the Shorbs reserved to themselves the privilege of developing water on the land "by the boring of wells, driving of tunnels, and such other means as engineering skill may suggest," and that pumping as a means of developing water is not of the same character as the means specifically referred to; that is, by boring wells or driving tunnels. But we do not think this provision is of special or any significance in determining the right of the plaintiff under the contract. That particular provision had reference to the means which the Shorbs reserved to themselves for the future development of water, which they declared they intended to make. In our judgment the rights of plaintiff are to be measur-

ed by the last clause in the agreement, which we have heretofore quoted, and which confers on Garvey or his assigns the right to have an engineer of their selection determine what work was necessary to restore the supply of water which the Shorbs were to have done at the former's expense. This latter clause is quite different from the clause relied on by appellant, is broader in its terms, and expressly gives a right to plaintiff which the other clause does not pretend to confer. Assuming, however, that this provision relied on by counsel for appellant is applicable, and is to be taken into consideration with the other general provisions, in determining the means which are to be employed in developing or restoring the flow of water in favor of plaintiff, we are satisfied that pumping is of the same general character to accomplish that purpose as "boring wells or driving tunnels." It will be observed that in the general clause the Shorbs covenant to perform such work towards restoring the water as a competent engineer may direct, and, while this work is referred to as development work, there is undoubtedly meant by the use of that term the performance of such work as would in the judgment of an engineer accomplish the restoration.

It is impossible, as suggested, that neither of the parties had in mind when the contract was made the use of a pumping plant as a means of restoring the water. They probably assumed at that time that a sufficient supply would be obtained by artesian flow or by tunneling. It is true, also, that no pumping was being done on the ranch at that time, or, for that matter, in the county of Los Angeles, as a means for obtaining large quantities of water for irrigation or purposes of general utility. But pumping as a means of lifting water from wells or natural streams flowing from a lower level than the land to be irrigated has existed from remote times. For ages it has been recognized in the older countries—in Europe, India, China, and Egypt—and applied for obtaining water for that purpose. While the earlier devices were primitive in their character, in the progress of the ages such improvements have been made in machinery and in mechanical devices that pumps perfect in construction and adaptability are now and for years have been used as the most effective means for lifting large volumes of water from low levels for irrigation purposes.

It is not claimed that pumping for irrigation was not known at the time of the making of the contract, but only that the parties could not have had it in contemplation, because it was not used on the ranch nor in the vicinity; the lower court finding that the high price of fuel for motive power for that purpose made it prohibitory and the use of electricity for such motive power was then unknown. But we do not think that the fact that pumps were not actually used on the

ranch, or in the county, is of any moment as far as the proper construction to be placed on the agreement is concerned. The grant to Garvey of these waters was a perpetual one, to endure for all time, and he paid a large sum of money as a consideration for it. It was in contemplation of the parties that possibly in the course of years this water supply would so decrease that Garvey could not obtain the amount he purchased by the means which were then being adopted to supply it. In anticipation of being confronted with that situation, they proceeded to provide how it should be met. They assumed it would be a situation which the parties themselves would not be able to cope with, and so provided that some competent engineer should be selected to whom it would be left to determine what means should be adopted to restore the flow of water which has been purchased. When the means actually being used to produce the supply failed, it was provided that a competent engineer, a person who would have knowledge, at the time the difficulty arose in obtaining the supply of water, of the most approved and adaptable methods and appliances to increase its flow, should be consulted, and his advice followed. There is certainly no reason why the parties could not have so provided. It was a wise provision to insert to secure to Garvey the permanent flow of water which he had purchased as long as any practicable means which a competent engineer might suggest could secure it to him. Whatever the means may have been which the Shorbs reserved to themselves and declared their intention to develop the waters on the tract by, it is evident that, under the provision of the contract we have been addressing ourselves to, the means which Garvey and his assigns were given the right to restore the water by were any means which a competent engineer should advise. The general language of the provision is capable of this construction, and there is no reason why a narrower construction should be given to it to defeat the right of plaintiff to a restoration of waters which the contract provided he should have restored by such means as an engineer should direct, and which the trial court finds cannot be restored, except by the installation of a pumping plant.

It is claimed, however, that pumping is not the development of water, either in its primary sense or in the sense that the term was used in the contract. Appellant contends that true development work is merely the opening of new channels for the outflow of underground stores of water by the propulsion of the forces of nature, while pumping, on the other hand, is the forcible abstraction of these natural stores by foreign and artificial work, and that the term "development," as applied to obtaining a water supply, has a well-recognized meaning under the decisions of this court. But if the driving of tunnels or making of cuts is the development of wa-

ter, as it must be conceded it is, we perceive no good reason why the installation of a pump or pumping plant is not equally such development. As said in *Charnock v. Higuerra*, 111 Cal. 473, 481, 44 Pac. 171, 173, 32 L. R. A. 190, 52 Am. St. Rep. 195, every diversion "of water from a stream is a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump. Indeed, it may be much more so; and the one alters the natural condition in the same sense that the other does." Whether subterranean waters are procured by means of driving tunnels or the operation of pumps, they are obtained in either instance by artificial, and not by natural, means. Tunnels are practically horizontal wells, differing from ordinary wells only in this: that the waters from the former find their way by gravity flow, while in the latter pumping must be resorted to to bring the water to the surface. They both disturb the natural conditions of the flow of the subterranean waters, and differ only as to the method of that disturbance. The result, however, is the same. They are both artificial means of reaching and controlling the natural subterranean flow, and are equally a means of developing water.

Nor do we understand that the decisions referred to by counsel contain any definition of the term "development" as applied to subterranean waters. The cases referred to—for example, *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281; *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820—do not attempt to give any definition of the term. They simply hold that the things which were done in an effort to procure and control the subterranean waters were acts which constituted development. The development effected in those cases was by means of cuts and tunnels, and the court held that these constituted a development of water. The court did not hold that development could only be accomplished by such means, but simply that within the definition of development these means constituted it.

In the case at bar the wells from which plaintiff had been securing its 30 inches of water had so decreased in their flow that water could not be obtained from them by the tunnels which had been driven. As the only method whereby the flow of water could be restored was through the installation of a pumping plant of the character decided on by the engineer, Gervaise Purcell, we are satisfied that whether the contract is to be construed as providing that a competent engineer shall suggest "development work" alone to be done to restore it, or that he could suggest any effective means to do so, even though it might not come within the definition of development work, still the installation of a pumping plant at the well as devised by him was "development work," and the development of waters for the purpose of restoring the amount to which plaintiff was entitled,

and that this construction placed on the contract by the trial court was correct.

The judgment appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

154 Cal. 277

BUSH v. HEAD. (Sac. 1,625.)

(Supreme Court of California. Sept. 11, 1908.)

1. ELECTIONS—CONTEST—JURISDICTION.

The office of judge of the superior court, the judge ordinarily acting only in the county in which he is elected, is within Code Civ. Proc. § 1111, providing for contest of the right of a person declared elected to an office "to be exercised" in "a county, city and county, city or * * * any political subdivision of either.

2. SAME—GROUNDS—ELIGIBILITY.

Even if a promise made by a candidate to induce persons to vote for him constitute the giving or offering of a bribe, this alone would not bring the case within Code Civ. Proc. § 1111, subd. 2, authorizing an election contest, when the person whose right to office is contested was not, at the time of the election, eligible to such office; Pol. Code, § 58, declaring every elector eligible to an office for which he is an elector, except where otherwise specially provided, and Const. art. 20, § 11, merely providing that laws shall be passed to exclude from office persons "convicted" of bribery.

3. SAME—ILLEGAL VOTES.

Code Civ. Proc. § 1111, subd. 4, authorizing a contest of an election "on account of illegal votes," applies only where votes are cast by persons not privileged to vote, or in a manner otherwise than provided by law, and not where an impropriety or offense is committed by the candidate or election officers, without the participation of the voter, notwithstanding any unworthy motive on his part.

4. SAME—"PROMISE OF VALUABLE CONSIDERATION."

There is a "promise of valuable consideration" within Purity of Election Law (St. 1893, p. 22, c. 16) § 19, subd. 1, making it an offense, for which the right of a person declared elected to an office may be contested, to promise a valuable consideration to a voter to induce him to vote for any particular person, where the successful candidate promised, in effect, that the duties of the office should not be performed, and there would be no expense in connection with it, and this, though his failure to qualify, which he promised, would not result in the office being

left without an incumbent, thus making a saving to taxpayers, but would create a vacancy which could and would be filled by appointment.

5. SAME — PLEADING — PRESUMPTION ON DEMURRER.

In the face of the averment of the petition, in an election contest, that a representation by the successful candidate was made to induce electors to vote for him, and that it had that result, it cannot, on demurrer to the petition, be presumed that the electors were not influenced by the promise, because under the law it was not possible of fulfillment.

6. SAME—JUDGMENT.

Under Code Civ. Proc. § 1123, authorizing the court, in an election contest, to enter judgment declaring the election of another than the one returned, only where it appears that such other person "has the highest number of legal votes," there can be only a judgment annulling the election, because of the successful candidate's inducement to voters that he would fail to qualify, and thus save the expense of the office; this not making illegal any votes cast for him on account thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 315.]

7. SAME—RIGHT TO CONTEST.

The right of an elector to contest an election is not affected by the fact that the only judgment which, under the circumstances, can be rendered—one annulling the election—will bring about the same result as the illegal promise of the successful candidate not to qualify, on which the contest is based.

In Bank. Appeal from Superior Court, Shasta County; J. E. Prewett, Judge.

Election contest by George W. Bush against Charles M. Head. There was a judgment of dismissal, and plaintiff appeals. Reversed.

Morrison, Cope & Brobeck and George O. Perry, for appellant. James E. Isaacs and W. H. Carlin, for respondent.

SLOSS, J. In this case, an election contest, a demurrer to the petition or "statement" was sustained. Judgment of dismissal followed, and the plaintiff appeals.

The grounds of demurrer relied on are the court's lack of jurisdiction of the subject-matter and want of facts sufficient to constitute a cause of action. The petition is in two counts, but the legal questions arising on this appeal will sufficiently appear from a single narration of the facts alleged by the plaintiff. After showing the plaintiff's right to bring the proceeding, the statement alleges that at the general election of November, 1903, the defendant, Charles M. Head, was elected a judge of the superior court of the county of Shasta, for a term of six years, to begin in January, 1903. He duly qualified and entered upon the performance of the duties of the office, which he has ever since held. In March, 1905, the Legislature passed, and the Governor approved, an act increasing the number of judges of the superior court in the county of Shasta from one to two, and providing that the Governor should appoint an additional judge in said county, who should hold office until January, 1907, his successor to be elected at the general election of November, 1906. The plaintiff, Bush, was appointed, and entered upon the

discharge of the duties of judge. Prior to the election of November, 1906, a convention of the Republican party regularly nominated him as a candidate for this office, to succeed himself. The Democratic party also held a convention, and the respondent, Head, already an incumbent of the office of judge for the term to end in January, 1909, presented himself as a candidate, and obtained the nomination by means of promises, made to delegates and the convention, that he would, if elected, fail, neglect, and refuse to qualify, or to enter upon the discharge of the duties of said office, and that thereby said office would be left without an incumbent, to the end and for the purpose of defeating and preventing the operation of the act of the Legislature increasing the number of judges in said county and that there would be saved to the delegates to said convention, and to the taxpayers of the county, the expense of paying the salary of said judgeship and of the support of said court. By reason of these illegal inducements said convention nominated Head as the candidate of the Democratic party for the office of judge, so created by the act of the Legislature. The promise or agreement of Head not to accept the office if elected thereto, and not to qualify or enter upon the discharge of the duties of said office for the purpose and object of creating a vacancy therein and defeating the operation of the act increasing the number of judges of said superior court, was made orally and in writing by said Head to the convention, and to the citizens and electors of Shasta county. The pledge or promise of Head that he would not, if elected, qualify or occupy the office was a matter of general knowledge among the citizens of the county, and was known to the electors thereof. At the election held on the 6th day of November, 1906, Bush, the contestant, received 1,210 and Head 1,561 votes. The result of the election was so found by the canvassing board, which declared Head elected. All of the electors who voted for Head did so with knowledge that he was not a candidate to fill said office, and that he would not qualify or accept said office if elected thereto. The contestant alleges, on information and belief, that more than 400 of the electors cast their votes for Head, with actual knowledge of his agreement not to qualify for or enter upon the discharge of the duties of said office, and for the purpose of aiding and abetting him in his unlawful purpose, and of preventing and defeating the operation and effect of said act of the Legislature, and of preventing the election of a judge of the superior court thereunder.

1. Section 1111, Code Civ. Proc., provides for a contest of the right of any person declared elected to an office "to be exercised" in "a county, city and county, city, or * * * any political subdivision of either." It is sought to support the demurrer, in so far as it is based on the ground of want of jurisdiction of subject-matter, by the claim that the

office of judge of the superior court is not included within this classification of offices, election to which may be the subject of contest. The contention is answered by a reference to *Saunders v. Haynes*, 13 Cal. 145, where a statute similar in its terms to the one under discussion was held to authorize a contest of an election to the office of district judge. If the district judge, who, under the judicial system then existing, performed judicial functions in a district comprising several counties, filled an office "to be exercised within a county," there is much stronger reason for holding that the same is true in the case of a judge of the superior court, who ordinarily acts only in the county in which he is elected.

2. Section 1111 of Code Civ. Proc. above referred to, permits a contest for any of the following causes: "(1) For malconduct on the part of the board of judges, or any member thereof. (2) When the person whose right to the office is contested was not, at the time of the election, eligible to such office. (3) When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise, defined in title four, part one, of the Penal Code. (4) On account of illegal votes." Further provision for contesting elections is made by an "Act to promote the purity of elections, * * * etc.," approved February 23, 1893. St. 1893, p. 12, c. 16. Section 12 of the act provides that "any elector of the state, or of any county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein for any of the causes or offenses named in this act. * * *" The only causes or offenses named in the act which can be said to have any application to the facts of this case are those specified in section 19, subdivisions 1 and 8, reading as follows:

"It shall be unlawful for any person, directly or indirectly, by himself or through any other person—

"(1) To pay, lend or contribute, or offer or promise to pay, lend or contribute, any money or other valuable consideration to or for any voter, or to or for any other person, to induce such voter to vote or refrain from voting at any election, or to induce any voter to vote or refrain from voting at such election for any particular person or persons. * * *

"(8) To advance or pay, or cause to be paid, any money or other valuable thing to or for the use of any other person, in consideration of being selected or indorsed as the candidate of any convention, * * * for a public office. * * *

It seems clear that, if there were no statutory provision on the subject other than that contained in the Code of Civil Procedure, the statement would fall short of making out

a ground of contest, unless the facts alleged bring the case within the terms of subdivision 3, § 1111, Code Civ. Proc. That subdivision 1 has no application is obvious. Nor can it be said that the promises alleged to have been made by the candidate give ground of contest for ineligibility, within the purview of subdivision 2. The Constitution, the Political Code, and the Code of Civil Procedure contain various provisions defining the elements of eligibility to judicial and other office (Const., art. 4, §§ 18, 20, 21, 35; article 6, § 18; article 20, §§ 10, 11; Pol. Code, §§ 58, 841; Code Civ. Proc. §§ 156, 157, 159), but in none of these do we find any declaration that the commission of the acts here set forth shall make the party committing them ineligible. Even if the making of the promises as alleged could be held to constitute giving or offering a bribe, the Constitution (article 20, § 11) provides merely that laws shall be passed to exclude from office persons convicted of bribery. In the absence of some special provision, constitutional or statutory, to the contrary, "every elector is eligible to the office for which he is an elector." Pol. Code, § 58.

Subdivision 4, authorizing a contest "on account of illegal votes," does not cover the case here presented. The term "illegal votes," as used in this section, clearly includes votes cast by persons not privileged to vote and votes not entitled to be counted because not cast in the manner provided by law. It is equally clear that a vote is not illegal because of the commission by the candidate or the election officers of any impropriety or offense, without the participation of the voter. These are, by subdivisions 1 and 3, made separate and distinct grounds of contest. Whether a vote, given in consequence of an agreement by an elector to exercise his franchise in a particular way, is "illegal" is a question which may be debatable. It is, however, not involved here. It is not alleged that any voter entered into an agreement with Head, or otherwise consented to be bribed. It is charged, merely, that certain electors cast their votes for Head, with knowledge of his promise, and for the purpose of preventing the execution of the legislative act and of relieving themselves of the expense of maintaining the court. Our attention is not called to any statutory provision, and we believe there is none, which makes the legality or illegality of a vote, cast by a qualified elector in the form prescribed by law, depend upon the motive or purpose which may have actuated him. So long as he had not committed any of the offenses denounced by the Penal Code or the Purity of Election Law, any elector, as such, had an absolute right to vote for or against any candidate. An unworthy motive could not convert the exercise of this right into an illegal vote, within the meaning of the Code provision under discussion. Apart from other considerations, it must be

obvious that public policy, demanding, *inter alia*, the preservation of "secrecy in voting" (Const. art. 2, § 5) would not be subserved by permitting the vote of a lawful elector, who had cast his ballot in regular manner and form, to be impeached by a judicial inquiry into the reasons which led him to cast that ballot in favor of one candidate rather than another.

The ground of contest, then, if there be any, must rest either on subdivision 3 of section 1111, or on the above quoted provisions of the Purity of Election Law. We need not inquire whether it falls within said subdivision 3, since we are satisfied that the act of 1893 authorizes a contest on the facts here set forth. Section 19 makes it unlawful for any person to offer or promise to pay "any money or other valuable consideration" to induce any voter to vote in a particular way. Here the defendant made a promise in order to induce the voters to cast their ballots for him. The promise was that he would act in a way that would result in a saving of expense to the taxpayers and electors. This was a promise of a "valuable consideration." It is, of course, not every promise of pecuniary benefit to the voter that is in violation of statute. A promise by a candidate to limit the cost of maintaining an office by administering it economically is no more than an undertaking to perform his duty, and is clearly not in conflict with the statute. But the promise here made went further than this. By it the candidate held out to the voters as an inducement, not the proper and efficient administration of the office, but the destruction, at least for a time, of an office created by law. It has been held, in several well-considered cases, that a promise by a candidate to discharge the duties of the office for less than the lawful salary or compensation is contrary to public policy, as in the nature of a bribe. *McCrary on Elections*, § 333; *Carrothers v. Russell*, 53 Iowa, 346, 5 N. W. 499, 36 Am. Rep. 222; *State v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *State v. Collier*, 72 Mo. 13, 37 Am. Rep. 417; *State v. Dustin*, 5 Or. 375, 20 Am. Rep. 746. See, also, *Tucker v. Aiken*, 7 N. H. 113. As is said in *Tucker v. Aiken*, *supra*, "the direct tendency of such practice is to introduce unsuitable persons into public employment—to induce the electors to give their suffrages to him who will work cheapest, instead of him who is best qualified." The principle applies fully to the case at bar, where the promise was, in effect, that the duties of the office should not be performed at all, and that there would be no expense in connection with it. It is undoubtedly true, as is pointed out by the respondent, that the electors entertained a vain and futile hope if they believed that the office could be destroyed and left without an incumbent by means

of the device sought to be employed. The failure on the part of the person elected to qualify would result in a vacancy, which could and should be filled by the Governor's appointment. But this consideration does not affect the illegality of the promise made, nor its sufficiency as a basis for contesting the election. The defendant made an offer to confer a pecuniary advantage upon the voters, and they, as is alleged, believing that the advantage would be conferred, acted upon the offer. The suggestion that the voters must be presumed to know the law, and that, so knowing, they could not be influenced by a promise which was not possible of fulfillment, is entitled to no weight. In the face of the averment that the representation was made to induce the electors to vote for the respondent, and that it did induce them to so vote, it cannot, on demurrer, be presumed that the contrary is the fact. The contest proceeds upon the theory that the contestant is entitled, first, to have the respondent's election annulled, and, second, to have the court declare the appellant elected. For the reasons above stated we think the first branch of this contention well founded. But we cannot agree with the second. Under the Code sections regulating election contests the court is authorized to enter a judgment declaring the election of another person than the one returned only where it appears that such other person "has the highest number of legal votes." Code Civ. Proc. § 1123. We have already stated that, in our opinion, the votes cast for Head, even if so cast in consequence of unlawful inducements held out to the voters, were not illegal votes. They cannot therefore be disregarded so as to make Bush the recipient of the highest number of votes. The utmost relief that could be obtained in this proceeding would be a judgment that Head's election be annulled. It is suggested that such judgment would bring about precisely the result that follows from compliance by the respondent with his promise not to qualify—namely, that there would be a vacancy, to be filled by appointment. This, however, is no reason for sustaining the demurrer. In the first place it is not alleged, and we cannot judicially know, that Head has not qualified, and that he is not, in defiance of his promise, occupying the office. But, even if we assume (as is, no doubt, the fact) that Head has, by failing to qualify, left a vacancy which has been filled by the Governor, his failure to qualify does not affect the right of an elector to maintain a contest. *Sweeny v. Adams*, 141 Cal. 558, 75 Pac. 182.

The judgment is reversed, with directions to the trial court to overrule the demurrer.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

(154 Cal. 265)

HOLT MFG. CO. v. COLLINS (EDWARDS et al., Interveners). (Sac. 1,595.)

(Supreme Court of California. Sept. 8, 1908.)

1. AGRICULTURE—LIENS—LABORERS' LIENS—THRESHING MACHINERY—OWNERSHIP.

Civ. Code, § 3061, provides that every person performing work or labor about or upon any threshing machine or other appliance thereof while engaged in threshing has a lien thereon to the extent of the value of his services. *Held*, that one performing labor in and about a threshing outfit at the employment of one not the actual owner, but lawfully in possession and operation thereof, under a contract with the owner, is entitled to a lien thereon for his services, regardless of the question of ownership.

2. SAME—PARTIES.

Where the buyers of a threshing outfit were in possession under a conditional sale, reserving title in the seller until paid for, and were in default at the time proceedings were instituted by the buyer's employés to impose a lien thereon for work and labor connected therewith, given by Civ. Code, § 3061, the seller was a necessary party to such proceedings, in order to subject its interest in the property to such lien.

3. SAME—FORECLOSURE OF LIEN—NATURE OF PROCEEDING—EFFECT OF JUDGMENT.

An action to foreclose a thresher's lien given by Civ. Code, § 3061, is not a proceeding in rem, except in the sense that the amount thereof can be collected only out of the property involved in the action, and is not a proceeding wherein a judgment for the sale of the property will bind the whole world or affect the interest of any person not a party to the suit.

4. JUDGMENT—PERSONS CONCLUDED—"PRIVIES."

Where sellers of a threshing outfit delivered the same to the buyer under a conditional sale, reserving title in the sellers until paid for, the sellers, by delivering possession to the buyers, did not become their privies, so that a judgment against the buyers in a suit by their employés to enforce a thresher's lien for services, given by Civ. Code, § 3061, would not bind the sellers, who were not made parties to the proceedings; a "privity" being defined as one whose succession to the rights of property affected occurred after the institution of the particular suit and from a party thereto or who claims under or in right of parties, as an executor or administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1204.]

For other definitions, see Words and Phrases, vol. 6, pp. 5606-5611; vol. 8, p. 7764.]

5. SAME—PARTIES—DISMISSAL.

Where defendant was dismissed from an action before judgment, the effect was the same as if he had never been made a party to the suit, nor was it required, by reason of having actual notice thereof, to intervene and assert its rights or be bound by the judgment rendered therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1187.]

6. AGRICULTURE—LIENS—THRESHER'S LIENS—FORECLOSURE—FINDINGS.

Under Civ. Code, § 3061, giving a thresher's lien for work performed by laborers in and about a threshing machine while engaged in crushing or threshing, a finding that interveners rendered services in the operation of the thresher was unavailable to sustain a judgment enforcing their lien, where there was no further finding that the services were rendered on the property while it was "engaged in crushing or threshing."

7. SAME.

Under Civ. Code, § 3061, conferring a laborer's lien on a threshing outfit for services rendered while engaged in crushing or threshing, an employer could obtain no lien for services

rendered about the engine of a threshing outfit while it was being used for other purposes than as a part of the threshing outfit.

8. SALES—CONDITIONAL SALES—POSSESSION.

Where the buyers of a threshing outfit, under a conditional contract of sale reserving title in the sellers until paid for, were heavily in default in their payments at the time the outfit was seized by the sheriff while in the hands of the buyers, in execution of an order of sale against the buyers only in proceedings to enforce threshers' liens, the seller was entitled to terminate the contract of sale, and recover possession of the property from the sheriff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1440.]

9. TRIAL—FINDINGS.

A general finding that all the material denials and averments of the answer to the complaint are true, and that all material averments of the amended complaint in intervention are true, was insufficient for any purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 929.]

Department 1. Appeal from Superior Court, Sacramento County; W. B. Wallace, Judge.

Action by the Holt Manufacturing Company against W. W. Collins and C. J. Edwards and others, interveners. From a judgment for interveners, and from an order denying plaintiff's motion for a new trial, it appeals. Reversed and remanded.

Chas. G. Lamberson and Frank Lamberson, for appellant. J. A. Allen and T. E. Clark, for respondent Collins. T. E. Clark, for respondent interveners.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment and an order denying its motion for a new trial, in an action brought by it against defendant Collins, sheriff of Tulare county, to recover possession of certain threshing machinery, consisting of a steam engine, etc., or its value. The complaint was in the form generally used in actions of claim and delivery, alleging ownership and right of possession in the plaintiff, value, possession by said defendant, demand for delivery, and refusal to comply therewith. The defendant sheriff by his answer denied the alleged ownership and right of possession of plaintiff, and set up, in justification of his claim to the possession, a certain judgment in the superior court of Tulare county in an action brought by C. J. Edwards and four others against J. E. Hubbard, Chauncy Hubbard, Owen Hubbard, Archy Hubbard, and this plaintiff, to enforce against said threshing machinery alleged liens for work and labor in and about the same, under section 3061 of the Civil Code, and an order of sale in satisfaction of said judgment issued thereon and placed in his hands for execution. The judgment so set up was against the Hubbards only, and showed upon its face that the action was dismissed as to the Holt Manufacturing Company prior to judgment, on motion of the attorney for the plaintiffs therein, and that judgment was given against the Hubbards upon their default, they having failed to appear in the action.

Plaintiff, it appears, consented to such dismissal. The judgment contained recitals showing substantially that it was made to appear to the court that the Hubbards were the owners and in possession of, managing, and operating the machinery as farmers, harvesters, and threshers, and that the plaintiffs had each worked and performed labor thereon in operating the same, at the request of the Hubbards, for which there was due them at the date of the judgment sums aggregating \$1,317, for which, with interest and attorney fees, they were entitled to judgment against the Hubbards, and to a lien on said property, and the sale of the whole property, including the interest of all the parties claiming ownership therein in satisfaction of the lien. The plaintiffs in said action, C. J. Edwards et al., filed in this action their complaint in intervention, setting up therein their claims to a lien on said property solely by reason of said judgment, there being no allegations therein tending to support any claim except as it was established by said judgment. They further alleged that plaintiff herein delivered the property to the Hubbards, knowing the purposes for which it was to be operated, and knew that it was so being operated. They joined with defendant sheriff in asking that the property be delivered to the sheriff to be sold to satisfy the judgment. Plaintiff's demurrer to this complaint in intervention for want of facts was overruled. Plaintiff then filed an answer to such complaint, and among other things denied the alleged effect of the judgment as against it, alleged that the judgment as to one of said creditors, Martha M. Pauley, had been fully paid and satisfied, and denied that the lien of the interveners amounted to \$1,500 or any sum whatever. In this answer it was also made to appear that although plaintiff was originally made a party defendant in the foreclosure case, and filed an answer denying all the material allegations of the complaint, it was not a party to the judgment, plaintiff having dismissed the action as to it. The interveners demurred to this answer for want of facts, and the demurrer was sustained.

A trial having been had, the court made its findings. From these it appears that the property was delivered by plaintiff to J. E. Hubbard on or about June 7, 1905, under a contract of conditional sale for \$8,500 payable in installments. It was agreed therein that plaintiff does not part with the title until all deferred payments are fully made, and that, in the event of default in payment, the plaintiff might, at its option, and without notice, terminate the agreement and retake the property. Under this agreement the Hubbards retained possession of the property, operating it, until it was taken from them by the sheriff under the order of sale in February, 1907. It was expressly found that the title to the property was at all times in the plaintiff, but that plaintiff's ownership there-

of, and all interest it had therein, was subject to said contract, as to which the evidence shows without conflict that the Hubbards were in default for over \$3,000 at the time of the demand for possession by plaintiff on the sheriff, and also to the foreclosure judgment in favor of the interveners and the right of defendant sheriff to subject the same thereto. The findings are full and explicit as to the proceedings in said foreclosure suit, resulting in said judgment and order of sale. It was further found that this judgment was a valid and subsisting judgment, establishing the lien of the interveners for labor performed by them as therein shown on and about the property. There are some other findings outside of any issue made by the pleadings, such as the finding that the interveners did in fact render services in and about said property in the operation thereof, which cannot be considered. Upon these findings judgment was given that defendant sheriff recover the property from plaintiff, by whom it had been taken at the commencement of this action, or its value, found to be \$3,500.

It is manifest from the record that the proceedings in the trial court were had and disposed of on the theory, apparently entertained both by counsel for respondent and the learned judge of that court, that the rights of the plaintiff in this property were foreclosed, so far as the claims of the interveners and the sheriff holding the property for the enforcement of those claims were concerned, by the judgment in the foreclosure proceeding. This undoubtedly would have been the situation in view of our decisions as to the effect of our statute relating to liens of laborers on threshing machines (now Civ. Code, § 3061), had plaintiff been a party to that judgment. It is there provided that "every person performing work or labor in, with, about or upon any barley crusher, threshing machine or engine, horsepower, wagon, or other appliance thereof, while engaged in crushing or threshing, has a lien thereon to the extent of the value of his services," which lien, it is provided, is to be enforced by an action brought for that purpose, resulting in the sale of the property. There is no provision as to who shall be parties in such action, and nothing to indicate that it was the intention that the judgment should bind the interest in the property of any person not a party to the action. It is settled by the decisions in this state that under this statute one performing labor in and about the operation of a threshing machine and outfit, at the employment of one not the actual owner, but lawfully in the possession and operation of the machine, under contract with the owner, can have and maintain against the property a lien for his services, and that to this extent the actual ownership of the property by a person other than such employer is an immaterial circumstance. *Chuch v. Garrison*, 75 Cal. 199, 16 Pac. 885; *Lambert v. Davis*, 116

Cal. 292, 48 Pac. 123. See, also, *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548. This is not disputed by plaintiff, and there is no claim by it that the statute when so construed is open to any objection on the ground of violation of any constitutional right of the owner of the property. In such cases the owner places his property in the possession of another, knowing the purpose for which it is to be used by him, and knowing that the statute gives a lien for their services to those who may be employed in such use, and he voluntarily subjects it to such liens as are given by the statute. But he thus subjects it only to such claims as constitute liens under the terms of the statute, and, under elementary principles, is entitled to his day in court to contest the validity of any asserted claim. His interest in the property cannot be affected by a proceeding for such enforcement to which he is not a party.

Passing the possible constitutional objection that might be made to a statute that purported to authorize the taking of the property of a person for the debt of another, alleged to constitute a lien on such property without an opportunity to the owner to contest the validity of the claim and lien, it is clear that nothing of this kind was ever contemplated by the statute before us. What it did contemplate was simply, as has already been held, that the laborer should have his lien on the property, as against the owner, for services rendered under employment by another lawfully in possession thereof, and that he might enforce this lien against the owner. When so proceeded against by the lien claimant, the fact that one is the owner of the property does not enable him to exempt his property from the lien given by the statute. It is in this sense, and this sense only, that this court has said that in such a case the actual ownership, is an immaterial circumstance. In all the cases hereinbefore cited the owner was a party to the action and to the judgment therein rendered, and in *Clark v. Brown*, supra, in discussing a question of costs, it was said that he was a necessary party; that he is a necessary party in the sense that his interest in the property cannot be affected by a judgment unless he be a party is clear. As was said in *Tay v. Hawley*, 39 Cal. 96: "It is a cardinal principle of jurisprudence that a judgment shall not bind or conclude a man, either in respect to his person or property, unless he has had his day in court. No person shall be deprived of life, liberty, or property without due process of law, says the Constitution; but this principle is older than written Constitutions, and, without invoking the constitutional declaration, every person may, as a matter of common right, insist that he be heard in his own defense before judgment passes, which binds, charges or injuriously affects his person or his estate." Under our statute a judgment foreclosing a lien can be conclusive only "be-

tween the parties and their successors in interest by title subsequent to the commencement of the action." Code Civ. Proc. § 1908, subd. 2.

The owner of the property in a case of this character occupies a position analogous to that of a subsequent purchaser or incumbrancer who takes prior to the commencement of an action to foreclose a prior lien. His interest is subject to the prior claim, but can only be affected by a judgment thereon to which he is made a party. In *Whitney v. Higgins*, 10 Cal. 551, 70 Am. Dec. 748, this court said: "The plaintiff's claim to the relief he seeks rests upon the general principle that the rights of a person cannot be affected by a suit to which he is a stranger. By the judgment in a suit parties and privies are alone bound. * * * Though the lien of mechanics is purely the creature of the statute, a decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and incumbrancers prior to the commencement of suit than a similar decree would have upon the foreclosure of a mortgage. If such purchasers or incumbrancers are not made parties they are in no respect bound by the decree or proceedings thereunder." In *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 540, it was said: "But the owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. * * * If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien and to object to the sale. The object of the sale is to subject such estate as the mortgagor held at the time to the satisfaction of the lien which he created, and if that estate has been disposed of, a decree directing its sale without the presence of its owner would be a mere arbitrary act, condemning without hearing, one man's property to pay another man's debt. It is only when the owner of the estate has had his day in court that a valid decree can pass for its sale. It is only under a decree of this nature that a purchaser can acquire any title." *March v. McKoy*, 56 Cal. 85, was an action in replevin. The plaintiff had executed to one Woods what was called a lease of the property for six months for a rental of \$100 per month, a bill of sale to be given at the end of six months if all the rent had been paid. While the property was so in the possession of Woods, repairs were made thereon by mechanics, who claimed a lien for their services, and in an action brought for that purpose, they obtained a

judgment foreclosing the lien, under which the property was sold by the sheriff. March was not a party to this action. The defendants claimed under this sale. The court said: "Woods was not the owner of the property in controversy when the repairs upon it were made. Assuming that the provisions of the Code which treat of the liens of mechanics give a lien upon personal property for repairs by mechanics who do not take possession of such property—a point which we do not decide—it would seem very clear that such liens cannot be enforced so as to deprive of his right the person having the general property in the chattels, without making him a party to the foreclosure suit." Mr. Freeman in his work on Judgments says: "The foreclosure of a mortgage or of any other lien is wholly inoperative upon the rights of any person not a party to the suit." See, also, Phillips on Mechanics' Liens, § 456. In Page v. W. W. Chase Co., 145 Cal. 582, 79 Pac. 278, it was held that an action for the foreclosure of a lien of a street assessment is not a proceeding in rem, except in the sense that the amount thereof can be collected only out of the property involved in the action, and is not a proceeding wherein a judgment for the sale of the property will bind the entire world, or affect the interest therein of any owner except those who are made parties defendant in the action. This is equally applicable under our statute relative to liens on threshing machines. See, also, Phillips on Mechanics' Liens, § 395.

Various reasons are suggested by counsel for respondents why the well-settled rule above stated has no application in this case, but we see no force in any of them. It is urged that the statute contemplates that a judgment against the employer having possession of the property shall bind the owner. We have already considered this point. It is further urged that plaintiff, by reason of its contract with the Hubbards, under which it delivered possession to the Hubbards, was privy to the Hubbards, and therefore within the rule that the parties to the action and their privies are bound by the judgment. Of course, there is nothing in this. As defined by the authorities, a privy, within the general rule, is one whose succession to the rights of property affected occurred after the institution of the particular suit, and from a party thereto (see *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159), or who claims under or in right of parties, as an administrator or executor. See *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651. As said by Mr. Freeman, they are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner. The rule applicable in this state in this class of cases is shown by subdivision 2 of section 1908 of the Code of Civil Procedure. It is urged that, inasmuch as plaintiff

was originally brought in as a party defendant in the foreclosure suit, and had actual notice of the pendency of the proceeding, it could, although dismissed from the action by the plaintiffs, have intervened, and thus presented any defense it had, and was bound to do so. The authorities cited by respondent on this point have no application whatever. Plaintiff had not asked for affirmative relief in its answer, and the plaintiffs had the absolute right to dismiss the action as to it, whether it consented or not. The fact that plaintiff did not object to the granting of the application to dismiss, and when asked indicated its consent thereto, is immaterial. The dismissal was, in effect, an absolute withdrawal of any claim by the foreclosure plaintiffs against its interest in the property, and plaintiff had the right to consider it as such. Where a defendant is dismissed from an action before judgment, the effect of the dismissal is the same as if he had never been made a party. Page v. W. W. Chase Co., 145 Cal. 584, 79 Pac. 278. We can conceive of no reason why the fact that plaintiff had actual notice of the proceeding against the Hubbards required it to intervene or be bound by any judgment against the Hubbards. Such is not the law. Page v. W. W. Chase Co., supra. See *Wakefield v. Van Dorn*, 53 Neb. 25, 73 N. W. 226. We fail to perceive the applicability of section 10 of article 12 of the Constitution prohibiting the passage by the Legislature of laws permitting the leasing or alienation of any franchise in such a manner as to accomplish certain results.

From what has been said it is clear that the answer of the sheriff, in so far as it rested on the judgment in the foreclosure proceedings, did not state facts sufficient to constitute a defense to plaintiff's action. The answer was effectual as a defense only in so far as it denied the allegations of plaintiff's complaint. Likewise, the complaint in intervention, based entirely on said foreclosure judgment, which upon its face showed that the action had been dismissed by the plaintiffs therein as to this plaintiff, utterly failed to state facts showing the interveners to be entitled to relief as against plaintiff, and plaintiff's demurrer thereto should have been sustained. Such judgment could not avail against plaintiff, at least unless it was accompanied by other allegations of fact showing that the interveners had in fact, independent of said judgment, a lien on plaintiff's property for their services. If it had contained such allegations, and plaintiff had thus been given an opportunity to contest interveners' claim, it is possible that its property might have been properly held subject to the judgment, so far as such judgment was warranted by the evidence given on the trial in support of such allegations. See *Redington v. Frye*, 43 Me. 578. Likewise the demurrer of interveners to plain-

tiff's answer to their complaint should not have been sustained. It in terms denied that interveners had a lien on plaintiff's property amounting to the sum of \$1,500 or any other sum. It further alleged payment and satisfaction by the Hubbards of a portion of the judgment against them. Likewise the finding that plaintiff's interest in the property was subject to and subordinate to the foreclosure judgment, and to the right of defendant sheriff to subject the same thereto, had no support in the evidence. In this connection it is clear that the finding that the Hubbards employed the interveners to labor on and about such machinery, and that the interveners rendered services in the operation of the same, is entirely without the issues made by the pleadings, and cannot be considered in support of the judgment. Even if it could be so considered, it would be unavailing, for it does not show that any of such services were rendered on the property while such property was "engaged in crushing or threshing" to which section 3061 confines the lien, nor does it show the amount or value of services rendered, the theory all the time plainly being that these matters were all conclusively settled by the foreclosure judgment. The evidence of intervenor Squires (who was given a lien for \$375), upon which alone this finding was based, was open to the objection made by plaintiff that it was not within the issues made by the pleadings, and should not have been admitted. It is worthy of note, as indicating a reason for the dismissal by the foreclosure plaintiffs of the original action against plaintiff, and the importance to respondents of having the judgment therein held conclusive against plaintiff without an opportunity to defend against the asserted lien claims, that on the cross-examination of Squires it was admitted by him that his claim was, in large part, for services rendered in and about the engine while it was being used for other purposes than as a part of the threshing outfit, as, for instance, hauling water for the engine during the plowing season, and repairing the engine between the end of the plowing season and the commencement of the harvesting season. Of course section 3061 of the Civil Code gives no lien for any such services.

As has been stated, the trial court also found that plaintiff's ownership was subject and subordinate to the contract of sale. It did not definitely find whether or not such contract had been terminated, and the right of possession of the Hubbards and their successors thereunder extinguished. If such right of possession on their part had been extinguished, there was, of course, no possible right of possession in the sheriff as against plaintiff, under a judgment and order of sale running against the Hubbards only. The uncontradicted evidence showed that the Hubbards were heavily in default

on their payments, between \$3,000 and \$5,000, and, according to the agreement, as found by the court, plaintiff had the right in the event of default in payment, with or without notice, to terminate the agreement and retake the property. It is admitted by the pleadings that prior to the commencement of this action plaintiff demanded of the sheriff the possession of the property, serving on him a written claim duly verified, setting out its ownership and right of possession. We know of no reason why plaintiff could not terminate the agreement as well after defendant sheriff had taken possession under the order of sale as before such taking. This finding of subordination of plaintiff's ownership to the contract of sale, even if it be conceded that the continuance in force of such contract would authorize the possession of the property by the sheriff for the purpose of selling the Hubbards' interest therein, which we do not decide, is without force, because it cannot be ascertained from the findings that the agreement is not terminated and all interest of the Hubbards thereunder extinguished. The general omnibus finding "that all the material denials and averments of the answer to the complaint herein are true, and all the material averments of the amended complaint in intervention are true," is insufficient for any purpose. *Ladd v. Tully*, 51 Cal. 277; *Harlan v. Ely*, 55 Cal. 344. See also, *Perkins v. West Coast Lumber Co.*, 120 Cal. 28, 52 Pac. 118.

In view of what we have said it is unnecessary to discuss other points.

The judgment and order denying a new trial are reversed, and the cause remanded for proceedings not inconsistent with the views herein discussed.

We concur: SHAW, J.; SLOSS, J.

154 Cal. 285

JOHNSON et al. v. SOUTHERN PAC. R. CO.
(L. A. 2,004.)

(Supreme Court of California. Sept. 11, 1908.
Rehearing Denied Oct. 9, 1908.)

1. RAILROADS—CROSSING ACCIDENTS—COMPANY LIABLE—PRESUMPTION.

Where it is shown or admitted in the pleadings that a corporation defendant was the owner of a railroad, in the operation of which a wrong was committed, the presumption is that the road was in its possession and being operated by it at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 863.]

2. SAME—LEASE OF ROAD—CONSTRUCTION.

The lease, made in 1835 by the Southern Pacific Railroad Company to the Southern Pacific Company for 99 years, of "all of its railroad situated in the state of California, known and designated as the 'Southern Pacific Railroad of California' with all its branches and all railroads now leased under it * * *" is unambiguous in its designation of the property leased, and cannot be construed to include lines of road subsequently built or acquired by the lessor, nor can its terms be extended by parol

evidence to embrace such lines, in an action to recover for their negligent operation.

3. SAME—LIABILITY OF OWNER FOR NEGLIGENCE OPERATION.

A railroad company owning a line of road cannot escape responsibility, or avoid the discharge of the duties and obligations imposed by its franchise, by voluntarily leasing its road to be operated by another company, and can only relieve itself from liability for injuries resulting from such operation by showing a lease made to the operating company under statutory authority, and conforming to the requirements of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 802, 803.]

4. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

In an action for an injury alleged to have been caused by the negligent operation of a train by defendant on its railroad, an instruction stating, in effect, that defendant admitted in its answer that it was operating such train was without prejudice to defendant, even if it did not make such admission, where it admitted its ownership of the road, and under the evidence was responsible in law for the operation of the train by itself or any other company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as matter of law, that contributory negligence is established; and, even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question, it is one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-306.]

6. RAILROADS—CROSSING ACCIDENT—QUESTIONS FOR JURY—EVIDENCE CONSIDERED.

A woman was driving along a highway with her 13 year old son, and when she had reached a point under an overhead crossing of defendant's railroad, the horse became frightened by a train crossing the bridge, and ran away causing her death. The son testified that they approached cautiously, stopping once, and at all times looked and listened for an approaching train, but neither saw nor heard the train until they were under the bridge. Both he and others on the highway testified that, owing to obstructions, the train could not be seen from near the bridge until it was within 300 feet. The train was running downgrade without steam, and did not give the signal of its approach required by statute. The only evidence as to its speed was the estimate of the fireman, who testified several years afterward. *Held*, that on such evidence the court properly submitted the question of contributory negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1166-1189.]

7. DEATH—ACTION FOR WRONGFUL DEATH—MEASURE OF DAMAGES.

In an action under the statute by a husband and infant children to recover for the wrongful death of the wife and mother, the children are entitled to recover for loss of the services of the deceased, which are distinct from those for which the husband may recover, and an instruction in such a case that the children were entitled to recover the value of the mother's "nurture and instruction, moral and physical, and intellectual training" was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 115.]

Department 2. Appeal from Superior Court, Santa Barbara County; James W. Taggart, Judge.

Action by Frank W. Johnson and others against the Southern Pacific Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Canfield & Starbuck, for appellant. Richards & Carrier, for respondents.

LORIGAN, J. This action was brought to recover damages from the defendant for the death of the wife of the plaintiff, Frank W. Johnson, and mother of the other plaintiffs, alleged to have been occasioned by the negligence of the defendant in causing one of its trains to approach an overhead crossing without signaling, by reason whereof a horse that the plaintiff Olin W. Johnson was driving in a buggy with the deceased was frightened, ran away, and overturned the buggy. The defense interposed was a general denial and contributory negligence. The action was tried before a jury, which returned a verdict for \$8,000, and from the judgment entered thereon, and from an order denying the motion of defendant for a new trial, it appeals.

This case was here before on an appeal from a judgment entered after demurrer to the complaint was sustained. The only point there involved was whether it was necessary under the law to signal the approach of a train at an overhead crossing. We held that the law requiring signals applied to all crossings—at grade or over or under grade (Johnson v. S. P. R. Co., 147 Cal. 624, 82 Pac. 306, 1 L. R. A. [N. S.] 307)—and reversed the judgment. On the present appeal the facts, stated generally, are as follows: Some years prior to the accident the railroad had constructed over Hollister avenue, in Santa Barbara county, an overhead steel bridge. The avenue runs westerly from the city of Santa Barbara to the village of Golita, and the railroad in crossing it runs north-easterly. At a point on the avenue and east of the crossing the natural surface of the grade, and consequently Hollister avenue itself, originally sloped to the west for about 1,000 feet to a creek. On the face of this slope the railroad was laid upon an embankment some 11 or 12 feet above the natural surface of the ground. In order to give headway for teams to pass under the railroad, and thus to make the railroad crossing an overhead, instead of a grade, crossing, Hollister avenue had been excavated easterly from a point about 400 feet east of the creek so as to make a roadbed nearly level to a point about 75 feet east of the crossing. This excavation of the avenue made a cut, of which the sides, commencing from the point of excavation on the west, arose gradually as they approached the crossing, where they were about 9 feet high, making the railroad at that point about 20 feet above the excavated surface of the avenue. A four board fence skirted Hollister avenue on the south. There were other physical conditions along and in the vicinity of Hollister avenue and the crossing which will be noted later. On the 25th

of July, 1901, the plaintiff Olin W. Johnson, then a boy about 13 years of age, started with his mother to drive eastward in a buggy from their home in Golita to the city of Santa Barbara, about 7 miles distant. The buggy was an ordinary side-barred buggy with the top down. The boy was of a cautious and careful disposition, and he and his mother were familiar with the road and the bridge, and had often driven along the road. When they reached a point about 450 feet west of the railroad bridge they stopped and listened, looking in both directions for a train. Hearing and seeing none, they proceeded at a slow jog trot towards the crossing. As Mrs. Johnson and her son were approaching the crossing, they were constantly looking to see if any train was approaching, and, seeing or hearing none, started to drive under the bridge, when for the first time they heard the rattle of an approaching train on the track above. This train consisted of a large number of ballast cars, and was engaged in getting ballast for a newly constructed line changes in the railroad between Santa Barbara and Ventura. It was proceeding from Irma, a station about three-quarters of a mile east from the crossing, and was rolling or drifting without steam downgrade towards the crossing. No signal or warning of any character was being given of its approach. At the noise of the train the horse immediately took fright, became unmanageable, galloped from under the bridge, struck the buggy upon the side of the cut, tipping it over, throwing out both Mrs. Johnson and her son. The latter was slightly injured, the former was killed.

At the close of the evidence for plaintiffs, the defendant moved for a nonsuit, on the ground that there was no evidence in the case connecting defendant with the accident. This was based upon the theory that it was made an issue under the pleadings whether the train which occasioned the accident was at the time thereof being operated by the defendant, and that plaintiff had failed to prove that it was. Respondents claim that, considering the entire answer of defendant, no such issue was raised, or if it was, that it was an immaterial one. There is no necessity for discussing this question. The complaint in one of its paragraphs specifically averred that upon the line of railroad where the accident happened the defendant was maintaining and operating a steam railroad, and was owner of the track and rolling stock and other appurtenances belonging to it. As to this allegation, the answer simply denied that at any time, or at all, said defendant was maintaining or operating any steam railroad. There was no denial of the ownership of the track and rolling stock of said railroad as alleged; and, while it is true there was no direct evidence that the defendant was operating the particular train occasioning the accident, still the admitted fact that it owned the track and rolling stock appurtenant to it was sufficient evidence, in the absence of any-

thing to the contrary, from which a proper and reasonable inference might be drawn by the jury that such train was at the time being operated by defendant. The rule is that, where it is shown, or is admitted, as it was by the pleadings, that a corporation was the owner of a railroad, in the operation of which a wrong was committed, the presumption is that the road was in its possession and being operated by it at that time. *Ferguson v. Wisconsin Central Ry. Co.*, 63 Wis. 145, 23 N. W. 123; *Walsh v. Missouri P. Ry. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Peabody v. Oregon, etc., Ry. Co.*, 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823. At the close of the evidence, counsel for appellant moved the court, for the same reason as just considered, to instruct the jury to return a verdict for defendant, which was denied. This motion was based upon certain evidence submitted by the defendant in making out its defense, under which it was claimed that another corporation, known as the "Southern Pacific Company of Kentucky," and not the defendant, the Southern Pacific Railroad Company, was liable to plaintiffs for any injury which they may have sustained.

A lease was introduced in evidence, dated February 10, 1885, made by the defendant, a California corporation, to the Southern Pacific Company of Kentucky, as authorized under an act of the Legislature. St. 1880, p. 21, c. 28. In this instrument the defendant leased to the Southern Pacific Company for 99 years "all of its railroad, situated in the state of California, known and designated as the 'Southern Pacific Railroad of California,' with all its branches and all railroads now leased under it, together with the rolling stock, telegraph poles, tools and property of every kind and nature whatsoever, now in use upon or in connection with said railroad, together with all the appurtenances thereunto belonging, with the right to possess, maintain, use and operate the said property, and to receive the rents, issues and profits thereof." In the lease the Southern Pacific Company agreed that it would "keep the said leased property in good order and condition and repair, operate, maintain, add to and better the same at its own expense," and at the termination of the lease, to return it, with the additions and betterments, in as good condition and repair as at the date of the lease. These constituted the terms of the lease, but it is apparent from them, taken in connection with other evidence relative to that part of the railroad upon which the accident took place, that as to it, this lease could avail the defendant nothing. In 1886, a year subsequent to the making of the lease, a corporation was organized, known as the "Southern Pacific Branch Railway Company," for the purpose of constructing a railroad from Saugus, in Los Angeles county, to Ellwood, in Santa Barbara county, and which it completed in 1886-87. In 1888 the said Southern Pacific Branch Railway Company

was, with divers other railroad corporations, consolidated into the Southern Pacific Railroad Company under the latter name. That part of the road on which the accident occurred was a change in, or addition to, the road constructed by the Southern Pacific Branch Railway Company, and not to any road owned or leased or in existence when the lease to the Southern Pacific Company was made by this defendant. The contention of appellant is that the lease included the railroad where the accident occurred, as well as the Southern Pacific Branch Railway, the road of which it was a part. But the lease is not capable of that construction. It makes no reference to future acquired railroads. There is no doubt or ambiguity in the language used in it, nothing equivocal in its terms. It clearly and plainly speaks of the property leased under it as railroad property of the date of the lease, known as the "Southern Pacific Railroad of California," with all its branches and all railroads now leased by it, together with its personal property now in use in connection with said railroads. It clearly speaks in the present tense, and as of the date of the lease. This language is clear and explicit and in no respect equivocal, and must govern the interpretation of the lease. Civ. Code, § 1638. It limited the property leased to that owned by the Southern Pacific Railroad Company at its date, and there is no warrant for extending its terms by construction so as to include subsequently acquired railroad property. And that only the roads and their equipment owned when the lease was made were intended to be leased is apparent not only from its terms, but from the conduct of the parties under it. It is provided in the lease that the Southern Pacific Company, the lessee "shall add to and better the same (the leased property) at its own expense." It is shown in the evidence that after the lease was made, the Southern Pacific Company made changes in the new lines constructed through Santa Barbara county, of which the portion of the road where the accident occurred is a part, and charged the cost of such construction to the lessor, the Southern Pacific Railroad Company. If the parties were acting under the lease of 1885, this cost, under its provisions, would have been borne by the Southern Pacific Company as lessee, and not by the Southern Pacific Railroad Company, as lessor. While the lease of 1885 speaks of betterments which may be made by the Southern Pacific Company as lessee, the change which was being made in the road upon which the accident occurred was not in the nature of a betterment under the lease. The change was an improvement, not being made on any road which was embraced in the lease, but upon one which was not included in it. See *Betterments*, vol. 4, Am. & Eng. Ency. of Law, p. 7; vol. 5 Cyc., p. 684.

It is insisted, however, that if the lease of 1885 did not embrace this subsequently con-

structed road, there was sufficient evidence to sustain an implied lease of it from the defendant to the Southern Pacific Company, as also sufficient evidence to establish a parol lease. The only testimony for which support in either of these positions can be claimed is that of C. P. Lincoln, assistant secretary of the defendant, who testified that the Southern Pacific Company was operating the roads all down in the locality where the accident happened. He identified the lease of 1885, and testified on direct examination that the line changes as made were turned into the operating company—the Southern Pacific Company—under that lease, and that this latter company was operating those lines and accounting for the profits under that lease. On cross-examination he stated he reached his conclusion in relation to that matter from the lease itself and by seeing the distribution of profits from year to year, and making entries thereof in the books of the company, that he inferred from his knowledge of the lease of 1885 and these entries that the Southern Pacific Company was operating all of the line under that lease, and that this was the entire source of his information. He testified, also, as additional information on the subject, that the annual report of the Southern Pacific Company showed the lines leased by the Southern Pacific Company, and in that showing appeared the Southern Pacific Railroad as one of its leased lines—that is, an addition—that from that report and the entries in his books and inspection of the lease he drew the conclusion that all these new roads were new additions to the main road and were operated under the lease. It is apparent that the testimony of this witness was directed to the lease of 1885, and amounted simply to a conclusion on his part that the lease embraced all roads, including the premises in question, acquired by the Southern Pacific Railroad Company subsequent to the making of the lease, as well as those owned by that company at the date of the lease. This testimony had no tendency to prove an implied contract of lease, but amounted only to an inference on the part of the witness, from the data which he had in the office of the company, that these subsequently built or acquired roads were embraced in the lease of 1885. This testimony, however, was incompetent and ineffectual for that purpose. The lease was clear and plain to the point that only railroads owned by the Southern Pacific Railroad Company at its date were embraced in it; and, this being true, it was not permissible, and the evidence was incompetent to extend the terms of the lease by parol evidence so as to embrace the subsequently acquired roads in it. *Phil. Elec. R. R. Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Ralya v. Atkins*, 157 Ind. 331, 61 N. E. 726; *Holston v. Campbell*, 89 Va. 396, 16 S. E. 274; *Devlin on Deeds*, § 840. Neither did this evidence prove an oral lease.

There was nothing to show that any negotiations were entered into relative to such a lease. No action of the officers of either corporation to that end is shown, nor the terms of any such lease. Aside from the lease of 1885, which we have seen did not embrace the road in question, there is only the evidence of the witness Lincoln upon which any claim of a parol lease can be based. But all this witness testified to was that the Southern Pacific Company operated the roads and accounted for the profits. This, however, did not establish a parol lease, because such operation would be consistent with other conventional relations aside from leasing; it would be equally consistent with the relation of principal and agent or employer and employé, or with the existence of a trackage contract or a mere license.

In this country it is the accepted doctrine and general rule that, as a railroad company receives a public franchise involving the discharge of great public duties and entailing responsibilities to the public, among other things, in the operation of its road, it cannot escape responsibility, or avoid the discharge of the duties and obligations imposed under its franchise, by voluntarily leasing its road to be operated by another company. It can only relieve itself from responsibility for injuries resulting from such operation by showing a lease made to the operating company under statutory authority. 1 Elliott on Railroads (2d Ed.) § 427 et seq.; Gulf, C. & S. R. Co. v. Miller, 98 Tex. 270, 83 S. W. 182; Singleton v. Southwestern R. R. Co., 70 Ga. 464, 48 Am. Rep. 574; Abbott v. Johnstown, etc., R. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; R. R. Co. v. Brown, 84 U. S. 445, 21 L. Ed. 675; Thomas v. R. R. Co., 101 U. S. 71, 25 L. Ed. 950. Legislative authority exists in this state, under the act of 1880 referred to, whereby a corporation may lease its railroad property to another company, and will be relieved from personal liability for an injury resulting merely from the negligent operation and handling of trains by the lessee. Lee v. S. P. R. R. Co., 116 Cal. 97, 47 Pac. 932. Relief from such liability, however, only exists where there is proof of a lease made as provided in the act, and it was the duty of the defendant to bring itself within the terms of the exemption under the act by showing such a lease. This it did not do. As we have heretofore said, a corporation shown to be the owner of a railroad is presumed to be in actual possession and operation of it, and this presumption is not repelled by proof merely that some other company at the time of an accident resulting from its operation was operating cars over it. Under the presumption the burden is upon the owner to show, when the question of liability for injury by moving cars arises, that the cars which inflicted the injury were under the control and operation of some other company by virtue of the lease of the road. The portion of the road here in question was

not embraced in the lease of 1885. There was no proof of an implied lease, or an oral lease, and, the presumption from the ownership of the road by it being that the operation of the cars of any other company over it was permitted under some contractual arrangement or relation other than a lease, which, under the statute, could alone relieve it from liability for the injury complained of, the motion of defendant to have the court instruct the jury to return a verdict in defendant's favor, on the ground that, if any responsibility existed, it was that of the Southern Pacific Company, was properly denied.

The court in one of its instructions stated to the jury that the defendant by its answer admitted that its train approached and passed over the bridge, but denied that it was negligent in its management. Appellant claims that this was error, because it insists that the answer raised an issue as to whether appellant caused this, or any train, to approach the crossing. It is very doubtful whether any such issue was raised by the pleadings; but, assuming that it was, we do not think the verdict should be disturbed because of the instruction. We cannot see how appellant could be injuriously affected under the evidence by giving it. As the defendant was the admitted owner of the road and the rolling stock being operated on it, it was responsible in law for any accident occasioned by such operation by any other company, unless it could establish that such other company was operating the road under a lease, as provided in the act of 1880. It did not establish it; and, in the absence of proof of a lease, the defendant was in law responsible for the operation of any train over its track. For all purposes of responsibility any train operated over the road was its train, even though operated by another company. Singleton v. Southwestern R. R. Co., supra; Abbott v. Johnstown, etc., R. R. Co., supra. Under these circumstances, it would not have been error on the part of the court to have stated to the jury directly that the defendant was in law liable for any injury occasioned by the operation of the train, provided they found that it was being operated carelessly and negligently in approaching the crossing, as alleged in the complaint, and it was not shown that the deceased had been guilty of contributory negligence. In this view, even conceding that it was not proper, according to appellant's theory of the pleadings, for the court to instruct the jury that the defendant admitted that its train approached the crossing, still, as in the absence of proof of a lease of its road to any other company, which was operating its cars over the road, defendant was as fully liable for any injury occasioned by such operation as if it were itself actually running the cars, the error was of no consequence.

It is claimed that the court should have instructed the jury on the motion of defendant

to return a verdict in its favor upon the ground that the evidence showed that the deceased was guilty of contributory negligence. The right of a defendant to have a jury so instructed can only obtain where the evidence conclusively establishes such negligence. It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury. *Seller v. Market St. Ry. Co.* 139 Cal. 268, 72 Pac. 1006.

Referring somewhat to the evidence in the case at bar. The theory of the appellant is that, by reason of certain measurements made by their witnesses, and from observations made by them as to the points along Hollister avenue traveled by Olin Johnson and his mother, from which a train approaching the crossing was visible, and taking into consideration respectively the gait at which the horse was going and the rate of speed at which the railroad train was approaching the crossing, it conclusively appeared that neither the deceased nor her son looked for the train. It is reasoned therefrom that, if they had looked, they could have seen the train approaching, and as they did not see it, they must therefore not have looked. But the facts upon which this theory is based are not so definitely and exactly fixed as to warrant the deduction as a matter of law. The observations of the witnesses of defendant were made some four and a half years after the accident, and the physical condition of things along the plane of observation from Hollister avenue to the railroad track was different from what it was at the time of the accident. Aside from the fact that at several points along Hollister avenue it was obstructed by trees, the evidence shows that at a point on the avenue 150 feet west of the crossing the view of the railroad track was obstructed by a large growth of tall mustard on a knoll, so that approaching trains could not be seen further than a distance of 300 feet at that point on the avenue. As to the gait of the horse and the rate of speed of the train, these are indefinite—the horse was jogging along probably five miles an hour, the train running about 15 miles an hour. The evidence of the plaintiff Olin Johnson is that both he and his mother were familiar with the crossing, and the latter nervous about approaching it; that they stopped, looked, and listened for the train at a point on Hollister avenue, heretofore referred to, and saw or heard none; that his mother cautioned him to drive slowly; that he did so, both of them repeatedly looking and listening for the train, but saw or heard nothing of it, until as he drove under the crossing, the noise of its approach frightened the horse

and resulted in the death of his mother. The testimony of the fireman of the train (the engineer had died before the trial) was that he saw the horse running from under the bridge as the train passed over it. The testimony of several witnesses driving easterly and westerly under the crossing at the time the accident happened, and who were as favorably situated as the Johnsons for seeing the train, and looked to see if it was approaching, was that at that time there was no train in sight. The fireman testified that the train was moving downgrade at about 15 miles an hour. This was but an estimate on his part, given years after the accident. It is a rule of physics that the momentum of bodies increases as they proceed down an inclined plane, and the jury might have well taken this rule into consideration in connection with the testimony of plaintiffs and their witnesses in determining whether, in approaching the crossing on a downgrade, the speed of the train was not greater than 15 miles an hour. If the speed was greater, the observations of the witnesses for defendant that the train could be seen at points along the track from stations on Hollister avenue, being based on a speed of 15 miles an hour, would become unimportant, as at the greater speed the train would not be in sight, when at the lesser speed, and from their points of observation, it might be visible. It is to be noted, too, that the observations made by the witnesses for defendant did not take into calculation the large growth of mustard—upwards of 5 feet in height—upon the knoll as it existed when the accident occurred. It was not there when they made their observations. The evidence shows that this growth obstructed a view beyond 300 feet down the track at a point 150 feet on Hollister avenue from the crossing. The jury had before them the testimony of plaintiff Olin Johnson, and the other witnesses in behalf of plaintiff, that they looked as they approached the crossing, and saw no train in sight; the testimony of the fireman that as the train crossed the horse galloped from under the bridge; the obstruction of the mustard growth to observation by the Johnsons, and the indefinite evidence as to the speed of the train and the downgrade. The jury had the right to accept the testimony of the witnesses for the plaintiff, and the other circumstances referred to, and to draw such inferences therefrom as they reasonably warranted. It cannot be said it was an unreasonable inference for them to draw that the train approached the crossing at a greater rate of speed than 15 miles an hour, and that this fact, with the growth of mustard obstructing their view of the track as they reached the crossing, prevented the Johnsons from seeing the train at any point when it would be in sight, according to the observation of the witnesses of defendant based on a speed of 15 miles an hour, and when they could have checked their further approach to the crossing or

turned back to avoid danger. The condition of the evidence was such that the jury had a right to draw this inference, and hence, it was proper for the court to refuse to take the case from them.

Appellant complains of an instruction to the jury as to the elements of damage recoverable by the plaintiffs. The court instructed the jury that the husband was entitled to recover the value of the present and future services of the "wife and companion," and the children the value of the mother's "nurture and instruction, moral and physical, and intellectual training"; that they "must award such a lump sum for damages as will fully compensate the plaintiffs, both the husband and children, for the pecuniary value to them of the life of the wife and mother." Appellant's criticism of this instruction is that under it the jury were to take into consideration losses in common to all the plaintiffs, that the services, for the loss of which the children were entitled to recover, were obviously different from those for which the husband might recover, and that the damages intended by the statute to be recoverable are damages common to all the plaintiffs, and do not include parental care, and it was error for the court to instruct the jury that they might include in their verdict the value to the children of their mother's "nurture and instruction, moral and physical, and intellectual training." We state the position of appellant to say that the settled law of the state is against it. Just such an instruction as is here criticised was before the court in *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 285, 42 Pac. 822, 1063. It was there held that, in the statutory action of this character, the children had a right to recover for the loss of such services as the trial court in this case specifically indicated they might, and as services distinct from those for the loss of which the husband might recover. This makes further discussion of appellant's point on the instruction unnecessary.

Several other grounds are advanced for a reversal, which, however, we deem untenable.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.

8 Cal. App. 497

CITY OF SAN BUENAVENTURA et al. v. MCGUIRE. (Civ. 530.)

(Court of Appeal, Second District, California. July 8, 1908. Rehearing Denied by Supreme Court Sept. 3, 1908.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—REPEALING POWER—STATUTES—"MAYOR."

The general municipal act of March 13, 1883 (St. 1883, p. 93, c. 49), divides cities into six classes, provides for a mayor in the first four, makes him in the fourth class a member of the council, with the right to vote only in case of a tie, and in the last two classes requires the council to elect one of its members

president, imposing on him the duty of signing all ordinances preliminary to publication, but giving him no veto power, and not requiring him to perform the duties of a mayor. Act March 27, 1897 (St. 1897, p. 190, c. 129), entitled, "An act to require ordinance and resolution passed by the city council or other legislative body of any municipality to be presented to the mayor, or other chief executive officer of such municipality, for his approval," provides (section 1) that every ordinance imposing a penalty passed by the council shall before it takes effect be presented to the mayor for his approval, and that, if it fails to receive his approval, it shall be lost, unless on its return it receives the votes of three-fourths of all the members, "provided that * * * this section shall not apply to cities in which the mayor is a member of the city council, or other governing body," and provides (section 4, p. 191) that in municipalities in which there is no mayor the duties imposed on said officer by the provisions of the act shall be performed by the president of the board of trustees, or other chief executive officer of the municipality. *Held*, that to prevent injustice and absurdity, the proviso in section 1 should be made to read "mayor or other chief executive," or the word "mayor" should be held to include all executive officers similarly situated, and thus prevent a construction giving the veto power to the president of the board of trustees of cities of the fifth and sixth classes, when it is denied to the mayor of cities of the fourth class.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4450-4451.]

2. MANDAMUS—COMPELLING PERFORMANCE OF MINISTERIAL ACT.

The act of the president of the board of trustees of a city of the first class in signing an ordinance, under Act March 13, 1883 (St. 1883, p. 93, c. 49) providing that he shall sign all ordinances preliminary to their publication, being ministerial, may be enforced by writ of mandate.

3. SAME—PROPER PARTIES PLAINTIFF.

Conceding that a city and the members of its board of trustees are not all necessary parties to a petition to compel the signing of an ordinance by the president of the board, they are proper parties.

4. CONSTITUTIONAL LAW—CONSIDERATION OF QUESTION OF CONSTITUTIONALITY—PARTIES AFFECTED.

The constitutionality of St. 1897, p. 190, c. 129, relative to presentation of ordinances to the chief executive of a city for his approval, will not be considered; no one affected by the act being before the court complaining, as, in fact, under its proper interpretation, it has no application to any city now organized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 39, 43.]

Petition by the city of San Buenaventura and others, constituting a majority of the members of its board of trustees, for writ of mandate to William McGuire, as president of said board of trustees. Peremptory writ ordered.

Merle J. Rogers, for petitioners. Shepherd & Poplin, for respondent.

ALLEN, P. J. Petition for writ of mandate. San Buenaventura is a city of the fifth class, the government of which, by the general municipal incorporation act of 1883, is vested in a board of five trustees. By a vote of three of the trustees, being the petitioners herein, an ordinance, in the ex-

ercise of the police power, was passed imposing a penalty. The president of the board and one other member thereof voted against such ordinance, and the president, respondent herein, refuses to sign the ordinance, and this proceeding is instituted to compel such action on the part of the president. A demurrer is interposed to the petition, general, as well as upon the ground of misjoinder of parties plaintiff. At the same time an answer was filed, to which a general demurrer is interposed.

The general act providing for the organization, incorporation, and government of municipal corporations, enacted March 13, 1883 (St. 1883, p. 93, c. 49), divides the cities of the state into six classes, in four of which a mayor is provided. And in the fourth class he is made a member of the council, with the right to vote only in case of a tie. In the fifth and sixth classes the city council is required to elect one of its members president. Among the duties imposed upon such president of the city council is the signing, in conjunction with the clerk, of all ordinances preliminary to their publication. No veto power is given to the president of the board of trustees in either class, nor is there anything in the act requiring the president of the board of trustees to perform the duties of the mayor. Afterwards, on March 27, 1897 (St. 1897, p. 190, c. 129), the Legislature passed an act entitled:

"An act to require ordinance and resolution passed by the city council or other legislative body of any municipality to be presented to the mayor, or other chief executive officer of such municipality, for his approval.

"Section 1. Every ordinance * * * imposing a penalty, which shall have passed the city council, shall, before it takes effect, be presented to the mayor for his approval. The mayor shall return such ordinance or resolution to the city council within ten days after receiving it. If he approve it, he shall sign it, and it shall then take effect. If he disapprove it, he shall specify his objections thereto in writing. If he do not return it with such disapproval within the time above specified, it shall take effect as if he had approved it. * * * If the ordinance or resolution shall fail to receive, upon the first vote thereon after its return with the mayor's disapproval, the affirmative votes of three-fourths of all the members, it shall be deemed finally lost, * * * provided, that the provisions of this section shall not apply to cities in which the mayor is a member of the city council, or other governing body.

"Sec. 2. The word 'municipality,' and the word 'city' as used in this act, shall be understood and so construed as to include, and is hereby declared to include, all corporations heretofore organized and now existing,

and those hereafter organized, for municipal purposes."

"Sec. 4. In municipalities in which there is no mayor, then the duties imposed upon said officer by the provisions of this act shall be performed by the president of the board of trustees, or other chief executive officer of the municipality."

The duties devolving upon the president of the board of trustees, in relation to the signing of an ordinance of such a character as the one under consideration, must be determined by a proper construction of the acts above cited. An examination of the act of 1897, especially when we consider the language of section 2, impresses one with the conviction that the Legislature, under a mistaken idea that it could by general laws control all municipalities, even in their municipal affairs, undertook to define the manner in which all of such municipalities should enact their ordinances, and that it was the legislative intent that every municipality whose chief executive officer was not a member of the legislative body, and therefore not familiar with proposed legislation, should be provided with a copy of all ordinances passed for examination, that he might approve or disapprove the same. It is further manifest from the proviso that it was the legislative intent that such presentation of the copy of the ordinances, and subsequent acts of the chief executive in relation thereto, was neither necessary nor proper, where the chief executive was a member of the legislative body. It must be conceded that the Legislature was not happy in the manner in which it expressed this intent; for the act provides that the chief executive officer of municipalities having no mayor shall perform all of the duties imposed upon a mayor by section 1 of the act, which are the examination after presentation, and approval or disapproval, and in the proviso is mentioned only the "mayor," as distinguished from the other chief executive, and the whole of the act is open to the criticism of imposing, by section 4, certain duties upon the president of the board, from the performance of which, by the proviso, he is exempted. "The rule is well settled in this state, and most probably in all other states, that if a statute is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is justified as within a fair interpretation of its language will effect its apparent object and promote justice." *Felton v. West*, 102 Cal 269, 36 Pac. 676. To construe the act of 1897 as respondent contends, to the effect that the president of the board of trustees of a city of the fifth class is given veto power, is to say that the Legislature undertook to confer upon one member of the board of trustees, who should be selected to preside, power and authority to prevent the

passage of any ordinance, except by the approval of every other member of the council except himself; and that as to cities of the fourth class the mayor, an independent officer, but who by the statute of 1883 is made a member of the city council, should for that reason, be shorn of such power and required to sign ordinances, whether approved or disapproved by him, if a majority of the council should pass them. Mr. Justice McFarland, in *Re Mitchell*, 120 Cal. 386, 52 Pac. 799, speaking for the court, says: "Where it [a statute] is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted." Applying this rule, we are led to the conclusion that however ambiguous and uncertain the language of the section may be, and however difficult it may be to reconcile the two sections, nevertheless the general intent of the Legislature is so apparent that the proviso found in section 1 should be made to read "mayor or other chief executive," or that the word "mayor" should be held to include all executive officers similarly situated. Otherwise, injustice and an absurdity would result. The act of 1897, then, having no application to cities or towns in which the mayor or other chief executive is a member of the governing body, the acts of respondent here in question must be considered with reference to the provisions of the municipal corporation act relating to municipalities of the fifth class. It appears to be conceded that, so considered, the duty of the president of the board of trustees in signing and authenticating the ordinances of the town of San Buenaventura is a ministerial act, and one subject to enforcement by writ of mandate.

Counsel for respondent further contend that, assuming the ministerial character of the act, nevertheless the petition is defective, in that there is a misjoinder of parties plaintiff. It may be conceded that the city of San Buenaventura and the individuals composing the board were not all necessary parties, but it does not follow that they are improper parties. *Barber v. Mulford*, 117 Cal. 358, 49 Pac. 206. The city as a legal entity affected by the ordinance is beneficially interested in all governmental questions within its jurisdiction, and may sue and be sued in all matters affecting the municipality. It certainly is interested in an ordinance, legally passed, the effectiveness of which is prevented by the failure of one of its officials to perform a ministerial act. On the other hand, the three members of the board of trustees, as trustees, upon whom the law has enjoined the duty of enacting legislation necessary for the protection of the citizens and in the interest of the public welfare, are interested in a manner different from the great mass of the public in seeing to the complete exe-

cution of their trust and the performance by others of ministerial acts necessary to the full protection of public rights. *Commissioners v. Trustees*, 71 Cal. 312, 12 Pac. 224.

It is further insisted that the act of 1897 is unconstitutional for various reasons assigned. We think it sufficient to say that this act under the constitutional amendment only applies "to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act." *Morton v. Broderick*, 118 Cal. 487, 50 Pac. 644. It may be stated, further, that only cities of the fourth, fifth, and sixth classes, under any reading of the act, are affected, as all other classes mentioned in the municipal incorporation act are in fact governed by freeholders' charters. Under the interpretation above given to the act and its proviso, the same has no present application to any city of any class now organized, and no one affected by the act is before the court complaining.

We are of opinion, therefore, that the petition is sufficient to entitle the petitioners to the relief sought, and the demurrer thereto is overruled; further, that the answer, which, in effect, raises only the legal questions involved in the demurrer to the petition, constitutes no defense, and the demurrer to such answer should be sustained.

For the foregoing reasons, a peremptory writ of mandate should issue as prayed for, and it is ordered accordingly.

We concur: TAGGART, J.; SHAW, J.

8 Cal. App. 497

CITY OF SAN BUENAVENTURA et al. v. McGUIRE. (S. F. 5,053.)

(Supreme Court of California. Sept. 3, 1908.)

In Bank. Petition for rehearing. Denied.

For opinion of District Court of Appeal, see 97 Pac. 526.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a transfer of this cause, because it seems perfectly clear to me that the decision of the District Court of Appeal violates a canon of statutory construction universally accepted by common-law courts, and which in this state has been made a part of our Code law. "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted, and where there are several provisions or particulars, such a construction, is if possible, to be adopted as will give effect to all." Code Civ. Proc. § 1858. This rule requires that meaning and effect should be given to section 4 of the act of

1897 (St. 1897, p. 191, c. 129), if possible. The construction adopted by the court deprives that section of all meaning, and of any possible effect, completely obliterates it from the statute, and this partly upon the ground of the supposed absurdity which would result from giving it effect, and partly upon the ground that, if the proviso at the end of section one is given any effect, there is a conflict between it and section 4, and that the proviso, being more reasonable, and more in accordance with the supposed general intent of the law, must prevail. In my opinion neither of these reasons holds good. The supposed absurd result of giving effect to section 4 is that it would be impossible to pass an ordinance imposing a penalty, or an ordinance of any other of the classes enumerated in section 1 of the act, without the vote of every other member of the board if the president happened to be opposed to its adoption. This must be conceded, but, if the Legislature had passed an act plainly requiring a unanimous vote of the board to give validity to an ordinance of any of the enumerated classes, I know of no ground upon which a court could take upon itself to enforce an ordinance which had received only four out of five votes in the council. And if, giving effect to all the provisions of the act of 1897, it must be conceded that four out of five votes are required to pass such an ordinance against the opposition of the president, there appears to be even less justification for the judicial enforcement of such an ordinance when it has been passed by the vote of a bare majority of the board and against the opposing vote of the president.

As to the supposed conflict between the proviso, if given any effect, and section 4, it proves to be an unfounded supposition when it is shown that the purpose of the proviso is fulfilled in applying it to municipal corporations of the fourth class, in which class, and in which class alone, the mayor—an officer elected by the people—is made a member, *eo nomine*, of the council, the legislative body, and given a casting vote in the passage of ordinances. St. 1883, p. 226, c. 49. The proviso, I say, has its full effect in its application to corporations of the fourth class, and there was a valid and perfectly apparent reason why the mayor in that class of corporations should be specially excepted from the requirements of the act of 1897; for by section 670 of the municipal corporations act his veto power and the mode of its exercise was already clearly and exactly defined. If his power was not to be enlarged, the proviso was necessary, and, as its only effect was to leave the mayors of that class of corporations with the same veto power they had been accustomed to exercise, we are bound to suppose that was what the Legislature meant. In this view there is no conflict between the proviso and section 4. The first applies to cities where

the mayors elected by popular vote are members of the city council—cities of the fourth class. The second applies to cities in which there are no mayors, *eo nomine*, independent officers elected by popular vote, but only a president of the board of trustees, *viz.* (cities of the fifth and sixth class), upon whom the duties prescribed by the act are devolved. There is, in my opinion, no conflict in the different provisions of the act, no ambiguity or uncertainty, and nothing in the result of its enforcement according to its terms which a court is entitled to pronounce an absurdity which the Legislature cannot be supposed to have contemplated.

I think the writ of mandate should have been denied.

8 Cal. App. 585

TOOMEY et al. v. KNOBLOCH et al.
(Giv. 503.)

(Court of Appeal, Third District, California.
July 24, 1908.)

1. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET IMPROVEMENTS—VALIDITY—ACTIONS—PARTIES.

Under Code Civ. Proc. § 378, providing that all persons having an interest in the "subject of the action," may be joined as plaintiffs, owners in severalty of different lots may join as plaintiffs in a suit for the cancellation of the warrant of assessment for street work, though the lien on each lot is separate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1203.]

2. APPEAL AND ERROR—HARMLESS ERROR—MISJOINDER OF PARTIES—RULINGS ON DEMURRER.

Any misjoinder of parties plaintiff in an action by owners in severalty of different lots for the cancellation of the warrant of assessment for street work is without prejudice to defendant; and the overruling of a demurrer to the complaint on that ground does not warrant the reversal of a judgment against defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4070.]

3. PLEADING—DENIAL—SUFFICIENCY.

In an action by owners in severalty of different lots for the cancellation of the warrant of assessment for street work, an answer which denies that a plaintiff claiming to own two lots now is or ever has been the owner of two lots does not deny the ownership, for a denial in the conjunctive raises no issue as to the ownership of either of the lots, and relieves plaintiff of the duty of proving ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 263.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. F. Toomey and others against F. Knobloch and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

J. P. Bernhard, for appellants. Southland & Barbour, for respondents.

BURNETT, J. By the judgment it was determined that certain assessments for street work are void, and the cancellation of

the entire record of the warrant, assessment, and diagram in the office of the superintendent of streets was adjudged because unauthorized by law.

There are only two reasons urged by appellants for a reversal of the judgment and the order denying the motion for a new trial, neither of which possesses any substantial merit. The plaintiffs are the owners in severalty of different lots, and the contention is made that they are improperly joined as plaintiffs, and that, therefore, the demurrer to that effect should have been sustained. But the trial court was right in its ruling because the statute expressly authorizes the joinder of plaintiffs in one action to accomplish a common purpose. Section 378 of the Code of Civil Procedure provides that "all persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs." It is true that it is not always easy to determine "the subject of the action." Mr. Pomeroy says: "The term does not seem capable of any clear and complete analysis, and the result is that it may denote the thing if any—land, chattel, person, fund, estate, and the like—in respect of which rights are sought to be maintained and duties enforced, or it may denote the sum of the questions between the parties to be determined by the judgment of the court." Pomeroy's Remedies (4th Ed.) § 384.

In the case at bar, though, the only thing in controversy affecting the rights of the parties is the validity of the assessment, and there is no good reason why that should not be considered the subject of the action. It is true that the lien as to each lot is separate and distinct, and the relief sought is the cancellation of as many distinct liens as there are lots affected by the alleged invalid assessment, but the common ground of complaint in which all the plaintiffs are interested is that the warrant of assessment, the source and basis of all the alleged liens, is invalid, and hence there is no support for the claim against any of the property, and the relief demanded which affects all who are joined in the action is the cancellation of said warrant. The adjudication of this common interest and the determination and application of this common relief in favor of plaintiffs necessarily lead to the removal of the cloud upon the title to all the property. It must be clear, therefore, that all the plaintiffs are interested in the subject of the action and in obtaining the relief demanded, and, even if not all necessary, they were at least proper parties to the proceeding. Owen v. Frink, 24 Cal. 177; People v. Morrell, 26 Cal. 361; Churchill v. Lauer, 84 Cal. 236, 24 Pac. 107; Pomeroy's Remedies (3d Ed.) § 183; 21 Ency. Plead. & Prac. pp. 463-466. But again, if the ruling of the court was technically erroneous, it is perfectly clear that defendants were not prejudiced thereby. Daly v. Rud-

dell, 137 Cal. 674, 70 Pac. 784; Woollacott et al. v. Meekin, 151 Cal. 701, 91 Pac. 612. In the latter case it is said: "Assuming that there was a misjoinder of parties plaintiff in an action by 12 persons owning separate lots of land to obtain a decree declaring void such assessment and the bonds issued thereon constituting a lien on their land, still such misjoinder was without prejudice to the defendant, and the overruling of a demurrer to the complaint on that ground will not warrant the reversal of a judgment against the defendant."

The other point urged by appellants is as easily disposed of. It was not necessary for plaintiffs to prove the title, for the reason, as pointed out by respondents, that it was not denied by defendants. The attempted denial is in this form: "This defendant has no information or belief with reference to the allegations contained in paragraph 1 of said complaint sufficient to answer the same, and basing his denial upon that ground, denies that the plaintiff, W. F. Toomey, now is or ever has been the owner of lot 7 and the north half of lot 8 of Griffith's addition." The denials are similar as to the other plaintiffs, each of whom claims to own more than one lot. It is too well settled for further controversy that such a denial in the conjunctive raises no issue as to the ownership of either of the lots, and hence relieves the plaintiff from any legal duty to prove the allegation. Leroux v. Murdock, 51 Cal. 541; Young v. Miller, 63 Cal. 302; Wise v. Rose, 110 Cal. 163, 42 Pac. 569; Nolan v. Hentig, 138 Cal. 283, 71 Pac. 440.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 588
BOURI v. SPRING VALLEY WATER CO.
(Civ. 487.)

(Court of Appeal, Third District, California.
Aug. 1, 1908.)

1. WATERS AND WATER COURSES.—WATER COMPANIES—SUPPLYING WATER FOR DOMESTIC PURPOSES—OBLIGATIONS.

A company supplying water for domestic purposes must, on furnishing water for a boiler used in operating a laundry, use such appliances in connection with its pipe system as will effectually keep water supplied by it and once used from returning through the feed pipes to the mains, thereby preventing the pollution of the water in the mains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 270.]

2. SAME.

One receiving from a company which also supplies water for domestic purposes water for his boiler used in a laundry has no right to use the feed pipes for the purpose of relieving the boiler of excessive pressure, but he must provide in connection with the boiler safety appliances for the escape of steam, thus relieving the boiler of excessive pressure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 270.]

3. SAME.

A company supplying water for domestic purposes also supplied water for a boiler used in a laundry. It knew that the owner of the boiler was in the habit of wrongfully using its pipes to relieve the boiler of excessive pressure, and that he had provided no other means of disposing of the surplus steam. It installed a check valve in the feed pipes through which it conveyed water to the boiler with knowledge that the effect of the installation would be to cause the boiler to explode because of excessive steam pressure, and it failed to give any notice to the owner. *Held*, that it was liable for the explosion of the boiler caused by excessive pressure.

4. SAME—COMPLAINT—SUFFICIENCY.

A complaint in an action against a water company for the explosion of a boiler, resulting from the installation of a check valve in the pipe, which supplied water to the boiler, which alleges that, when the check valve was attached, the company knew that it would confine the hot water and steam in the boiler, and prevent the same from passing through the feed pipe so as to relieve the boiler from excessive pressure, etc., is bad on demurrer for failing to clearly allege that the company knew that plaintiff was, at the time of the installation of the check valve, using the feed pipe as a vent, and had no other means of relieving the pressure in the boiler.

5. SAME.

Where plaintiff suing for the explosion of a boiler was primarily at fault for failing to provide the boiler with safety appliances for the escape of steam, and he wrongfully used defendant's feed pipe through which water for the boiler was supplied by defendant, he must, to state a cause of action against defendant, clearly show that the act of defendant in installing the check valve in the feed pipe, and thereby preventing the escape of steam from the boiler causing it to explode, was negligence so flagrant as to overcome the wrongful act of plaintiff himself.

6. PLEADING — DEMURRER — SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND.

Where plaintiff was afforded two opportunities to amend his complaint, so as to overcome objections raised by general demurrer, and he was familiar with the defects in the pleading, it was not error on sustaining a demurrer to the second amended complaint to sustain it without leave to amend, and render judgment for defendant.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Henri Bouri against the Spring Valley Water Company. From a judgment for defendant, on sustaining a demurrer to the second amended complaint without leave to amend, plaintiff appeals. Affirmed.

J. F. Chapman, for appellant. A. E. Shaw, for respondent.

HART, J. The court below sustained a demurrer to the second amended complaint without leave to amend. Judgment was thereupon entered in favor of the defendant. This appeal is from said judgment.

The action was commenced for the purpose of recovering damages from the defendant for injuries sustained to certain property of plaintiff, and which are alleged to have been caused through the negligent acts of the defendant. The defendant is a corporation whose principal place of busi-

ness is in the city and county of San Francisco, and is engaged in the business of supplying water to the inhabitants of said city and county for domestic purposes.

The second and third paragraphs of the complaint recite the history of the transaction out of which the controversy arises, and contain the gravamen of the complaint, and we therefore here present said paragraphs in their entirety:

"(2) That on the 12th day of July, 1905, at the time of the explosion hereinafter mentioned, and for a long time prior thereto, and including the month of June 1905, said plaintiff was maintaining and operating a laundry at number 514 Central avenue, in said city and county of San Francisco; that during all of said times said plaintiff used in said laundry a galvanized iron boiler of large capacity, to wit, of 100 gallons of water, for the purpose of heating water in said boiler, to be used in the operation of said laundry, all of which was well known to said defendant, its servants, and employes during all of said time, and at the time the check valve was attached to the pipe as hereinafter mentioned; that during all of said time said defendant, through a pipe attached to said boiler, supplied water to said boiler, from a main of said defendant in the adjoining street, for the purpose of being used in said laundry; that said plaintiff paid said defendant the charges demanded and required by said defendant for the water thus supplied.

"(3) That on or about the 20th day of June, 1905, said defendant, by its servants and employes and without the knowledge or consent of plaintiff, attached a check valve to said pipe through which said defendant supplied water to said boiler, as hereinbefore stated, to wit, in the feed pipe leading from said main to said boiler; that said check valve thus attached confined the hot water and steam in said boiler, and thus prevented the same from passing through said feed pipe so as to relieve said boiler from excessive pressure, and that, by reason of said check valve being thus attached, the pressure of the hot water and steam in said boiler was greatly increased, and, in consequence thereof, said boiler did on said 12th day of July, 1905, explode with great force and violence, and by reason thereof the said building where said laundry was maintained and operated was greatly damaged and injured; that prior to the time said check valve was thus attached to said pipe sufficient of the hot water and steam in said boiler did pass through said feed pipe so as to relieve said boiler from excessive pressure; that at the time said check valve was thus attached to said pipe the said defendant, its servants, and employes, who thus attached said check valve to said pipe, well knew that the operation of said check valve when thus attached to said pipe would be to confine the hot water and steam in

said boiler, and prevent the same from passing through said feed pipe so as to relieve said boiler from excessive pressure of said hot water and steam, and said defendant, its servants, and employes should reasonably have then known that thus attaching said check valve to said pipe was liable to cause said boiler to explode; * * * said plaintiff had no knowledge or information that said check valve had been attached to said pipe until after the explosion hereinbefore mentioned occurred; that the act of attaching said check valve to said pipe as above stated was a careless and negligent act on the part of said defendant, and its said servants and employes." The demurrer is both general and special. We are of the opinion that the general demurrer was properly sustained. It is therefore unnecessary to refer to the special demurrer.

The contention of the respondent is that the allegations of the complaint disclose such contributory negligence upon the part of plaintiff in the management of the boiler, the bursting of which as alleged caused the damage complained of, as to destroy his right of recovery, inasmuch as there is nothing in said complaint showing that plaintiff had equipped said boiler with safety appliances for relieving the pressure. It must be conceded that it was and is the duty of the defendant to invoke the use of such appliances in connection with its pipe system as will effectually keep water supplied by it and once used from returning through the feed pipes to the mains, thereby preventing the pollution of the water in the mains, and thus the impairment of its potableness or use for general domestic purposes. It must further be conceded that the plaintiff had no right or authority to use the feed pipe for the purpose of relieving the boiler of excessive pressure, but that it was his duty to provide, in connection with said boiler, safety appliances or a vent for the escape or venting of the steam from said boiler and thus relieving it of inordinate pressure. It may also be stated as a well-settled rule of the law of torts that if the plaintiff had used, though wrongfully, the pipes of the defendant for the purpose of relieving the said boiler of excessive pressure, and the defendant knew that plaintiff was and had been accustomed to so using said pipes, and that the plaintiff himself had provided no other means for disposing of surplus steam and thus relieving the pressure, and the defendant installed a check valve in the feed pipe through which it conveyed water to the premises and for the use of plaintiff, knowing that plaintiff was using said pipes for that purpose, and had knowledge and knew that the effect of the installation of said check valve in said feed pipe would be to cause the boiler to explode, and the defendant under such circumstances established said check valve in said feed pipe without notifying the plaintiff of the fact, the de-

fendant would be liable for any damage sustained by plaintiff by reason of the bursting of said boiler because of the installation of said check valve in said feed pipe. The principle thus enunciated may be found to be at the bottom of that class of cases where a person, without right or license, habitually passes over the premises of another. If the owner of such premises should dig a ditch across the pathway over which he knew the trespasser was accustomed to pass at night, without informing or notifying such trespasser of the existence of the ditch, and the latter, as was his custom, should undertake to pass over the pathway in an ordinarily careful manner and fall into such ditch and sustain injuries thereby, there could be suggested no reason in law why the tort-feasor should not be required to respond in damages for his act, amounting, as it would, under such circumstances, to criminal negligence at least. If deliberately done, with the intent that it should result in injury to the trespasser, it would manifestly amount to a positive act of criminality. The fundamental principle of this proposition is that a person suffering from the wrongful act of another must appeal to the law for his remedy. He cannot, in other words, as a rule, take the law into his own hands and furnish his own means of redress. In the case at bar, as before observed, if the plaintiff by direct and unequivocal averments had disclosed knowledge on the part of the corporation and its servants that he was using said feed pipe as his only available means of relieving the exploded boiler of undue pressure, and, without notifying plaintiff thereof, the defendant attached an appliance to said feed pipe, the necessary and inevitable effect of which was to so increase the pressure of hot water and steam in the boiler as to cause the explosion of the same, then we should say that without doubt he had stated a cause of action.

But we think the complaint is fatally defective in the respect to which we refer. The only allegation in the complaint which in anywise even approximately meets the criterion by which we believe and have declared that the sufficiency of such pleading must be tested is found in the following averment: "That at the time said check valve was thus attached to said pipe the said defendant, its servants, and employes, who thus attached said check valve to said pipe, well knew that the operation of said check valve when thus attached to said pipe would be to confine the hot water and steam in said boiler and prevent the same from passing through said feed pipe so as to relieve said boiler from excessive pressure of said hot water and steam," etc., followed by an averment that the defendant and its employes should have personally known that the effect of attaching said check valve to said pipe would be to cause the boiler to explode,

This allegation is not, in our opinion, sufficiently direct and specific to bring the matter of the conditions existing as to the operation of said boiler at the time of the installation of the check valve to the knowledge of the defendant. It may be true that a strong inference from said allegation, referring as it does to the particular check valve which caused the trouble, is that the defendant must have known that plaintiff had been and was using the feed pipe as a vent through which the boiler was relieved of excessive pressure. But we think that in a case where, as here, the plaintiff was primarily at fault, or engaged in doing a wrong as against the defendant, and had failed to provide the boiler itself, as it was his duty to do, with safety appliances, to perform functions which he wrongfully forced upon the feed pipe, not intended to be so used, he should be required to make it appear absolutely clear and unquestionable that the act of the defendant constituted the grossest kind of negligence—negligence so flagrant as to fully overcome or eliminate as a factor in the case the wrongful act of the plaintiff himself. In other words, the complaint should not only show, as it does clearly enough, that the defendant and its employés failed to give the plaintiff notice of the installation of the check valve at the very time it was adjusted to the pipe, or notice of their intention to connect the same with said pipe previously to its installation, but it should be made to clearly appear that the defendant knew that plaintiff was at the very time of the installation of said check valve using said feed pipe as a vent and had no other means of relieving the boiler of excessive pressure. The latter fact does not clearly and distinctly appear in the complaint, and failure to so state it leaves the plaintiff in the position of asking for a judgment for damages to his property to the infliction of which he contributed by his own negligence, or which would not have occurred but for his own inexcusable remissness. As stated, it was defendant's duty to connect a check valve to the feed pipe if, in its judgment, it was necessary to do so to preserve the purity and potableness of the water it was supplying for domestic purposes. There was no duty cast upon it to assume that the plaintiff had not provided appropriate means for the protection and preservation of his own property. To the contrary, the defendant had the right to assume, if indeed the matter ever at all occurred to "its mind," that the plaintiff had done his duty by equipping his boiler with all the necessary appliances for the safe and proper operation thereof.

The plaintiff was afforded two opportunities to amend his complaint so that it would state facts sufficient to overcome the objections raised to it by the general demurrer. We must assume that the questions presented were fully discussed and argued before the

court below, and the plaintiff thus made thoroughly familiar with the particular respect wherein his pleading was deficient. It is therefore probable that the plaintiff is without the facts necessary to bring himself within the views herein expressed on the allegations requisite to state a cause of action against the defendant. As the Supreme Court says in *Dukes v. Kellogg*, 127 Cal. 563, 60 Pac. 44, "the failure to make a good pleading probably arises in a lack of facts rather than in the fault of the pleader."

For the reasons set forth herein, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 566

BANK OF MENDOCINO v. BROWN.
(Civ. 493.)

(Court of Appeal, Third District, California.
July 24, 1908.)

1. BANKS AND BANKING — LIQUIDATION — POWERS OF BANK COMMISSIONERS.

Under the law creating the bank commissioners and defining their powers, requiring the commissioners to examine the condition of every banking corporation in liquidation in the same manner as in case of solvent banks, and providing that subject to the right of removal and appointment the directors of banking corporations in liquidation shall manage the affairs thereof under the direction of the bank commissioners, etc., the business of closing up the affairs of a banking corporation in liquidation is vested in the directors of the corporation, and the bank commissioners have authority over the directors and the affairs of the corporation only for the purpose of safeguarding the depositors and stockholders against an extravagant or fraudulent administration.

2. SAME — OFFICERS — SALARIES — POWER TO FIX.

St. 1895, p. 177, c. 167, § 12, giving the bank commissioners power to limit the number and salaries of employés of banking corporations in liquidation, amends St. 1887, p. 92, c. 80, giving the commissioners power "to designate the number of officers and employés necessary to close up the business * * * and to fix the salaries of the same"; and under it the commissioners are empowered to fix the maximum number of employés of banking corporations in liquidation, and to fix their maximum salaries, and, where the commissioners have fixed such limitation, the directors of the corporation must fix the number of employés and their salaries within such limit.

3. SAME.

In an action by a banking corporation for money collected and retained by an officer, the answer admitted receiving the money in the capacity as officer, and alleged that the officer retained the same in part payment of his compensation for services as secretary and manager during the liquidation of the corporation, and set forth an express agreement to pay him a specified sum per month as his salary without alleging between whom the agreement was made. *Held*, that the allegation of an agreement to pay him a salary referred to the action of the bank commissioners fixing the limit of the salary and the answer failed to show a valid agreement fixing his salary.

4. SAME.

Where the directors of a banking corporation in liquidation failed purposely or negligent-

ly to fix the salary of its secretary and manager, though the bank commissioners fixed the maximum salary to be paid him, he could only recover on a quantum meruit.

5. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

Where, on a quantum meruit for services, witnesses variously fixed the value of the services, a finding of the court on the question of value is conclusive on appeal.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Bank of Mendocino against Albert Brown. There was a judgment for plaintiff, and, from an order denying a new trial, defendant appeals. Affirmed.

Thomas, Pemberton & Thomas, for appellant. T. L. Carothers and Mannon & Mannon, for respondent.

HART, J. This action was brought to recover from the defendant the sum of \$11,400, alleged to have been collected and received by him for and on account of the plaintiff while he was acting in the capacity of secretary and manager of the latter, and which said sum, it is averred, defendant still retains and refuses to turn over to said plaintiff.

The facts disclosed by the pleadings and the evidence are briefly these: On the 10th day of February, 1896, an action was instituted in the name of the people by the Attorney General of the state, at the instance of the state bank commissioners, for the purpose of having the plaintiff adjudged insolvent, and that it was unsafe for said plaintiff to do business, and to have it enjoined from further carrying on business, except for the purposes of liquidation; that on the 10th day of March, 1896, a judgment was duly rendered and entered by the superior court of Mendocino county adjudging plaintiff insolvent and restraining it from further transacting business. Defendant was employed as secretary and manager of plaintiff to close up its affairs, and performed that service, the same covering a period of five years. The complaint alleges that plaintiff and its officers knew nothing of the money so collected and received for it by the defendant until June 26, 1905, when they were informed of the fact by one F. W. Stickney, who had theretofore been employed by the board of directors of the corporation to examine the books of account kept by defendant, showing his transactions for and on account of plaintiff, and by which examination the discovery of defendant's failure to account to plaintiff for all the moneys received for it by him was made. The defendant does not deny having received the money referred to in the complaint, but alleges that he retained the same in part payment of his compensation for his services as secretary and manager of plaintiff. He claims that his services were reasonably worth the sum of \$200 per month, and that there is still due him, in addition to the amount sued for by plaintiff, the sum

of \$800, for which he asks judgment. Defendant further alleges that this action is barred by certain provisions of the statute or limitations. After hearing the evidence, the court found that the sum of \$11,400, as alleged in the complaint, had been collected and received by defendant for plaintiff; that the defendant retained the same; that the plaintiff or its officers had no knowledge of the collection of said sum by defendant prior to June 26, 1905, on which date they were informed of said transactions of defendant by said Stickney; that no fixed compensation for defendant's services was agreed upon, and that the same was reasonably worth the sum of \$160 per month, and no more; that the action is not barred by the statute of limitations; that the defendant performed services for the corporation between the 1st day of September, 1900, and the 1st day of June, 1905, for which he was entitled, in the aggregate, to the sum of \$9,120; and that the plaintiff is entitled to judgment against defendant for the sum of \$2,880. This appeal is from the order denying the defendant a new trial.

No question is raised as to the sufficiency of the evidence to sustain the court's findings, the only point presented involving the rulings of the court rejecting evidence offered by the defendant in support of the claim that the state bank commissioners, after the plaintiff corporation had been adjudged insolvent and ordered into liquidation, fixed the salary of the defendant, as secretary and manager of said corporation, at the sum of \$200 per month, and that he was therefore entitled to such salary. Upon the controverted point it is the position of the appellant that, by the provisions of the law defining the powers of the bank commissioners, said officials are not only vested with the exclusive power of designating the number of persons to be employed in closing up the business of a banking institution in liquidation, but also of fixing the salaries of such employes. The contention of the respondent is, and such was the view taken by the court below, that the law does not contemplate that the bank commissioners shall either employ or fix the salaries of the employes, but are only empowered, in order to cause an expeditious and economical termination of the affairs of a banking institution adjudged insolvent, to control the matter of the maximum number of employes to be employed to perform the work and to limit their salaries. It is argued that, when the bank commissioners have fixed a limit within which such salaries shall be kept, the officers of the bank may then fix such salaries either up to or below the limit so fixed.

The law creating the bank commissioners and defining the powers of its members does not contemplate, in our opinion, that the business of winding up the affairs of an insolvent bank in liquidation shall be conducted in person by the bank commissioners themselves. To the contrary, it appears to be the purpose

of the act to place the responsibility of closing up the affairs of such corporation upon its officers, who must carry on the work under the general supervision of the commissioners. This power of general supervision is expressly given, yet we doubt not that the very same power and the same authority could be exercised by said commissioners under the provision requiring them to examine the "condition of every such corporation, in liquidation, in the same manner as in the case of solvent banks." After providing that, in case of vacancies occurring in the membership of the board of directors or trustees, the court in which the corporation has been adjudged insolvent and ordered into liquidation may, by appointment, fill the same, or may, for sufficient cause, remove any director or trustee, the act further provides: "Subject to this right of removal and appointment, the Directors or Trustees of all banking corporations in liquidation shall be permitted to conduct the management of the affairs of such corporations during the process of liquidation, under the direction of the Bank Commissioners," etc. From this, as well as from what appears to be the general scheme of the act, it was manifestly intended by the Legislature that the business of closing up the affairs of a banking corporation in process of liquidation should be managed by the directors or trustees of such corporation, and that the bank commissioners are vested with authority over the directors and the affairs of the corporation for the purpose only of safeguarding the depositors and stockholders against an extravagant or fraudulent administration of the business. The act, as observed, provides that the bank commissioners shall limit the number of employes to be employed in closing up the affairs of an insolvent banking corporation. This power cannot, of course, be exercised by the directors or trustees; but it will not be doubted that, after the number has been fixed by the commissioners, the directors, if they determine that the full limit will be unnecessary to conduct the business, may employ any less number. When the commissioners have fixed the limit beyond which the directors are not authorized to extend the number of employes, they have exercised all the power in that respect conferred upon them by the act. So, in the case of the salaries of the employes, when the commissioners have fixed the maximum limit of their salaries, the duty of those officers in that regard has terminated, and the directors may fix such salaries at less than the amounts so limited. In other words, as we construe the provisions of the act as to the salaries of the employes, the commissioners may by resolution or otherwise declare the maximum amount which the directors may agree to pay to each employe as a salary, while the directors have the right to fix such compensation at any figure within such limit. This view is strengthened by a consideration of the amendment of

the original provision with reference to the number of employes and their salaries by the Legislature of 1895, and by a comparison of the language of said amendment with that of the law as it read prior to the change referred to. As the act read before said amendment, the bank commissioners had "the power to designate the number of officers and employes necessary to close up the business of any such corporation, and to fix the salaries of the same." See St. 1887, p. 92, c. 80. Under the amendment the board is given the power only of limiting the number of employes and also limiting the salaries of the same. See St. 1895, p. 177, c. 167, § 12. There is obviously a wide distinction between the language of the provision as originally enacted, and the language of the provision as amended. It is evident that, if the Legislature intended originally to vest full and exclusive power in the commissioners to absolutely control the number of employes and the matter of fixing their salaries, it has by the subsequent legislation on the subject withdrawn such power by leaving it with the directors of the corporation to fix both the number of employes and the amount of compensation to be paid to them for their services, after the commissioners have established the limit beyond which they are not permitted to go in either case. If, as we have suggested, the word "limit" as used in the statute with reference to the salaries of the employes is amenable to the interpretation contended for by the appellant, the same meaning must be attributable to the same word when used in connection with the number of employes to be employed in the work of closing up the affairs of an insolvent banking corporation. The result of such interpretation would be that, although the officers of such corporation are in a much better position than the bank commissioners to know and determine the number of employes actually necessary to do the work "expeditiously and economically," the former would have no discretion in the matter of the number of persons to be employed, but would be compelled to accept the full number limited by the commissioners. This would be perfectly absurd; yet it is plain that, if the proposition contended for by appellant is maintainable, the other rests upon equally as strong reason and consequently equally as supportable.

The defendant pleads in one part of his answer an express agreement to pay him the sum of \$200 per month as his salary, but does not allege between whom and himself such agreement was made. Doubtless, however, this allegation refers to the action of the bank commissioners fixing the limit of the salary to be paid him. There is no pretense that there was any express agreement, to which the directors were parties, to pay the defendant the sum of \$200 per month for his services, or any other specified amount. Having failed, whether from neglect or purposely is unimportant, to make an express agree-

ment with the directors definitely fixing the compensation for his services, the defendant was required to rely upon a quantum meruit, and this he pleaded, and at the trial undertook to show that the reasonable value of the labor performed was \$200 per month. The plaintiff's witnesses upon this point, however, variously fixed the value of his services at from \$75 to \$150 per month, and, as is conceded, the court's finding upon the question of the value of such services is conclusive here.

The excluded evidence, under the theory upon which it was offered, was immaterial, for the action of the commissioners fixing the limit of the salaries of the employes of an insolvent banking corporation in process of liquidation could be important only in a case where it was claimed that the salaries allowed or paid by the directors of such corporation were in excess of the limit fixed by the commissioners.

For the reasons herein given, the order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 578

LINCOLN NORTHERN RY. CO. v. WISWELL. (Civ. 465.)

(Court of Appeal, Third District, California.
July 28, 1908.)

1. EMINENT DOMAIN — COMPENSATION — PAYMENT—EXECUTION.

Code Civ. Proc. § 1252, providing that, where the sum assessed in eminent domain proceedings is not paid or deposited, defendant may have execution as in civil cases, does not authorize execution until after the expiration of the time fixed for making payment or deposit.

2. SAME—NATURE OF PROCEEDING.

In a proceeding under the statute to condemn, there is no element of contract.

3. SAME — JUDGMENT—"FINAL JUDGMENT"—"FINAL ORDER OF CONDEMNATION."

The "final judgment" in Code Civ. Proc. § 1251, providing that plaintiff in condemnation proceedings must, within 30 days after final judgment, pay the sum assessed, etc., is the judgment fixing the amount of damages, and is not the final order of condemnation authorized by Code Civ. Proc. § 1253, providing that, where the sum assessed in a condemnation proceeding has been paid, the court may make a final order of condemnation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798, 2802; vol. 8, p. 7663.]

4. SAME—DISMISSAL OF PROCEEDINGS—RIGHT OF PLAINTIFF.

Under Code Civ. Proc. §§ 1251-1253, requiring plaintiff in condemnation proceedings to pay within 30 days after final judgment the sum assessed, authorizing execution as in civil cases on the same not being paid, etc., a plaintiff in condemnation proceedings may abandon the enterprise, and dismiss the action within the 30 days in which to make payment or deposit of the award and before payment or deposit on payment of defendant's costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 649, 650.]

5. SAME — COSTS ON DISMISSAL — ATTORNEY'S FEES.

Since under Code Civ. Proc. § 1255, providing that costs in condemnation proceedings may be allowed or not, the costs are such as ordinarily attend the trial of causes, and since the only provision for allowing attorney's fees is in section 1251, where the action is on the bond therein mentioned, there is no provision for payment to defendant of attorney's fees on dismissal by plaintiff of the proceedings.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Lincoln Northern Railway Company against Mattie M. Wiswell to condemn a right of way. From a judgment dismissing the action on motion of plaintiff, defendant appeals. Affirmed.

W. H. Carlin and L. L. Chamberlain, for appellant. F. P. Tuttle, for respondent.

CHIPMAN, P. J. The action was to condemn a right of way over the land of defendant. Upon the verdict of the jury fixing the amount of the damages to defendant's property, the court on October 9, 1907, adjudged that plaintiff pay defendant, within 30 days from the date of the judgment, the sum fixed by the jury, to wit, \$4,030.50, or deposit the same in court for the use of defendant, "and, upon said payment or deposit of said money as aforesaid within said time, a final order or decree of condemnation * * * shall be entered in this proceeding." On November 7, 1907, plaintiff gave notice that it would move the court to dismiss the action, upon the ground that plaintiff had never taken possession of the land sought to be condemned, and "will never enter upon said land and has abandoned the location of the route set forth in said complaint, and the right to condemn the same." In an affidavit heard with the motion plaintiff by its attorney set forth facts in support of the motion, stating, in addition to the grounds above set forth, that the sum awarded was excessive, that no payment or deposit had been made, and that plaintiff does not intend to do so within 30 days from the date of the judgment or at all, and that plaintiff intends to select a new location for the line of its railroad, and that the same will not pass over the lands of defendant. In an affidavit by counsel for defendant it is set forth that defendant was and is satisfied with the award of damages, and is ready to accept the same and permit plaintiff to take possession of the land, and that "defendant has nor does she intend to move for a new trial or take an appeal from the judgment or decree heretofore made by said court in said action." It is further stated that defendant incurred certain expenses in the action among which was an attorney's fee of at least \$500. It appeared that, at the time of hearing said motion to dismiss, plaintiff paid to defendant her costs taxed in the action, which did not include any attorney's fee. Upon the

hearing of the motion the court made and caused to be entered its order dismissing the action, from which defendant appeals.

We feel relieved from entering upon an examination of the cases as to the question when, or within what time, the plaintiff in condemnation proceedings may abandon the enterprise, decline to take the property, and dismiss the action. The case of *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444, we regard as decisive of the question here. The facts in the two cases were not the same, but the discussion of the question in that case shows very clearly that in a case, as here, where the motion to dismiss on the ground that plaintiff had abandoned the enterprise and no longer desired the land is made before plaintiff is in default in paying or depositing the money awarded by the jury, defendant has no cause for complaint. Appellant urges that in *Pool v. Butler* no mention was made of section 1252 of the Code of Civil Procedure, and that the meaning of that section is still undetermined. It reads as follows: "Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff."

It is claimed that the judgment fixing the amount of damages is a final judgment, and gives to the defendant a vested right to the money; and this is argued from the fact that the statute gives the defendant an execution as in civil cases. It will be observed that the statute does not authorize execution to issue until after the 30 days have expired. We are not called upon to decide the rights of a defendant where the money awarded has been deposited within the 30 days required by section 1251 of the same Code, although *Pool v. Butler*, we think, does in fact decide that question also. We are to decide only whether the plaintiff may abandon the enterprise, and dismiss action upon payment of defendant's costs, within the 30 days given in which to make payment or deposit the money, when, in fact, no payment or deposit has been made. Upon this point we have no doubt of plaintiff's right to do so. In the proceeding under the statute to condemn there is no element of contract. *Pool v. Butler*. The final judgment mentioned in section 1251, as to payment of which reference is made in section 1252, is the judgment fixing the amount of damages, and is a final judgment in the proceeding, and is an appealable judgment (Cal. S. R. Co. v. S. P. R. R. Co., 67 Cal. 59, 7 Pac. 123); the subsequent final order of condemnation (section 1253) being an order after

final judgment (Id.). Mr. Lewis says: "The weight of authority is that, in the absence of statutory provision upon the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the awarded judgment." Lewis, Em. Dom. § 656. Whether or not this view correctly expresses the limit of the right to abandon, we have no hesitancy in holding that it is not reached where the plaintiff makes his election to abandon before he is called upon to pay the amount of the award; and we find nothing in section 1252 leading to any other conclusion. Section 1253 provides that when payments have been made and the bond given, if plaintiff elects to give one, as required by sections 1251 and 1252, "the court must make a final order of condemnation. * * * And a copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified." It was said in *Pool v. Butler*: "The vesting of the title to the deposit in the defendants is coincident with the vesting of the right to the land for the purposes for which it is sought." Here, however, the payment had not been made, and plaintiff gave notice of abandonment and moved to dismiss the action within the thirty days given in which to make payment, which presents a much stronger case for the exercise of the right to abandon than was that of *Pool v. Butler*.

Appellant makes the point that the court should have required payment of attorney's fees as part of the costs. Section 1255 provides that "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." These costs are such as ordinarily attend the trial of causes. The only provision for allowing attorney's fees is found in section 1251, where the action is on the bond therein mentioned.

The judgment dismissing the action is affirmed.

We concur: HART, J.; BURNETT, J.

LINCOLN NORTHERN RY. CO. v. CLARK
et al. (Civ. 466.)

(Court of Appeal, Third District, California.
July 28, 1908.)

Appeal from Superior Court, Placer County;
J. E. Prewett, Judge.

Action of eminent domain by the Lincoln Northern Railway Company against Elizabeth Clark and others. From a judgment of dismissal of the action on motion of plaintiff, defendants appeal. Affirmed.

L. L. Chamberlain and W. H. Carlin, for appellants. F. P. Tuttle, for respondent.

PER CURIAM. This is an action of eminent domain in which the state of facts, so far as the questions involved are concerned, are the same as in the case of Lincoln Northern Railway Company v. Mattie M. Wiswell (No. 465) 97 Pac. 536, this day decided.

Upon the authority of the decision in that case, the judgment dismissing the action is affirmed.

154 Cal. 303

MILLSAP v. BALFOUR. (Sac. 1,635.)

(Supreme Court of California. Sept. 12, 1908.
Rehearing Denied Oct. 13, 1908.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF COST—STATUTES—REPEAL.

The municipal incorporation act (St. 1883, p. 256, c. 49, § 771), providing a method of assessing on adjoining property the cost of street improvements in cities of the fifth class, is repealed by St. 1885, p. 147, c. 153, in so far as it is inconsistent therewith.

2. SAME.

Under St. 1885, pp. 147, 152, c. 153, §§ 2, 7, authorizing the city council to order street work, including the construction of sidewalks, and providing that the expenses shall be assessed on the "lots and lands fronting thereon," etc., a lot fronting on one side of a street may be assessed for the cost of constructing a sidewalk along the opposite side thereof, though the owner of such lot has, in advance of any proceeding by the council and for his own convenience, laid a sidewalk along his property line without obtaining an agreement from the opposite owner to pay a half of the cost thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1040-1041.]

3. APPEAL AND ERROR—STATEMENT IN BRIEF UNSUPPORTED BY RECORD—EFFECT.

A statement in the brief of counsel on appeal, unsupported by anything in the record, will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2962.]

4. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET WORK—ACTIONS TO ENFORCE—COMPLAINT—SUFFICIENCY.

A claim that the payment of fees of attorneys for plaintiff, suing to foreclose an assessment lien for street work, cannot constitutionally be imposed against defendant, goes merely to the extent of the relief to which plaintiff may be entitled, and cannot be determined on a demurrer to a complaint alleging facts from which a right to some relief arises.

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by Wirt Millsap against Douglas Balfour. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions.

E. B. Mering, for appellant. Hudson Grant, for respondent.

SLOSS, J. Action to foreclose assessment lien for street work. Defendant had judg-

ment upon the sustaining of his demurrer to the complaint. Plaintiff appeals.

The board of trustees of the city of Woodland authorized the construction of a concrete cement sidewalk along the south side of Clover street in said city, "excepting such portions thereof where concrete cement sidewalks have already been constructed and accepted." A contract was duly let, and the work done. The assessment on which this action is based assessed the cost of the work upon the lots fronting on both sides of Clover street. The defendant is the owner of a lot fronting on the north side of the street, and the sole question presented is whether a lot situated on one side of the street may be assessed for the cost of constructing sidewalks along the opposite side.

The question must be decided upon a consideration of the terms of the act of March 18, 1885, commonly known as the "Vrooman Act" (St. 1885, p. 147, c. 153). Section 771 of the municipal incorporation act (St. 1883, p. 256, c. 49) provides a method of assessing upon adjoining property the cost of street improvements in cities of the fifth class (which includes Woodland), but this section must be regarded as repealed in so far as it is inconsistent with the later provisions of the Vrooman act. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *City Imp. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776. By section 2 of the act of March 18, 1885, the city council is authorized to order certain street work to be done. The construction of sidewalks is included in the classes of work enumerated. Section 7, subd. 1, provides that "the expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided. * * *" Then follow several subdivisions providing other methods of assessment for various cases, none of which covers the present situation. What, in the case of work done on one side of a public street, is meant by the phrase "shall be assessed upon the lands fronting thereon"? Is the cost to be assessed upon the lands fronting on both sides of the portion of the street improved, or on the lands fronting on the side of the street adjoining the improvement? The proper interpretation of this provision has been declared by this court in *San Diego Investment Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082. There the work done was the grading of so much of a street as lay on the east side of its center line. It was held that the cost of the work was to be assessed against lots on both sides of the improved portion of the street. "It is claimed," say the court, "that the words 'fronting thereon' refer to the work done, and not to the street on which all the lots on both sides front. The position is untenable." The case at bar cannot be distinguished from the one cited. The construction of sidewalks is authorized by sec-

tion 2 of the act, the same section that empowers the council to order the grading of streets. The method of assessment provided by the act is the same for each case, viz., the expense of the work is to be "assessed upon the lots fronting thereon." There is no reason for saying that the words "fronting thereon" mean one thing as applied to the grading of a street and another thing as applied to the laying of a sidewalk; the work in each case being done on only one side of the street. That both sides are to be assessed is the necessary conclusion from a reading of section 7 as a whole. Provision is made for exceptional cases in which the assessment is to be made upon lots on one side only. Subdivision 8 of section 7 declares that, "when sewerage or re sewerage is ordered to be done under the sidewalk on only one side of a street for any length thereof, the assessment for its expenses shall be made only upon the lots and lands fronting nearest upon that side. * * *" This language indicates clearly the intent, in the particular case covered by subdivision eleven, to assess upon the one side only. But subdivision 8 is the statement of an exception to the general rule of subdivision 1 that the cost is to be assessed upon the lots and land "fronting thereon." The exception would be unnecessary, indeed meaningless, if under the general rule work done on one side of the street were to be assessed only against lots fronting on that side.

It is said in *San Diego Inv. Co. v. Shaw*, supra, that there is no injustice in the rule of the statute as we have construed it. The improvement of any portion of a street is presumed to work a benefit to the neighboring property. It is this assumed benefit which affords the justification for all assessments. No inequality results from the method of assessing both sides. If the owner of property on the side not improved is compelled to share the burden of furnishing a sidewalk on the further side of the street, he obtains a corresponding advantage when a sidewalk shall be constructed along his property. In this connection, it is argued that the respondent has already, at his own cost, laid a sidewalk along his property line, and that, therefore, if a sidewalk shall hereafter be ordered on that side of the street, the portion already done must be excepted from any assessment made. Subdivision 11, § 7. He will thus have paid the entire cost of the sidewalk on his side, and be compelled to pay one-half of the cost of the walk on the opposite side. But the complaint does not show that any such work has been done, and the statement in the brief, unsupported by anything in the record, is entitled to no consideration. Furthermore, even if the fact were as suggested, it would have no importance in this discussion. Under the provisions of subdivision 1 of section 7, the respondent was entitled, whenever a sidewalk was ordered on his side of the

street, to have one-half of the cost assessed to the property on the opposite side. He was under no obligation to lay the walk in advance of any proceedings by the council. If he chose, for his own convenience and benefit, to so lay it without obtaining an agreement by the opposite owner to pay one-half of the cost, the resulting expense was one which he voluntarily assumed. We are cited to several cases in other jurisdictions declaring that a sidewalk is to be regarded as an appendage to the premises to which it is attached, and that its cost may be assessed to those premises alone. *Wakefield Sanitary Authority v. Mander*, L. R., 5 C. P. Div. 248; *State v. Mayor*, 37 N. J. Law, 415, 18 Am. Rep. 729; *Borough of Greensburg v. Young*, 53 Pa. 280. These decisions are based on statutes differing from our own. We do not doubt that the Legislature would be justified in prescribing one rule for assessment in the case of sidewalks and another where work is done on the roadway. Our Legislature, however, has not done so, and, as the entire matter is one for statutory regulation (subject, of course, to constitutional restrictions), the courts have only to apply the law as it is written.

The point that the payment of plaintiff's attorneys' fees cannot constitutionally be imposed upon the defendant goes merely to the extent of the relief to which the plaintiff may be entitled and cannot be determined on a demurrer to a complaint which alleges facts from which a right to some relief arises.

The judgment is reversed, with direction to the court below to overrule the demurrer.

We concur: ANGELLOTTI, J.; SHAW, J.

154 Cal. 299

RANDALL v. FREED. (Sac. 1,645.)

(Supreme Court of California. Sept. 12, 1908.)

1. APPEAL AND ERROR—RULINGS—EXCEPTIONS—REVIEW.

Under Code Civ. Proc. § 646, providing that an exception must be taken at the time the decision is made, except as provided in section 647, declaring what decisions shall be deemed excepted to, an objection to a ruling not excepted to, and not within section 647, cannot be urged on appeal, though the trial was conducted by the party complaining, who was not versed in the law.

2. SAME.

Rulings of the court in calling a jury and in permitting a party to give testimony are not within Code Civ. Proc. § 647, defining what decisions shall be deemed excepted to, and are not reviewable, unless excepted to.

3. SAME.

Under Code Civ. Proc. § 647, as it existed prior to the amendment by St. 1907, p. 715, c. 379, defining what decisions shall be deemed excepted to, instructions given must be excepted to to enable appellant to take advantage of errors therein.

4. SAME.

Errors appearing on the face of the judgment roll may be raised on the appeal from the judgment, though no exceptions were taken.

5. INJUNCTION—RESTRAINING TRESPASS—IRREPARABLE INJURY.

Equity will not restrain a trespass unless it appears that the injury resulting from the trespass will be irreparable, and it is not sufficient simply to allege that fact, but it must be shown how and why it will be so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 98.]

6. NUISANCE—PRIVATE NUISANCE—INJUNCTION—ADEQUACY OF LEGAL REMEDY.

Equity will not issue an injunction in cases of nuisances, in the absence of a showing that there is no plain, speedy, and adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 56.]

7. SAME.

Threatened acts consisting merely of repeated trespasses and the use of offensive language addressed to another do not, in the absence of a showing that irreparable injury will result therefrom, authorize the granting of injunctive relief, though a nuisance will be created by such acts.

8. SAME—"PUBLIC NUISANCES"—STATUTES.

One threatening to commit repeated trespasses and to use offensive language addressed to another does not threaten to create a nuisance within Civ. Code, § 3480, defining a public nuisance as one affecting at the same time an entire community or a neighborhood or any considerable number of persons, etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5799-5804.]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Anna Randall against Clark V. Freed. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Transferred from Court of Appeal (94 Pac. 1056). Judgment modified and affirmed, and order denying a new trial affirmed.

Tabor & Tabor (Grove L. Johnson, of counsel), for appellants. L. L. Chamberlain, for respondent.

SLOSS, J. This is an action to recover damages for a battery alleged to have been committed by defendant upon the person of plaintiff. The defendant answered, denying the material allegations of the complaint. The answer included a counterclaim, in which the defendant alleged that he was the owner of a dwelling house, which he occupied with his family; that the plaintiff wrongfully and maliciously entered said premises, and did, "by malicious, wrongful, and unlawful acts and words disturb the peace and quiet of defendant and his family, and did then and there willfully and unlawfully trespass upon the grounds, property of the defendant, and make herself a nuisance to defendant and his family." The specific acts complained of are the use by plaintiff of "opprobrious epithets" addressed to defendant and his wife. It is further alleged that, on the occasion mentioned in the complaint, plaintiff attacked defendant "with her hands and fists," and that he merely defended himself. The "counterclaim" charges that plaintiff informed defendant that she would come upon his prem-

ises whenever she chose, and say to him and his family whatever she pleased to say, avers that he has suffered damage in the sum of \$500, and asks judgment for such sum, together with a decree restraining plaintiff "from continuing to create a nuisance in and about the said premises of the defendant." The case was tried before a jury, which returned a verdict in favor of the defendant without damages. The court adopted the verdict, and made findings, by which it declared that all of the allegations of the complaint were untrue, and that all the allegations of the counterclaim, except the allegation as to damage, were true. Judgment was entered that plaintiff take nothing, that defendant recover his costs, and that plaintiff be enjoined from "entering the lands and premises of said defendant, or any part thereof, and committing a nuisance or disturbing the peace of said defendant and his family, in or upon the road or roads immediately adjacent to said premises."

Plaintiff appeals from the judgment, and from an order denying her motion for a new trial. From the statement on motion for new trial it appears that the plaintiff was not represented by counsel, but conducted the trial in her own behalf. The record shows no exception to any of the rulings of the court now assigned as error. The fact that the trial was conducted by a person not versed in the law may serve to account for the failure to take exceptions to adverse rulings, but can, of course, afford to this court no ground for disregarding the want of such exceptions where they are necessary. Except in certain cases specified by statute (Code Civ. Proc. § 647), an exception "must be taken at the time the decision is made" (Code Civ. Proc. § 646), and, if it is not so taken, the objection to the ruling cannot be urged on appeal (McCartney v. Fitz Henry, 16 Cal. 184; Keeran v. Griffith, 34 Cal. 580; Thiele v. Koster, 63 Cal. 241; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955). Among the points here made are that the court erred in calling a jury and in permitting the defendant to give certain testimony. These rulings are not within any of the classes of judicial acts "deemed to have been excepted to" under Code Civ. Proc. § 647. For the same reason, we cannot consider the criticisms directed against the court's instructions to the jury. While the law has now been amended so as to relieve parties from the necessity of taking an exception to an order "modifying, giving, or refusing to give, in whole or in part, an instruction to the jury" (Code Civ. Proc. § 647, as amended in 1907; St. 1907, p. 715, c. 379), the amendment was not in force at the time this case was tried. Before the amendment, it was thoroughly settled that instructions given to the jury must be excepted to, in order to enable the appellant to take advantage of errors in them, if there be such errors. *Wilkinson v. Parrott*,

32 Cal. 102; *Williams v. Southern Pac. R. Co.*, 110 Cal. 457, 42 Pac. 974.

The point that the findings are not supported by the evidence cannot be maintained. On every material issue there was a substantial conflict of testimony.

We think, however, that the court erred in granting the defendant relief by way of injunction. The error appears on the face of the judgment roll, and the point may be raised on the appeal from the judgment. No exception is necessary. Waiving the question whether the matters alleged by defendant in this connection form a proper subject for counterclaim, the facts set up and found afford no basis for an injunction. The acts which plaintiff is alleged to have threatened consist merely of repeated trespasses, and the use of offensive and insulting language addressed to defendant and his wife. It does not appear that any irreparable injury would result from the commission of the threatened acts, nor that, if they were committed, the defendant would not have a complete and adequate remedy at law. "Before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable. And it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so." *Mech. Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703; *Cal., etc., Co. v. Union, etc., Co.*, 122 Cal. 641, 55 Pac. 591. It is of no consequence that the counterclaim alleges that plaintiff "makes of herself a nuisance to defendant." The defendant's conclusion that a nuisance was created is not sustained by the specific facts alleged (*Civ. Code*, § 3480), but, even if we were to accept his conclusion, he is not helped. A court of equity will not issue an injunction in cases of nuisance any more than in other cases in the absence of a showing that there is no plain, speedy and adequate remedy at law. *Wood on Nuis.* (3d Ed.) 1150; 14 *Ency. of Plead. & Prac.* 1123. We are unable to perceive that, in the event of a recurrence of the acts complained of, the defendant cannot secure prompt and adequate relief through the ordinary processes of law.

The judgment is modified by striking therefrom the provisions restraining and enjoining the plaintiff from performing the acts above referred to, and, as so modified, the judgment will stand affirmed.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

154 Cal. 307

ROBERTS v. JACOB et al. (L. A. 1,809.)
(Supreme Court of California. Sept. 19, 1908.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—SUBSTITUTED SERVICE OF PROCESS—SUFFICIENCY.

The question of the sufficiency of substituted service of process embraces a proposition as to whether or not there has been due process

of law within the state and federal Constitutions.

2. SAME—PROCESS—SUBSTITUTED SERVICE.

An affidavit for publication of summons which shows that plaintiff made inquiry, without avail, of 12 county officers of the county as to the whereabouts of defendants or either of them, and which avers that plaintiff made diligent inquiry of the former neighbors of defendants, giving their names, together with their statements of their inability to furnish any information, shows due diligence required by *Code Civ. Proc.* § 412, authorizing service by publication on defendant absent from the state, etc., and service of summons by publication is sufficient within the Constitution, guaranteeing due process of law.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 10, *Constitutional Law*, § 929; vol. 40, *Process*, § 118.]

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by S. L. Roberts against Thomas E. Jacob and another. From an order setting aside a judgment in favor of plaintiff, he appeals. Reversed.

W. J. Mossholder, W. Parrish, and Parrish & Mossholder, for appellant. Collier, Smith & Holcomb, for respondents.

HENSHAW, J. Judgment was entered in favor of plaintiff and against the defendants in 1897. Jurisdiction of the defendants was obtained by the substituted process of publication of summons. Eight years after the entry of the judgment the trial court set it aside upon the ground that the facts set out in the affidavit for the order of publication did not show the due diligence required by section 412, *Code Civ. Proc.* Plaintiff appeals.

The affidavit for publication of summons in this case contained all that was embraced in the affidavit considered by this court in *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 210, 70 Pac. 732. Moreover, it contained additional facts not averred in the affidavit considered in that case. In *Rue v. Quinn* the affiant declared that he had made inquiry "of several prominent county officers" (giving the names of such officers), and further stated: "I have also made inquiry of all other persons from whom I could expect to obtain information as to the residence or whereabouts of each of the said defendants, and, after such search and inquiry and due diligence, the said defendants cannot be found within the state of California." In the affidavit in the case at bar the plaintiff names 12 county officers of the county of whom he made inquiry, without avail, as to the whereabouts and post-office address or residence of the defendants, or either of them. And, in addition, he avers that he has made due and diligent inquiry of the old residents of the city of San Diego, the former neighbors of said defendants, and then proceeds to give their names, together with their statements of their inability to furnish any information. The affidavit here presented is thus more complete and persuasive in its statement of facts touching diligence than that reviewed

by this court in *Rue v. Quinn*. It is substantially conceded by respondent that, to uphold the judgment of the trial court, we must reverse the decision of *Rue v. Quinn*, which has since been approved in *Weis v. Cain*, 140 Cal. xvii, 73 Pac. 980; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *People v. Norris*, 144 Cal. 422, 77 Pac. 998; *People v. Mason*, 144 Cal. 770, 78 Pac. 1113; *Sharp v. Salisbury*, 144 Cal. 721, 78 Pac. 282; *Shepard v. Mace*, 148 Cal. 272, 82 Pac. 1046; *Cargile v. Silsbee*, 148 Cal. 260, 82 Pac. 1044; *Emery v. Kipp* (Cal.) 97 Pac. 17. Respondent urges that we should do this upon the ground that the decision violates the familiar section 1, art. 14, Const. U. S., and that this federal question was not considered by the court in rendering its decision. Herein respondent is in error. Every case where the question arises of the sufficiency of substituted process necessarily embraces the proposition as to whether or not there has been due process of law. The provision of the Constitution of the United States does not differ in this respect from that found in article 1, § 13 of our own Constitution. Since the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, every case upon this subject-matter has been decided with direct reference, either express or necessarily implied, to these constitutional provisions. Respondent urges, however, that the decision of this court in *Rue v. Quinn* does violence to the decisions of the Supreme Court in *Roller v. Holly*, 176 U. S. 402, 20 Sup. Ct. 410, 44 L. Ed. 520, and *Marx v. Ebner*, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. Ed. 547. In *Roller v. Holly* the notice served upon the plaintiff in Rockingham county, Va., December 30, 1890, required him to appear in Limestone county, Tex., on January 5, 1891, five days thereafter, to answer in a foreclosure suit. The Supreme Court laid down the indisputable proposition that a notice would be of no value unless the time limited by it were reasonable and adequate for the purpose, and held that the time limited by this notice under these circumstances was unreasonable, and that, therefore, there was not due process of law. There is certainly nothing in this case touching upon the questions decided in *Rue v. Quinn*.

In *Marx v. Ebner* the affidavit for publication of summons showed that summons had been issued and returned by the marshal with the statement "that after due and diligent search neither of the within named defendants, nor their agents, could be found within this district." The same return to the summons is made by the sheriff in the case at bar. The affidavit for publication of summons, in addition to the return of the marshal, showed that one of the defendants was a foreign corporation, existing under the laws of the state of Oregon; that another defendant, Farrell, was not a resident of the district of Alaska, but resided in the city of Portland. It further appeared that no officer of the defendant corporation resided within

the district of Alaska, and that the corporation had no managing agent or representative within the district; that the post-office address was No. 246 Washington Street, Portland, Or.; and that Portland, Or., was also the post-office address of the defendant Farrell. Objection to the sufficiency of this affidavit was made upon the ground that it did not disclose any diligence, nor that after due diligence the defendants, or either of them, could not be found in the territory. The Supreme Court said: "The objection is made by the appellant that there was no sufficient proof that the defendants after due diligence could not be found; and, therefore, the court ordering the publication had no jurisdiction to make the order; that the simple statement of the marshal that defendants could not be found after due and diligent search was no proof that any such search had been made; and that it was necessary to show what had been done in the way of searching for defendants, so that the court could itself judge whether due diligence had been exercised. Taking the return of the officers with the other facts proved, we think this contention is not well founded." The affidavit in the case at bar, as well as the affidavit in *Rue v. Quinn*, were much fuller and more complete in their statement of facts showing diligence than was the affidavit held sufficient by the Supreme Court in the case under consideration. Therefore, neither upon the merits of respondents' contention nor upon the authorities which are cited is any reason shown for a departure from the decision of this court in *Rue v. Quinn*, nor for an affirmance of the order of the trial court in setting aside the judgment in this case.

For which reasons the order appealed from is reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.

8 Cal. App. 702

MURPHY v. STELLING et al. (Civ. 399.)

(Court of Appeal, First District, California. Aug. 18, 1908. Rehearing Denied by Supreme Court Oct. 15, 1908.)

1. SALES—ACTIONS FOR BREACH OF WARRANTY—PLEADING—SUFFICIENCY.

A complaint alleging that plaintiff applied to defendants to purchase apricot trees, and that defendants sold and delivered to plaintiff the trees, warranting them to be of a certain variety, clearly stated that both defendants sold the trees and gave the warranty, and was not ambiguous on the ground that it could not be ascertained therefrom whether plaintiff purchased from the defendant demurring or his codefendant, or whether such defendant or his codefendant gave the warranty.

2. TRIAL—TRIAL BY COURT—FINDINGS—CONSTRUCTION.

Findings must be construed so as to uphold a judgment rather than to defeat it.

3. SAME.

In an action for breach of warranty, plaintiff separately alleged several items of damage in different amounts, following which was the

general allegation that plaintiff, by reason of the premises, had sustained great damage in the several amounts stated, namely \$1,533.35. Defendant denied each of these allegations. The court found all the allegations of the complaint to be true, save those as to damages, and as to those allegations found "that plaintiff has sustained damages, by reason of the premises, in the sum of \$450." *Held* that, though the finding was uncertain in not indicating what elements were considered in ascertaining the amount of damages, it was sufficient, in the absence of any request for a more specific finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 916.]

4. APPEAL AND ERROR—BRIEFS—REPLY BRIEFS—SCOPE.

Points, made for the first time in a reply brief, are out of the orderly presentation of questions to be passed on by an appellate court and should be made in the opening brief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3097.]

5. SAME—RECORD—QUESTIONS PRESENTED FOR REVIEW—SUFFICIENCY OF EVIDENCE.

Findings of fact cannot be attacked on appeal, where the evidence is not before the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2911.]

6. SALES—ACTIONS FOR BREACH OF WARRANTY—TIME TO SUE.

Code Civ. Proc. § 338, subd. 4, requiring an action for relief because of fraud to be brought within three years from the accrual thereof, has no application to an action for mere breach of warranty.

7. LIMITATION OF ACTIONS—DEMURRER RAISING DEFENSE.

A general demurrer does not present the question of the bar of the statute of limitations.

8. PLEADING—DEFECTS AND OBJECTIONS—WAIVER.

Where defendant by the filing of a stipulation that the complaint should be amended by the addition of the prayer in the stipulation set forth, had notice of the relief desired by plaintiff, and proceeded to trial without objecting that the prayer had not been formally added to the complaint, it is too late, after judgment, to object to such omission.

9. APPEAL AND ERROR—HARMLESS ERROR—PLEADING.

Where it is clear that defendant suffered no substantial injury because the prayer for relief was not formally added to the complaint, Code Civ. Proc. § 475, declaring that no error or defect shall be regarded unless it affects substantial rights, applies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4075-4088.]

10. JUDGMENT—CONFORMITY TO PRAYER FOR RELIEF.

Under Code Civ. Proc. § 580, providing that where an answer is filed, any relief may be granted consistent with the complaint and embraced within issue, jurisdiction to grant any particular relief does not depend on the prayer, but upon the issues made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 442.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. C. Murphy against F. E. Stelling and another. Judgment for plaintiff against F. E. Stelling alone, and he appeals. Affirmed.

John B. Kerwin, for appellant. Nicholas Bowden, for respondent.

HALL, J. This is an appeal by F. E. Stelling from a judgment rendered against him for damages, upon breach of warranty upon a sale of certain apricot trees. The action was brought against F. E. Stelling and Edward Stelling, but judgment went against F. E. Stelling only, and he alone appeals.

The appeal comes to this court upon the judgment roll alone, without any bill of exceptions, and was taken more than 60 days after the rendition and entry of judgment. In the opening brief of appellant but two points are made as grounds for a reversal of the judgment. The first is that appellant's demurrer should have been sustained. The grounds of demurrer stated are that the complainant does not state facts sufficient to constitute a cause of action, and that the complaint is uncertain and ambiguous, for the reason that it cannot be ascertained therefrom whether the plaintiff purchased said trees from this defendant (appellant) or his codefendant Edward Stelling, and also that it cannot be ascertained therefrom whether this defendant or his codefendant made the representations and warranty that the trees were of the Blenheim variety. Appellant in his brief suggests no reason why the general demurrer should have been sustained, save to say, "We believe the complaint so defective that the general demurrer should have been sustained." The allegations challenged by the special demurrer are "that on or about the 25th day of February, 1894, the plaintiff applied to the defendants to purchase apricot trees of the number and variety hereinafter mentioned, and the defendants on said day sold and delivered to the plaintiff 521 apricot trees, and then and there, at the time of said sale, represented and warranted to said plaintiff that said trees were of the Blenheim variety." This is a clear and precise statement that the defendants—that is, both defendants—sold the trees and gave the warranty to plaintiff. It is in no sense ambiguous or uncertain in the regard suggested by the demurrer. The demurrer was properly overruled.

The second point urged for a reversal is that the court failed to find upon material issues. Plaintiff in his complaint separately alleged several items of damage in different amounts, and followed these several allegations with the general allegation "that said plaintiff by reason of the premises has sustained great loss and damage in the several amounts hereinabove set forth; that is to say, in the sum of \$1,533.35." Appellant denied each of these allegations. The court found all the allegations of the complaint to be true, save as to the allegations of damages, and as to those allegations found, "that plaintiff has sustained damages by reason of the premises in the sum of \$450," and gave judgment accordingly. We think this finding sufficient to support the judgment, in the absence of any request for a more spe-

cific finding. Facts were alleged that, if proven, would support such finding. The finding is uncertain, in that it does not appear what elements the court considered in ascertaining the amount of damages, but findings must be construed so as to uphold a judgment rather than to defeat it (*Breeze v. Brooks*, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257), and any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it (*Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309). In *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123, the court found damages in a lump sum, intended to cover both actual and punitive damages. It was there said: "Neither was it necessary for the court, any more than it would have been for a jury, if the case had been tried before a jury, to segregate in its findings the amount of actual damages from the amount given as exemplary damages, unless requested so to do." Although the finding in this case is not as certain as it might be, in that it does not indicate what elements the court considered in ascertaining the damages, it substantially disposes of all the issues upon the question of damages, and is sufficient in the absence, at least, of a request for a more specific finding. This disposes of all the points made by appellant in his opening brief.

In his reply brief he for the first time makes the points that the action was barred by subdivision 1 of section 339 of the Code of Civil Procedure, and that the court had no jurisdiction to render any judgment, because the complaint contains no prayer for any judgment. Upon these points it is sufficient to say that they should have been presented in the opening brief (*Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431); but, in addition to this manifest departure from the orderly presentation of questions to be passed on by an appellate court, we find no merit in either of the points. Defendant did not raise the question of the statutory bar by his demurrer, but by his answer he pleaded that the action was barred by subdivision 1 of section 339 of the Code of Civil Procedure, and by subdivision 4 of section 338 of the Code of Civil Procedure. The court found the facts against him upon the issues presented by these pleas. The evidence is not before us, and the findings of fact made by the court cannot upon this appeal be attacked. Section 338 of the Code of Civil Procedure has no application to the cause of action set forth; and as to section 339, the action may have been taken out of its operation by proof that the warranty sued on was in writing signed by defendant, or that

defendant had been absent from the state for a sufficient length of time to prevent the bar of the statute. Upon the issue raised by defendant's plea of the bar of the statute, the court found the facts against defendant, and upon the record before us we cannot review this finding. A general demurrer does not present the question of the bar of the statute of limitations. *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

Regarding the second point, that the court had no jurisdiction to render any judgment because the complaint contains no prayer for relief, plaintiff, upon suggestion of a diminution of the record, was allowed to file a certified copy of a stipulation filed in the trial court, which we think supplied the defect of the complaint. This stipulation is signed by the attorneys for both parties to this appeal, and is indorsed: "Stipulation adding prayer to complaint and amending same accordingly." It is in the words as follows: "It is hereby stipulated by and between the parties hereto that the complaint of plaintiff shall stand and be amended by the addition of the following prayer thereto, namely: Wherefore, plaintiff prays the judgment of said court against the said defendants for the sum of \$1,533.35, together with his costs herein expended. And that the answers of said defendants shall stand and be the answers to said complaint as amended." This prayer was not in fact written into the complaint or otherwise added thereto, save by filing the stipulation above set forth; but the cause was subsequently tried without objection. Under these circumstances a reasonable construction of the stipulation is that no further addition to the prayer was necessary or contemplated. The defendant, by the filing of the stipulation, had full notice of the relief desired by plaintiff, and proceeded to trial without objecting that the prayer had not been formally added to the complaint, and it is now too late after judgment to object to such omission. It is perfectly clear that, by the irregularity now complained of, defendant suffered no substantial injury, and the case is quite within the rule laid down in section 475 of the Code of Civil Procedure. Where an answer is filed, as in this case, the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue, and is not limited to relief demanded in the prayer. Section 580, Code Civ. Proc. In such case the jurisdiction of the court to grant any particular relief does not depend on the prayer of the complaint, but upon the issues made by the pleadings.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 677

DENTON v. VANN et al. (Civ. 443.)

(Court of Appeal, Third District, California.
Aug. 15, 1908. Rehearing Denied by Supreme Court Oct. 13, 1908.)

1. COUNTIES—POWER TO MAKE POLICE REGULATIONS.

The power granted counties by Const. art. 11, § 11, to make police regulations is to be exercised by the board of supervisors, and not by the people of the county directly.

2. INTOXICATING LIQUORS — ORDINANCES AGAINST LIQUOR LICENSES.

An ordinance of a county board of supervisors, prohibiting the granting of a liquor license in all precincts outside of incorporated cities, except in a precinct where at a general election a majority of the votes shall be for license, is a valid exercise of the police power, involving no delegation of legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 7.]

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by J. T. Denton against W. A. Vann and others, members of the board of supervisors of the county of Colusa, and said board. Judgment for defendants, and plaintiff appeals. Affirmed.

A. A. De Ligne, for appellant. Seth Millington (Dudley Kinsell and C. C. Hamilton, of counsel), for respondents.

NUTTER, J. This is an action for a writ of mandate to compel the board of supervisors of the county of Colusa to approve a bond presented by appellant to the board upon an application made by him for a license to conduct a saloon in Maxwell precinct in said county. The board declined to approve the bond, for the reason that the electors in Maxwell election precinct at the last general election voted that no saloon licenses should be issued in that precinct. Issues were properly joined, a trial had, at the conclusion of which the court made findings of fact, from which it drew its conclusions of law. Judgment thereon passed for respondent board, and this appeal was taken therefrom.

The court found that the appellant, at the beginning of the license year commencing on the 1st day of November, 1907, filed an application for a license to maintain and conduct a saloon in Maxwell election precinct for the sale of liquors, and complied with all the requirements of the ordinance known as No. 49; and that the board of supervisors rejected and denied the appellant's application and refused such license. It further found that Ordinance No. 49 was duly enacted on the 7th day of October, 1903; that said Ordinance No. 49 was amended by the enactment of Ordinance No. 56, which said amendatory ordinance went into full effect and force October 20, 1906, and ever since has been in full force, and has not been repealed, modified, altered, or amended. The portion thereof in controversy here is as follows: "Section 1. Section 8 of Ordinance No. 49 of Colusa county, California, dated October 7, 1903, as amended by Ordinance

No. 55, passed August 10, 1906, is hereby amended to read as follows: (a) No license shall be granted for the sale of spirituous, malt or fermented liquors or wines in any quantity, at any fixed place of business in any precinct, outside of a municipal corporation in said Colusa county, excepting for the license year ending November 1, 1907, to persons engaged in business on the 1st day of October, 1906, unless at the previous general election there shall have been placed upon the ballots in each of said precincts in the manner provided by section 1197 of the Political Code of the state of California, for submitting questions to the vote of the people the words: 'For granting liquor licenses. Yes. For granting liquor licenses. No.' (b) No license for the sale of spirituous, malt or fermented liquors or wines in any quantities at any fixed place of business, shall be granted in any precinct outside of a municipal corporation in said Colusa county where at the last general election the majority of votes cast upon said question as provided in subdivision (a) of section 1 of this ordinance was against the granting of liquor licenses."

The court also found: "That at the general election held in Colusa county, state of California, on November 6, 1906, for the election of state, county and township officers, there was placed upon the ballots used in said election, in each of the precincts of said Colusa county, outside of municipal corporations, in the manner provided by section 1197 of the Political Code of the state of California, for the submitting questions to the vote of the people the words: 'For granting liquor licenses. Yes. For granting liquor licenses. No.' That at the last general election held in Colusa county prior to November 4, 1907, and prior to December 2, 1907, to wit, the general election held in Colusa county, state of California, on November 6, 1906, for the election of state, county and township officers, the majority of votes cast upon said question, as provided in subdivision (a) of section 1 of said Ordinance No. 56 was against the granting of liquor license in the precinct of Maxwell in Colusa county, state of California, which said precinct of Maxwell is the precinct in which plaintiff proposes, and did propose, to engage in the business of selling liquors and wines, as set forth in his complaint and petition herein."

The court also made the following conclusions of law:

"1. That Ordinance No. 49, as amended by Ordinance No. 56, is a valid ordinance of Colusa county, and at all times since October 20, 1906, has been and now is in full force and effect.

"2. That said amendatory Ordinance No. 56 is a valid ordinance of Colusa county, and the terms and provisions are, and each of them is, within the scope of the power and authority of the board of supervisors of said

county to enact; that said amendatory ordinance is, and at all times since October 20, 1906, has been, in full force and effect.

"3. That the action of the board of supervisors of Colusa county in refusing to approve the bond of plaintiff herein was not arbitrary or without cause, but was in strict compliance with and obedience to the provisions of said Ordinance No. 49, as amended by said Ordinance No. 56, and was with the right, authority, and requirement of said ordinance.

"4. That plaintiff is not entitled to a writ of mandate directing or requiring defendants herein to approve the bond of plaintiff described in his complaint and petition herein, nor to any relief in the premises."

Section 11 of article 11 of the Constitution provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Section 1 of article 11 of the Constitution provides: "The several counties as they now exist are hereby recognized as legal subdivisions of this state." There is no controversy between appellant and respondents as to the fact that the provisions of the Constitution above quoted do directly confer on counties the power to make police regulations, and that the power is not dependent upon statutory, as distinguished from constitutional, authority; but appellant contends that the Constitution does not provide whether such power shall be exercised by the board of supervisors or by the people of the county directly. Respondents, on the other hand, contend that, not only is state legislative authority unnecessary to enable the board of supervisors to enact all requisite local laws for the regulation of the sale of liquor, but, on the contrary, any attempt on the part of the state Legislature to enact statutory restrictions upon this vested constitutional right of local legislation would be an invasion of the power of the local legislative body of the county and, to that extent, unconstitutional and void. The Constitution at the time of its adoption recognized the counties then in existence as legal subdivisions of the state duly organized, and provided that the Legislature in the creation of new counties should define their boundaries, and provide for the election of officers therein; and, when the people within the defined territory elected such officers, and they qualified, a local county government was thereby organized and established in such new county, and then there immediately vested in such county thus organized the constitutional grant of power. This direct constitutional grant of power to the counties must be construed to mean counties in their organized condition as bodies politic, and is an authorization by the Constitution to the local legislative body, as the representative of the county thus organized, to exercise the powers thereby granted in enacting local laws.

This brings us, then, to a consideration of the ordinances, and whether in their terms they are within the scope of the power and authority of said board of supervisors to enact, and whether the action of the board was arbitrary or without cause. The weight of authority is to the effect that the constitutional right of a person to engage in business does not apply to one desiring to engage in the retail liquor traffic, but before so engaging, one must apply for a permit to the sovereign power, which power has retained unto itself the right to permit or withhold the right altogether, or to grant the permit upon such conditions as it pleases, either in the mode of applying therefor, or in its exercise, if granted. It is the declared law of this state that the governing power of the county or municipality may prohibit the manufacture or sale of intoxicating liquors altogether, or that such county or municipality may impose such conditions upon the sale of such liquors as it pleases. It was said in *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747: "But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. And if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." This doctrine was affirmed in *Davis v. Board of Supervisors of Merced County* (Cal. App.) 95 Pac. 170. In *Re Kidd*, 5 Cal. App. 159, 89 Pac. 987, the court says: "This ordinance, regularly adopted, in plain terms prohibits the sale of all intoxicating liquors in said city by any person, except that the council may issue a permit to keepers of hotels having 40 bedrooms or more to sell vinous and malt liquors, served in the dining room thereof as part of a regular meal. The ordinance is claimed to destroy petitioner's right to engage in business upon the same terms as other citizens, and that it creates a monopoly in favor of a certain class. Let the correctness of his conclusions be assumed, and we have a case where the lawmaking power is regulating a business the tendency of which is injurious to the public morals, safety, and welfare. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than any other source, * * * There is no inherent right in a citizen thus to sell intoxicating liquors. *Foster v. Police Commissioners*, 102 Cal. 491, 37 Pac. 763, 41 Am. St. Rep. 194. It is only a calling not in any way injurious to the community which every one has a right to pursue. In *re Parrott* (C. C.) 1 Fed. 481, 6 Sawy. 349. That

the legislative power may prohibit a traffic by retail of intoxicating liquors is conceded. If the governing power can prohibit a thing altogether, it may impose such conditions upon its existence as it pleases, even arbitrary ones. *Ex parte Christensen*, 85 Cal. 213, 24 Pac. 747."

The ordinance does not delegate any legislative power. It is not a case where the electors are called upon to determine whether a certain ordinance shall be passed by the local legislative body. The board for itself, in its legislative capacity, determined to enact the ordinance without suggestion from the electors, and did enact it as a law, in full effect, October 20, 1906, and thereby did prohibit the granting of licenses for the sale of liquors in any quantity in all the precincts of said county outside of incorporated cities, except upon certain conditions. It prescribed a condition that must exist before a license could be granted, and the electors of the several precincts were called upon to express themselves by ballot upon this condition, with which condition an applicant for the issuance to him of a liquor license must comply and present proof thereof to the board, before it, the board, had jurisdiction, acting in its ministerial or quasi judicial capacity to grant said license; but if the electors did not express themselves upon this condition, the ordinance still remained in full force and effect as a prohibitive measure. Its validity as a local law was in no wise impaired. The court, in the case of *Davis v. Board of Sup'rs of Merced County*, supra, in speaking to the question of the condition imposed, and in comparing the points enunciated in *Re Bickerstaff*, 70 Cal. 35, 11 Pac. 393, said: "We see no essential difference in the two cases. In the *Bickerstaff* Case the license could not be granted unless a certain certificate of citizens attested the good moral character of the applicant, while here the license is not to be granted if a certain number of electors protest against it. In both cases the ordinance prescribed the condition on which the applicant may hope for the success of his application—in the one case his application is made to depend upon his obtaining a certificate of certain persons; in the other it will be denied if certain persons object." So in the present case, to say that the board of supervisors could be legally governed as to any exercise of power in the granting or refusing of retail liquor licenses by a protest of a majority of the qualified electors of an election precinct, established by a written and signed petition, and that the same board could not be legally governed by the recorded will of the same qualified electors of the same precinct, established as the result of a general election held therein, would be to hold that there is more sanctity to be given to a mere signed petition than there is to the solemn, secret, and deliberate result secured through the safeguards of a general election.

It may be said, further, that if an ordinance permitting the protest of a majority of the electors of a precinct to govern and determine the board of supervisors of a county upon the question of refusing a license to sell intoxicating liquors by retail, is a valid exercise of authority on behalf of such board, we can see no reason why it is not within the scope or authority of such board to enact an ordinance, and be governed by its provisions, wherein the recorded will of the majority of the electors of an election precinct, as shown by the last general election, may be determinative and decisive upon the question of granting or refusing such license. In the one case a written protest, signed by a majority of the qualified electors of an election precinct, forms the basis of the denial of the license, independent of the character of the applicant, or the place where the proposed business of selling liquor is to be carried on; and, on the other hand, the applicant, as a condition precedent, must present to the board of supervisors, with his bond and application, evidence to the effect that a majority of the electors have at the last general election favored the granting of licenses in the election precinct where he proposes to establish his retail liquor business.

In principle we see no difference between the cases heretofore cited and the case at bar. The conclusions of law reached by the trial court were correct.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 659

In re WILKES et al. (Civ. 442.)

(Court of Appeal, Third District, California.
Aug. 15, 1908.)

1. ASSIGNMENT—SALARY OF OFFICER.

The salary of an officer is not assignable before it is earned, so that, in the case of an officer who receives a salary by the month, an assignment, purporting to be of his salary for a month, during all of which he is in the service, executed and filed before the end of the month, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 23.]

2. MANDAMUS—DEFENSES.

Before mandamus to compel a city auditor, with whom the transcript of a judgment against an officer of the city has been filed, to pay the officer's salary into court, as required by Code Civ. Proc. § 710, will be denied, because of the auditor having drawn his warrant for such salary, on the day the transcript was filed, in favor of one to whom the officer made an assignment of the salary, void because executed and filed before the end of the month, it must, at least, appear that the auditor acted in good faith, and that the warrant has been paid.

3. APPEAL AND ERROR—NECESSITY OF SHOWING ERROR.

Before a judgment will be reversed, error must be affirmatively shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Application by John Wilkes and another for mandamus against George Sievers, city auditor of the city of Stockton. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Webster & Webster, for appellant. C. W. Miller, for respondent.

CHIPMAN, P. J. Mandamus. The court made the following findings of fact and conclusions of law: Plaintiffs are copartners, and defendant Sievers is city auditor of the city of Stockton, whose duty it is to draw warrants upon the city treasurer for the payment of salaries of all city officials when due and payable. One Bert Harbin was the duly elected and qualified police clerk of said city, and became indebted to plaintiffs for the common necessities of life in the sum of \$126.80, for which amount plaintiffs duly recovered judgment in the justice's court on July 30, 1907, and said judgment is in effect and is final. The salary of said police clerk was the sum of \$1,104 a year, payable, \$92 per month, on the first day of each month for the previous month, under the charter of said city, and on August 1, 1907, there was due said Harbin, for salary as such police clerk, the sum of \$92, for the month of July, which he attempted to assign to one Williamson, by the following document: "Stockton Cal., July 1907. For value received, I hereby transfer and assign my claim against the city of Stockton, California, amounting to \$92, to H. E. Williamson, and hereby authorize the city treasurer to pay the same to him as assignee. B. Harbin"—and said alleged assignment was filed by said Williamson with the city auditor on or before July 30, 1907. On August 1, 1907, and while there was due and unpaid, and payable to said Harbin, his salary as aforesaid, plaintiffs filed with said auditor a transcript of said judgment, duly authenticated, with an affidavit, as provided in section 710 of the Code of Civil Procedure, claiming the right to avail themselves of the provisions of said section, whereupon it became the duty of said auditor to draw a warrant for the sum due said Harbin as aforesaid, in favor of the justice of the peace, in whose court said judgment was rendered, or to pay said sum to the said justice's court, but that said auditor failed, neglected, and refused, and still fails and refuses, so to do. It is further found that said salary "was nonassignable, and could not be assigned, and said alleged assignment is contrary to law, and was and is void as against public policy"; that said assignment was for the salary of said Harbin for the month of July, 1907, and was and is the only assignment, or attempted assignment, made by him to said Williamson; that plaintiffs are beneficially interested

in the drawing of said warrant in favor of said justice court, and have no plain, speedy, and adequate remedy at law; and that plaintiffs are entitled to a peremptory writ of mandamus, directed to said city auditor, commanding him to draw a warrant on the city treasurer in favor of said justice court "for the sum of \$90, being the amount of the salary of said Bert Harbin as police clerk of said city of Stockton for the month of July, 1907, less the sum of \$2 thereof, which is due to the police pension fund of said city of Stockton out of said salary under the charter of said city, or to pay said sum of \$90 into said justice court." Judgment was accordingly entered, from which and from the order denying his motion for a new trial defendant appeals.

The bill of exceptions does not purport to contain all the evidence submitted at the trial. The only testimony in the record is that of defendant Sievers, called for plaintiffs. He testified as follows: "Bert Harbin came to my office on July 31, 1907, and endeavored to draw his salary for the month of July, 1907, stating he wanted to leave town that night; but I refused to allow him to do so, but I took his affidavit, which is necessary under the city charter for a city officer to take before drawing his salary, and he left the office, and afterwards, and on the same day, he returned to my office with H. E. Williamson. The warrant was already made out to the order of H. E. Williamson, as the assignee of Bert Harbin, as a matter of clerical convenience, and because of the assignment, set forth in the petition, filed with me either on July 29, or July 30, 1907. That on August 1, 1907, I delivered to said H. E. Williamson the said warrant, as directed by Bert Harbin July 31, 1907. The assignment set forth in the petition is the only assignment made by Bert Harbin to H. E. Williamson for the salary for the month of July, 1907, and has not been changed in any way since it was filed in my office by H. E. Williamson."

Appellant makes the following points: (1) That the salary was assignable, citing sections 954, 1044, 1045, 1083, and 1084 of the Civil Code; *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179, and numerous other cases relating to assignments; (2) that Harbin had earned 30 days of his salary, and the assignment carried at least that much; (3) that as Sievers had issued and delivered the warrant, he cannot obey the mandate of the writ, it being out of his power to do so. It may be conceded that the salary of an officer may be assigned after it has been earned. The question here is whether it may be assigned before it is fully earned or by piecemeal. Should the officer who receives a monthly salary resign or be dismissed from his trust during the month, it may be also conceded that his claim for compensation may be assigned after it is

earned. Here, however, the officer was in service for the entire month of July, and still is, so far as it appears, and the claim which he undertook to assign was for the entire month, and it was for the entire month that a warrant was delivered to Williamson. It was decided in *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963, that an unearned salary cannot be assigned; that it is against public policy. See *Mechem on Public Officers*, § 874. The doctrine laid down in *Bangs v. Dunn* is well settled, both in England and the United States. 2 Am. & Eng. Ency. of Law, p. 1033. The reason for the rule is thus stated: "The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void, both in law and equity, as being against public policy." *Id.* We do not think an officer whose salary is payable monthly can split up his earnings and assign them from day to day as earned. But, however this may be, in the case here the assignment purports to be for the month's salary of \$92. It was executed and filed with the auditor before it was earned. The salary was not due and payable until August 1st, and on that day the transcript of plaintiffs' judgment was filed with the auditor. In issuing his warrant to Williamson he acted upon a void assignment, and his action thereon is void.

The remaining point is that, defendant having issued his warrant to Williamson, it is beyond his control, and mandamus will not compel him to do an impossible thing. As a general proposition, it is true that the court will not compel the performance of an act not within the power of the person to whom the writ issues. *Egilbert v. Superior Court* (Cal. App.) 91 Pac. 748. But we do not think the defendant can shield himself under this rule, for the reason that the outstanding warrant is void. Both defendant and Williamson, the payee of the warrant, are chargeable with knowledge that the warrant was unauthorized and void. So far as appears it has not been paid, and never will be paid. Before plaintiffs should be denied the relief sought by the invocation of the rule just stated, it should at least appear that Harbin acted in good faith, and that the warrant issued by him has been paid. For aught we know its payment has been enjoined and the warrant canceled. Before the judgment will be reversed error must be made affirmatively to appear. Plaintiffs' transcript of their judgment was filed with the auditor on the same day he issued his warrant to Williamson, and it may have is-

sued with the knowledge of the auditor and Williamson that the plaintiffs' transcript of judgment was then on file with the auditor.

From any view of the case we think the judgment and order should be affirmed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 641

PEOPLE v. O'BRIAN. (Cr. 73.)

(Court of Appeal, Third District, California.
Aug. 15, 1908. Rehearing Denied by
Supreme Court Oct. 13, 1908.)

1. EMBEZZLEMENT — INFORMATION — FIDUCIARY CAPACITY.

Where an information for embezzlement of the proceeds of a certificate of deposit alleged, in the language of Pen. Code, § 507, prohibiting embezzlement by a bailee, that defendant received the certificate of deposit as bailee, it was not necessary to allege the nature of the bailment, nor the particulars thereof, in order to charge the fiduciary relation between prosecutor and defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, §§ 47-50.]

2. SAME.

Where an information alleged that the prosecutor deposited with defendant, as bailee, a certain certificate of deposit of the value of \$250, etc., and that defendant cashed the certificate, and converted that sum, the fact that defendant was charged with having embezzled the money instead of the certificate was immaterial, under Pen. Code, § 507, declaring that every person who embezzles property intrusted to him, or the "proceeds thereof," is guilty of embezzlement.

3. SAME—OWNERSHIP OF MONEY.

An allegation that prosecutor was the owner of a certificate of deposit at the time he intrusted it to defendant as bailee; that defendant cashed it, and received the proceeds thereof, for and on account of prosecutor, and thereupon converted such proceeds—constituted a sufficient allegation of prosecutor's ownership of the money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, §§ 44, 45.]

4. INDICTMENT AND INFORMATION—VENUE.

An information, filed in Sacramento county for embezzlement, charged that defendant, "at the said county of Sacramento," in California, was intrusted by prosecutor, as bailee, with a certificate of deposit on the Silver Bow National Bank of Butte City, Montana, payable to prosecutor, and thereafter, on September 5th, "at and in the city, county, and state aforesaid," defendant cashed the certificate and converted the money. *Held*, that the words "Butte City" did not refer to the location of the offense, but was merely a part of the name of the bank issuing the certificate, and that as the word "county" could only refer to Sacramento, the information was not defective for failure to allege the venue of the crime with certainty.

5. EMBEZZLEMENT—CERTIFICATE OF DEPOSIT—ISSUANCE—CORPORATE CAPACITY OF BANK.

Where it was not charged that the bank issuing a certificate of deposit, the proceeds of which, \$250, defendant was charged with embezzling, was a party to the transaction, or that it was injured or had any relation to the certificate except by way of description, the information was not defective for failure to allege the bank's corporate capacity, or whether the certificate was issued by the bank, or covered money belonging to prosecutor there on deposit.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Cornelius O'Brian was convicted of embezzlement, and he appeals. Affirmed.

A. A. De Ligne, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

NUTTER, J. Appeal from judgment, and from orders denying the motion for a new trial, and denying the motion in arrest of judgment. The information in this case is entitled and was filed in the superior court of Sacramento county, state of California, and it charges that the defendant, on a certain day in September, 1907, "at the said county of Sacramento, in the state of California, and before the filing of this information, was then and there by one Michael Ward intrusted, as bailee, with certain personal property, to wit, a certificate of deposit for the sum of \$250, lawful money of the United States, on the Silver Bow National Bank of Butte City, in the state of Montana, payable to the said Michael Ward, then and there of the value of \$250, lawful money of the United States, and then and there the personal property of the said Michael Ward, and thereafter, on or about the 5th day of September, 1907, at and in the city, county, and state aforesaid, the said Cornelius O'Brian did cash said certificate of deposit, and did then and there receive and take into his (the said Cornelius O'Brian's) control and care the said sum of \$250, lawful money of the United States, for and on account of the said Michael Ward, and thereafter, and on or about said last-mentioned day, and in the said city, county, and state aforesaid, did willfully, unlawfully, feloniously, and fraudulently embezzle, convert and appropriate the said \$250 so secured to his (the said Cornelius O'Brian's) own use, without the consent of the said Michael Ward, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." Appellant demurred to the information upon the following grounds: (1) That the court had no jurisdiction of the offense charged; (2) that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code; (3) that more than one offense is charged; (4) that the facts stated do not constitute a public offense. The demurrer to the information was overruled. After conviction, and before sentence was pronounced, the defendant moved in arrest of judgment upon all the grounds set forth in the demurrer, and two additional grounds, namely: (1) That the information contains matters which, if true, would constitute a legal justification or excuse of the offense, and a legal bar to the prosecution; and (2) that it does not appear from the information that the offense was committed in Sacramento county. The motion in arrest

of judgment was by the court denied, and sentence pronounced, hence this appeal.

The evidence is not brought up, and the only question presented to the court for its consideration is the sufficiency of the information. Section 507 of the Penal Code, under which the foregoing information was framed, provides that "every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof to his own use, or secretes it, or them, with a fraudulent intent to convert to his own use, is guilty of embezzlement." It is contended that the information is insufficient, in that it fails to allege that the defendant was acting as agent, or in any other confidential capacity, toward Ward when he received the money which he is charged with having embezzled, or that the money was the property of Ward, and that he is not charged with having embezzled the certificate of deposit. It is alleged that Ward was the owner of the certificate of deposit payable to himself; that he intrusted the same to the defendant as bailee; that it was of the value of \$250 lawful money of the United States; that he had cashed it, received and took into his care and control, as the proceeds thereof, the said sum of \$250 in lawful money of the United States, for and on account of said Ward; and that he fraudulently converted the said sum of \$250 so received by him to his own use without the consent of said Ward. It having been alleged in the language of the statute that the defendant received the certificate of deposit as bailee, it was not necessary for the pleader to allege the nature of the bailment, nor the particulars or circumstances thereof. As was said in *People v. Gordon*, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174, and affirmed in *People v. Goodrich*, 142 Cal. 216, 75 Pac. 796: "The essential elements of embezzlement are the fiduciary relations arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. The origin or particulars of the relation need not be stated." Stating that the property was intrusted to defendant as bailee sufficiently showed the creation of a fiduciary relation, and it was not necessary to allege the circumstances of the felonious conversion. The fact that the defendant is charged with having embezzled the money instead of the certificate will not, in our opinion, avail him. The money was the proceeds of the certificate, and came into his care by reason of his cashing it; and, since it is provided by said section 507 of the Penal Code that "every person who embezzles property intrusted to him or the proceeds thereof, is guilty of embezzlement," he is, in either event, liable. The statement that Ward was the owner of the certificate at the time he intrusted it to the defendant; that defendant cashed it and received the proceeds thereof, coupled with the allegation

that he did so for and on account of Ward—is a sufficient allegation of Ward's ownership of the money.

It is further contended that the place of the embezzlement is not alleged with sufficient certainty, because the county of Sacramento, in the state of California, and Butte City, in the state of Montana, are both mentioned in the information, previous to the words "then and there" and "aforesaid"; that the reference through the word "said" and "aforesaid" does not identify, with any more certainty, the county of Sacramento, state of California, than it does Butte City, in the state of Montana. While the information is not as explicit in this regard as it should be, nevertheless we think it sufficient to support the judgment of conviction. The words "Butte City" as used in the information do not refer to that city as a locality or place where any transaction with the defendant occurred, but constitute a portion of the name of the bank issuing the certificate, and "the state of Montana," following the name of the bank, is descriptive only of the bank's location, and, in our opinion, has no reference to the venue necessary to be charged in the information. The word "county" is not mentioned in connection therewith, and is found only referring to Sacramento, wherein it is positively alleged defendant was intrusted with the certificate, the proceeds of which he embezzled. The information was dealing with the alleged act of the defendant; and, inasmuch as no more than one time or place had been mentioned in the information previous to the use of these words which related to the act of the defendant, the information is not open to the objection which might prevail if more than one time or place was mentioned prior to the use of said words when so referring to his acts. The subsequent use of the word "city" cannot be held to refer to Butte City as a place descriptive of the venue of the alleged crime, and can be totally disregarded, since, as above stated, Butte City was used only as a part of the name of the bank therein mentioned, and not as a place at which occurred any act charged against the defendant. Therefore, the words "then and there" and "in the city, county, and state aforesaid" must be construed as having reference only to Sacramento county, Cal. And the use of the word "city" as mentioned in said latter phrase must be treated as surplusage which can in no way vitiate the said information.

It is also urged that the information fails to state that the Silver Bow National Bank of Butte City is a corporation, or whether the certificate was issued by the bank, or whether it covered money which said Ward had on deposit in said bank. We think these objections are equally untenable. It is not charged that the bank was a party to the transaction with this defendant, or that it was in any wise an injured party, or had any relation to the certificate except by way of

description thereof. It would be true that, if it were charged that the bank was the party defrauded, it would be necessary to allege its corporate capacity, and prove the same at the trial. And it was equally unnecessary to allege whether the certificate was issued by the bank, or covered money belonging to said Ward there on deposit. These allegations would be directed to the question of value; and, inasmuch as the certificate is alleged to be of the value of \$250, so likewise the money embezzled, the information is therefore sufficient in that regard, and whether the certificate was of the alleged value was a matter of proof at the trial.

No other points are urged in behalf of appellant, except that it is stated generally in the brief on file that he relies upon all other errors appearing in the record. No other claimed errors have been pointed out. We have examined the record, and find the instructions full and fair. The information conforms to the requirements of section 950 of the Penal Code, and contains a statement of the acts constituting the offense in such a manner as to enable a person of common understanding to know what was intended, and is therefore sufficient.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J

8 Cal. App. 622

DAHLGREN v. SUPERIOR COURT OF
SANTA CRUZ COUNTY. (Civ. 508.)

(Court of Appeal, First District, California.
Aug. 13, 1908.)

1. CERTIORARI—GROUNDS—EXISTENCE OF REMEDY BY WRIT OF ERROR.

Certiorari cannot be used as a writ of error to correct errors of the trial court within its jurisdiction.

2. COURTS—"JURISDICTION."

Jurisdiction is the power to hear and determine a cause, and carries with it the power to decide a cause within the jurisdiction of the court incorrectly as well as correctly, and it does not relate to the rights of the parties, but to the power of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1.

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697-7698.]

3. CERTIORARI—GROUNDS—EXCESS OF JURISDICTION.

Under Code Civ. Proc. §§ 1365, 1368, 1369, 1411-1413, 1427, fixing the order in which persons are entitled to letters of administration, and authorizing the appointment of a special administrator, the court, having power to appoint a special administrator, does not exceed its jurisdiction in appointing a stranger a special administrator on his petition therefor, notwithstanding the petition of a daughter and heir at law and devisee and legatee of decedent for her appointment, and certiorari does not lie to review the order.

Certiorari by Caroline Colton Dahlgren to the superior court of the county of Santa Cruz to annul an order appointing a special administrator of Ellen M. Colton, deceased. Application denied, and writ discharged.

Chas. M. Cassin, Bart Burke, and Marcel E. Cerf, for petitioner. J. F. Riley, Barclay Henley, and Crittenden Thornton, for respondent.

HALL, J. This is an original proceeding upon certiorari, having for its purpose to obtain the judgment of this court, annulling an order made by the superior court of Santa Cruz county, appointing the First Federal Trust Company, a corporation, special administrator of the estate of Ellen M. Colton, deceased. Upon the filing of the petition by Caroline Colton Dahlgren, praying for the writ, the same was issued out of this court, and a return thereto was in due time made.

The facts of the case are briefly these: A petition for the probate of the will of Ellen M. Colton having been filed in the superior court of Santa Cruz county, a contest thereof was filed by Helen Sacher, a great granddaughter and heir at law of decedent, through her guardian. Thereupon an order was duly made appointing Walter J. Bartnett special administrator of said estate. Subsequently a petition was filed by the said granddaughter, acting through her guardian, praying for the removal of said Bartnett as such special administrator. Said Bartnett thereupon presented to the court his resignation as such special administrator, and the court made and entered an order revoking his letters and removing him as special administrator of said estate. No question is raised as to the regularity of any of the proceedings of the court up to this point. Immediately upon the removal of Bartnett as such special administrator, Caroline Colton Dahlgren, the only surviving child of deceased, filed her petition with the court in proper form, praying to be appointed special administratrix of said estate, and S. C. Rogers, as public administrator of Santa Cruz county, filed a similar petition for his own appointment. Both petitioners were represented by attorneys. The attorney for Helen Sacher objected to the appointment of either of said petitioners, and the court refused to hear evidence on behalf of such petitions, but made an order appointing the First Federal Trust Company such special administrator. This action took place on the 23d day of December, 1907. On December 30, 1907, the court made and entered an order revoking and setting aside the said order of December 23d, and on the next day, December 31st, the First Federal Trust Company presented and filed with the court its petition, praying to be appointed special administrator of said estate, and the court thereupon on said day and without notice granted such petition, and made and caused to be entered on the minutes of the court an order appointing said First Federal Trust Company special administrator of said estate, under which order it has qualified, and letters of special administration have been issued to it.

The question is thus broadly presented: Has

the court jurisdiction to appoint as special administrator of an estate a stranger to the estate in the face of the petition of a daughter and heir at law and devisee and legatee of decedent for her appointment as such special administratrix? We say, in the face of a petition by a daughter, for the court, upon making the first order appointing the First Federal Trust Company on December 23d, did not in terms deny the petition of Mrs. Dahlgren, so that, when the court vacated and set aside such order, there was left pending before the court the petition of Mrs. Dahlgren and the petition of Rogers, as public administrator. This was the condition when, on the 31st day of December, the First Federal Trust Company presented its petition, and the court granted the same.

It is earnestly urged by petitioner in this proceeding that the court in making its order acted without and in excess of its jurisdiction. Unless this contention can be sustained, petitioner's application must be denied, for it is well settled in this state that the writ of certiorari cannot be issued to correct errors, either of fact or of law, committed by the lower court within the limits of its jurisdiction. *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8; *Central Pacific R. R. Co. v. Placer Co.*, 46 Cal. 670. It is not contended that under the circumstances existing on the 31st day of December, 1907, when the court made its order appointing the trust company special administrator, it did not have power to appoint a special administrator of the estate of Ellen M. Colton, but only that it had no jurisdiction to appoint a stranger to the estate in the face of a petition by a daughter, who was not incompetent or otherwise disqualified. The authority to appoint a special administrator is given by section 1411 of the Code of Civil Procedure, and also, upon the resignation or removal of an administrator or executor, by section 1427 of the same Code. Section 1412 of the Code of Civil Procedure provides that "the appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator." The following section (1413) provides that, "in making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment." In the case before us the only person who could claim to be entitled to letters testamentary is Bartnett, who had resigned and been removed as special administrator. The order in which persons are entitled to letters of administration is fixed by section 1365. Under this section, a surviving husband or wife, or his or her nominee, is first entitled, and children are second, and an entire stranger to the estate is tenth in right, but any one of these may be rejected if incompetent. Sections

1368, 1369. It is for ignoring the order of preference fixed by section 1365 of the Code of Civil Procedure, without a showing of incompetency on the part of the petitioner, that it is now claimed that the order made by the court is without or in excess of its jurisdiction. For the purposes of this decision, it may be conceded that the court committed gross error in so doing; but from this it does not necessarily follow that the court acted without or in excess of its jurisdiction. Jurisdiction is generally defined as the power to hear and determine a cause. This is the definition given by the standard law dictionaries (Bouvier and Anderson). It necessarily carries with it the power to decide a given cause or controversy within the jurisdiction of the court incorrectly as well as correctly. In *State of Rhode Island v. State of Massachusetts*, 12 Pet. 718, 9 L. Ed. 1233, it is said: "Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them; the question is whether, in the case before a court, their action is judicial or extra-judicial; with or without authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

It was said in *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536: "Jurisdiction does not relate to the rights of the parties as between each other, but to the power of the court." This language was quoted with approval in *Fisher v. Hepburn*, 48 N. Y. 41, and is particularly appropriate to the case at bar, where it must be conceded that the court had power to appoint a special administrator, and under certain conditions might rightfully and without error appoint either one of the applicants then before it. In *Ex parte Watkins*, 32 U. S. 568, 8 L. Ed. 786, the rule is laid down that "the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it at all." This language was quoted with approval in *United States v. Maney* (C. C.) 61 Fed. 140.

Coming now to decisions in our own state, we find the same or similar views repeatedly expressed. In *Ex parte Bennett*, 44 Cal. 84, it is said: "Jurisdiction has often been said to be the power to hear and determine. It is in truth a power to do both, or either, to hear without determining, or to determine without hearing." "It is not the particular decision given which makes up jurisdiction, but it is the authority to decide the question at all. Otherwise the distinction between erroneous exercise of jurisdiction, on the one hand, and the total want of it, on the other, must be obliterated." *Chase v. Christianson*, 41 Cal. 253. In *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8, the lower court had granted a motion to dismiss an appeal taken to it

from the judgment of a justice's court. The appeal was in all respects regularly taken, and the superior court under the law should not have dismissed the appeal. Speaking of the action of the court in dismissing the appeal, it was said: "If it had jurisdiction to hear the motion, and as to that matter there can be no question, then its ruling upon the motion was simply an exercise of that jurisdiction; and, however erroneous such ruling might be, it would be only an error of law, in no manner subject to review by an original proceeding in this court. In this case the court had jurisdiction to hear the motion, and it would be an absurdity to say that upon the submission of the matter the court had jurisdiction to deny the motion to dismiss the appeal, but no jurisdiction to grant it."

* * * It may be conceded that the action of the court in dismissing the appeal was entirely without support in law, and furnished ample material to justify a reversal of the order if a proper matter for review under the statute; but such may be the fact, and yet no question of excess of jurisdiction be involved." In *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565, the superior court had erroneously stricken out an answer filed by a defendant, and entered judgment against him without any further trial, in a case appealed from a justice's court. The court, upon the application for a writ of certiorari, said: "Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision made. The court in this case had the power, and in the regular course of proceeding in the disposition of the case before it was actually called upon to determine, as a matter of law, whether or not the answer of petitioner was properly filed, and whether he was legally in default in the action; and the fact that the court erred in such decision does not render its judgment void." Each of the two last cited cases was a case where no right of appeal existed, and the petitioner was without redress as to the action of the lower court founded upon a pure error of law. In *White v. Superior Court*, 110 Cal. 60, 42 Pac. 480, the court quoted with approval from *Von Roun v. Superior Court*, 58 Cal. 358, this language: "If the order is one which the court had power to make, it is not for us to inquire whether this power was properly exercised or not. The writ of review is not a writ of error." To the same effect is *History Company v. Light*, 97 Cal. 56, 31 Pac. 627. In *Woodward v. Superior Court*, 95 Cal. 272, 30 Pac. 535, upon an application for a writ of prohibition, it was said: "The court had jurisdiction of the subject-matter and of the parties. It had the power therefore to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction." See, also, *Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688, where the above language is

quoted with approval. So in the case at bar the court had jurisdiction of the subject-matter. It is not contended that it was without power to appoint a special administrator of the estate of Ellen M. Colton, deceased, under the conditions existing. It also had jurisdiction of the parties. The statute authorizes the appointment to be made at any time and without notice. When the court made the appointment, there was pending before it three petitions upon behalf of three different applicants, either one of whom the court under certain conditions might rightfully appoint or refuse to appoint. Each petitioner was an actor asserting a claim adverse to each of the other petitioners. The court decided the controversy in favor of the trust company and against the claim of petitioner, Mrs. Dahlgren. It may be said that the court committed a gross error of law in so doing; but the writ of certiorari cannot be used in this state as a writ of error. The court had jurisdiction of the subject-matter, and of the parties, and the order was one that it had power to make. It therefore did not exceed its jurisdiction in making the order complained of.

We have reviewed the authorities and gone to considerable length into the question of what constitutes jurisdiction because of the case of *In re Ming*, 15 Mont. 79, 38 Pac. 228, relied on by petitioner. The decision in this case, by two of the three justices constituting the court, does support the contention of petitioner, and was based upon statutes, so far as they relate to the appointment of special administrators, in substance the same as ours. The majority of the court held that the probate judge in appointing the public administrator in preference to the children of the decedent acted in excess of jurisdiction, although no application had been made by the children when the petition of the public administrator was filed and his appointment made. After the appointment had been made, the children petitioned to have the same vacated, and one of their number appointed. The entire argument of the court is devoted to showing that under the laws of Montana the children were entitled to preference, and the court in its opinion nowhere discusses what constitutes jurisdiction, or attempts to draw any distinction between error of law merely and want of jurisdiction. The third member of the court in a dissenting opinion holds that the order was not in excess of the jurisdiction of the court. The conclusion reached in the prevailing opinion in the *Ming* Case does not commend itself to our judgment.

The application of petitioner must be denied, and the writ discharged; and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 595

PEOPLE v. WILLIAMS. (Cr. 88.)

(Court of Appeal, Second District, California.
Aug. 6, 1908.)

1. CRIMINAL LAW—APPEAL—APPEALABLE ORDERS.

Under Pen. Code, § 1259, providing that upon an appeal by defendant from a judgment the court may review any intermediate order, which may have affected the judgment, an order overruling a motion to set aside an information is not appealable, but is reviewable on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2591.]

2. SAME—NECESSITY OF BILL OF EXCEPTIONS—REVIEW OF RULING ON INFORMATION.

By the direct provisions of Pen. Code, § 1172, exception may be taken to a decision denying a motion to set aside an information, and section 1174 provides a mode for the authentication and settling of such exceptions in a bill of exceptions. *Held*, that an order overruling a motion to set aside an information would not be reviewed upon evidence taken at the preliminary examination set out in the minutes of the trial, but not incorporated in a bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2924.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

John Williams was convicted of burglary, and he appeals. Affirmed.

Matthew S. Platz, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. This is an appeal on the part of the defendant from a judgment of conviction of the crime of burglary.

The only assignment of error upon which it is urged the judgment should be reversed is the denial of the defendant's motion to set aside the information filed against him upon the ground that he had not been legally committed by a magistrate before the filing of the information. It appears from the minutes of the trial that, in support of the motion, defendant introduced in evidence the transcript of the proceedings of defendant's preliminary examination had before the justice of the peace as transcribed by the shorthand reporter who acted in such capacity at said preliminary hearing. This evidence is not incorporated in a bill of exceptions, but is set forth in the minutes of the trial. The appeal is upon the judgment roll.

An order denying a motion to set aside an information is not an appealable order, but reviewable on appeal from the judgment under the provisions of section 1259 of the Penal Code, which is as follows: "Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." In discussing a like order, the Supreme Court in *People v. Simmons*, 119 Cal. 1, 50 Pac. 844, says: "As the motion, if granted, would have affected the judgment, the order may

be reviewed on this appeal from the judgment, the proceedings having been brought up by bill of exceptions." The proceedings here, however, have not been brought up by bill of exceptions, nor in any other mode of authentication provided by law. By express provision of section 1172 of the Penal Code exception may be taken by either party to the decision of the court in granting or denying a motion to set aside an information. And section 1174 of the Penal Code provides a mode for the authentication and settling of such exceptions in a bill of exceptions. These sections provide the only mode for obtaining a review of the order which appellant claims to have been erroneously made. Evidence embodied in the minutes and exceptions noted in the minutes as here presented furnish no authenticated or legal record from which we can determine whether the court erred in making the order. *People v. Terrill*, 131 Cal. 112, 63 Pac. 141; *People v. Long*, 121 Cal. 494, 53 Pac. 1097; *People v. Emmons* (Cal. App.) 95 Pac. 1032.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 600

PEOPLE v. IZLAR. (Cr. 94.)

(Court of Appeal, Second District, California.
Aug. 8, 1908.)

1. CRIMINAL LAW—APPEALABLE ORDERS.

Under Pen. Code, §§ 1237, 1238, declaring the cases in which appeal may be taken, an order denying a motion to set aside an information is not appealable; but objection to it may be considered on appeal from the judgment.

2. SAME—APPEAL—BILL OF EXCEPTIONS.

The remedy provided by Pen. Code, § 1174, for a party claiming that the trial judge has refused to settle the bill of exceptions according to the facts, application to the Supreme Court to prove the same, not having been availed of, the statements in the bill of exceptions must on appeal be taken as true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2894-2896.]

3. SAME—AMENDING BILL OF EXCEPTIONS.

That an amendment, consisting of a copy of the docket of the committing magistrate, was present, and was made a part of the bill of exceptions, at the hearing of defendant's motion to settle the bill, is enough; no preparation and service of amendments by a district attorney being required by Pen. Code, § 1174.

4. SAME—APPEAL—SUFFICIENCY OF RECORD TO SHOW ERROR.

The record on the motion to set aside the information, on the ground that defendant was not informed of his rights to counsel on the preliminary examination, being merely an uncertified excerpt from the transcript of testimony taken by the reporter, containing a recital that defendant appeared in court, unaccompanied by counsel, and containing no statement that defendant was advised of his right to counsel, followed by a stipulation that the transcript of the proceedings before the magistrate "shows nothing aside from the above, except the taking of the testimony and the holding of defendant to answer," does not negative the fact that the magistrate fully informed defendant as to his right to counsel.

5. INDICTMENT AND INFORMATION—DESIGNATING OFFENSE BY NAME.

The facts charging the offense of assault with a deadly weapon being clearly stated in the information, it is immaterial that it designates it as an "assault with a deadly weapon with the intent to commit murder."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 180.]

6. CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Refusal to instruct as to assault with intent to commit murder, and to define murder and manslaughter, is harmless; the conviction being only of assault with a deadly weapon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3154-3169.]

7. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

A requested instruction that defendant was justified in killing C., if he believed himself in danger of suffering bodily harm and injury from C., was bad, as omitting the elements of the character of the threatened injury.

8. CRIMINAL LAW—APPEAL—HARMLESS ERROR—EVIDENCE.

Exclusion of testimony is harmless, the fact sought to be shown appearing by other evidence, and not being controverted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Appeal and Error, §§ 3145-3153.]

9. WITNESSES—EXAMINATION—REFRESHING MEMORY.

While the district attorney may not, except under certain exceptional circumstances, impeach his witness, he may refresh his memory by reading from the transcript of his testimony at the preliminary examination; but he may not use this as a subterfuge to get before the jury incompetent evidence tending to make a case for the prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 897-898.]

10. CRIMINAL LAW—APPEAL—NECESSITY OF OBJECTIONS BELOW.

In the absence of objection raising the point, it cannot be held that the court erred in allowing the district attorney to refresh the memory of his witness by reading from the transcript of his testimony at the preliminary examination, on the ground that it was a mere subterfuge to get before the jury incompetent evidence.

11. WITNESSES—IMPEACHMENT.

The district attorney does not impeach his witness by reading from the transcript of his testimony at the preliminary examination to refresh his memory; the statements of the witness at the trial and at the preliminary examination being easily reconcilable.

Appeal from Superior Court, Kern County;
Paul W. Bennett, Judge.

William R. Izlar was convicted of crime, and appeals from the judgment of conviction and certain orders. Affirmed.

Matthew S. Platz, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appeals from an order denying a motion to set aside an information, a judgment of conviction of the crime of assault with a deadly weapon, and an order denying a motion for a new trial. The first order is not appealable (Pen. Code, §§ 1237, 1238), but the objection to it may be considered under the appeal from the judgment. Defendant was informed against for the crime

of "assault with a deadly weapon with intent to commit murder." Upon arraignment he moved to set aside the information upon the ground that he had not been legally committed by a magistrate. Section 995. In support of this motion, he contends that he was not informed of his right to counsel upon the preliminary examination. As disclosed by the bill of exceptions, the motion was made on "all the papers on file in the case and specifically the transcript of the proceedings taken at the preliminary examination." The record on the motion consists of an excerpt from the transcript of testimony taken by the shorthand reporter at the preliminary examination and a certified copy of the docket of the justice before whom the examination took place.

There is a recital in the portion of the transcript read that "the defendant appeared in court, unaccompanied by counsel." It contains no statement that defendant was advised of his right to counsel, and is followed in the record by stipulation that the transcript of the proceedings before the magistrate "shows nothing aside from the above except the taking of the testimony and the holding of the defendant to answer to the superior court." The justice docket contains the entry: "Sept. 30, 1907, defendant arraigned on said charge and by the court duly informed of all his rights." The copy of the justice docket was inserted in the bill of exceptions by way of amendment at the time of the hearing of defendant's motion to settle the bill, and defendant objected to its being included in the bill on the grounds that "the district attorney had failed to prepare and present the proposed amendment," and, also, "on the further ground that defendant's proposed bill of exceptions contained a correct copy of all the proceedings had before the committing magistrate as taken down by the shorthand reporter," etc. Appellant contends that we should rule upon his exceptions to the settlement of the bill of exceptions by the trial judge and exclude the justice's docket from consideration in passing upon the trial court's action in denying defendant's motion to set aside the information. This we cannot do. The statute (Pen. Code, § 1174) provides relief for a party who claims that the trial judge has refused to settle the bill of exceptions in accordance with the facts. Defendant did not avail himself of the remedy thus provided, and we must take the bill as we find it and the statements in it as being absolute verity. *People v. Goldenson*, 76 Cal. 328, 351, 19 Pac. 161. If the matter were one which we could consider at this time and in this way, we should still be compelled to hold that against the objections made by defendant the trial court was still justified in its ruling on the motion. The first objection is met by the physical fact that the amendment was present and made a part of the bill. There is no prepara-

tion and service of amendments by a district attorney required by section 1174. The excerpt presented as all the proceedings at the preliminary examination shows on its face that it is not all of the proceedings before the magistrate. It contains no certificate of the reporter, and, even if it did, this would make it but prima facie evidence of the matters which it contained. *People v. Cox*, 76 Cal. 281, 18 Pac. 332. If the stipulation be considered as supplying the omission, it does not negative the fact that the court fully informed the defendant as to his right to counsel and all other rights. We are not dependent upon the justice's docket in order to sustain the ruling of the trial court on the motion to dismiss the information.

In support of the demurrer to the information, it is contended that the information is defective because it designates the crime committed as an "assault with a deadly weapon with the intent to commit murder." The name given the offense is not material if the facts charging an offense be clearly stated. *People v. Morley* (Cal. App.) 97 Pac. 84; *People v. Eppinger*, 105 Cal. 38, 38 Pac. 538. The designation of the crime here used has been expressly held not to constitute a charging of more than one offense (*People v. Beam*, 66 Cal. 394, 5 Pac. 677), and the demurrer was properly overruled. The instructions requested by the defendant relating to the intent necessary in establishing the crime of assault with intent to commit murder became immaterial and their refusal harmless and nonprejudicial, since the verdict of the jury was for the minor offense of assault with a deadly weapon. *People v. Green*, 1 Cal. App. 432, 82 Pac. 544. The refusal to give the definitions of murder and manslaughter was not prejudicial for the same reason.

The instruction predicated upon self-defense was also properly refused. If given, it would have instructed the jury that the defendant was justified in killing Chappell if "he believed himself in danger of suffering bodily harm and injury from Chappell." This would have eliminated all element of the character of the injury threatened and the reasonableness of the belief upon defendant's part. Pen. Code, §§ 197, 198. The question asked of the witness Ashton by defendant on cross-examination was not directly in line with the apparent purpose of his direct examination, but was well within the scope of proper cross-examination and the objection of the district attorney should have been overruled, but it is clear that the ruling of the court in sustaining the objection did not prejudice the defendant in any way. The question sought to elicit evidence that defendant was intoxicated at the time of the shooting. This appears by the testimony of other witnesses, and was not controverted. On redirect examination of one of the witnesses for the people the district at-

torney asked the question: "Did you see Chappell [the complaining witness] and the defendant shake hands and make up before the shooting occurred?" To this the witness replied: "No, sir; I did not." Also, the question: "Do you remember anything being said about making up?" To this the witness replied: "Only when the defendant asked the first time to shake hands." Thereupon the district attorney stated that he would refresh the witness' memory from notes taken at the preliminary examination. To this the defendant objected on the ground that it was a cross-examination by the prosecution of its own witness. The objection was overruled, and the district attorney proceeded to read as follows (giving the page of the transcript): "And Chappell would not have anything to do with him, so he went over there and sat down and the surveyors got around him and got to talking to him, and they made it up to have a drink and to make friends, I think. I never paid much attention to that part of the fracas." The witness thereupon said: "I do not remember making any such statement as that. I know there was words spoken about all have a drink. The gang walked up to have a drink while the defendant walked in the back room to get his coat. I never saw no hand shaking or anything of that kind." As said in the Durrant Case, 116 Cal. 213, 48 Pac. 84: "The witness would have had the undoubted right to read his testimony given upon the examination for the purpose of refreshing his memory. Code Civ. Proc. § 2047. Such a transcript may at least be regarded as a private memorandum. Reid v. Reid, 73 Cal. 206, 14 Pac. 781. When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury." On the other hand, a pretense of refreshing the memory from such a transcript cannot be made a subterfuge to get before the jury incompetent evidence and statements which tend to make a case for the people. People v. Creeks, 141 Cal. 532, 75 Pac. 101. If the circumstances of the case at bar bring it within the rule of the case last cited, there is no objection here upon which we can say the ruling of the trial court was erroneous. If it is meant by the objection that the district attorney was "cross-examining his own witness" that he was endeavoring to impeach him, this was not done. The statements of the witness in the two records are easily reconcilable, and it cannot be said that,

as explained by the witness, the evidence read from the transcript of the testimony taken at the preliminary examination in any manner prejudiced the case of the defendant. People v. Majoine, 144 Cal. 303, 77 Pac. 952. We do not, however, think the facts of this case bring it within the rule declared in People v. Creeks, and see no good reason for impugning the motives and good faith of the district attorney, as the record discloses nothing from which the inference can be drawn that he intended to do more than call the attention of the witness to what appeared to him to be an apparent discrepancy between the testimony of the witness on the trial and that at the preliminary examination with the view to reconciling them and ascertaining the real facts. The case for the prosecution was not strengthened by the matter read from the transcript.

No prejudicial error appearing in the record, the judgment and order denying the motion for a new trial are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 597

PEOPLE v. CLAUDIUS. (Cr. 90.)

(Court of Appeal, Second District, California.
Aug. 7, 1908.)

1. CRIMINAL LAW—TIME FOR TRIAL—CONSENT TO DELAY.

Though defendant was not brought to trial within 60 days after the filing of the information, yet his consent, within such time, that the trial should be set for the date fixed, relieved the prosecution, on the motion to dismiss, of the necessity of showing other good reason why the motion should be denied.

2. ABDUCTION — FOR PROSTITUTION — EVIDENCE.

Evidence on a prosecution for taking away from the custody of the mother, and without her consent, an unmarried female under the age of 18 years for the purpose of prostitution, held sufficient to warrant a conviction, on the principle that one is presumed to contemplate the probable consequences of his acts, though defendant and the girl testified that it was understood between them that she should not engage in prostitution, and there was no direct evidence that she did practice public prostitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abduction, § 22.]

3. SAME.

On a prosecution for taking away a girl for the purpose of prostitution, evidence that, before defendant's acquaintance with the girl, he had been married to and had lived with a prostitute, is competent on the question of the intent reasonably to be inferred from his relation with the girl, and his object in placing her under the surroundings shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abduction, § 19.]

4. SAME.

On a prosecution for taking away a girl for the purpose of prostitution, the costume provided her by the keeper of the resort in which defendant placed her, ostensibly as a dancing girl, is admissible as bearing on the intent and object in recruiting for the place.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

James Budd Claudius appeals from a con-

viction, and from an order denying a motion for a new trial. Affirmed.

R. W. Richardson and Richardson & Martin, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment of conviction, and from an order denying a new trial.

The information, filed October 9, 1907, charged the defendant with unlawfully taking away from the custody of the mother, and without her consent, an unmarried female under the age of 18 years for the purpose of prostitution. Within the 60 days next ensuing after the date of filing the information the cause, by consent, was set for trial December 9th, at which date it was commenced and thereafter concluded on December 12, 1907. While it is true that the defendant was not brought to trial within 60 days after the filing of the information, yet his consent that the trial should be set for the date fixed obviated the necessity upon the part of the people of showing upon the motion to dismiss other good cause why the motion should be denied.

It is claimed upon this appeal that the evidence contained in the record is insufficient to warrant a verdict of guilty as charged. It is disclosed by the evidence that this young girl, claimed to have been abducted, was of that class who frequent the public dance halls of Los Angeles, where she met the defendant, a young man who, while but 24 years of age, had been once married to and lived with a woman whom he conceded was a prostitute, but who had procured an annulment of the marriage before defendant's relations with the girl began. The usual results which are to be expected from a dance hall acquaintance followed. Shortly after they had commenced their illicit relations, the defendant accepted employment as floor manager from one Moore, the keeper of a disreputable resort at Bakersfield. He and the girl accompanied Moore to Bakersfield, where she entered the house as one of the dancing girls kept for the entertainment of customers and after the dance to sell drinks. Above this dance hall rooms were provided where the girls, engaged in dancing and selling drinks during the early part of the evening, were permitted to entertain their admirers after the bar closed, and to retain money earned by them in such rooms. Defendant and this young girl occupied one of these rooms during their stay in Bakersfield. It is not shown by direct evidence that she actually practiced public prostitution, and both defendant and the girl testify that it was understood between them that she should not engage in prostitution, although it is shown that the other girls similarly situated did, and the rooms were maintained for that purpose. The girl gave all the money

she earned to defendant, and Moore provided her with a striking costume in which she appeared at the dances. This costume was in evidence and exhibited to the jury. We make this rather extended statement of facts to illustrate the conditions surrounding this girl, for which defendant was responsible, and which he knew existed before he took her there, and to demonstrate that the jury were warranted, even in the absence of direct evidence, in finding that the girl was taken away for the purpose of prostitution. Men of average intelligence could not have found otherwise. To say that the conduct of the defendant in relation to this girl was not satisfactory evidence of the intent charged, notwithstanding their joint protest, would be to destroy the force of the established principle that one is conclusively presumed to contemplate the probable consequences of his own acts. The intent charged was a matter of fact which was for the jury to determine, and with their determination we are perfectly satisfied.

The court did not err in permitting evidence of defendant's statements to the effect that, before his acquaintance with the girl, he had been married to and had been living with a prostitute. It was competent as tending to show to the jury the intent reasonably to be inferred from defendant's relation with this young girl and the object sought to be attained by him in placing her under the surroundings shown. Humiliating as it may be, courts and juries cannot close their eyes to the fact that among the degenerates in all cities has grown up a class who live upon the shame of women, and while it cannot be classed as a business, yet it has become so widespread that in a case like this, where there is involved the intent with which the defendant acted, it was proper to show that from his previous conduct and life he was of that class, and that in the prosecution of that nefarious calling he induced this girl to enter a life from which but one result could be anticipated.

The record discloses no impropriety in any statement made by the court during the progress of the trial, nor any language by the district attorney not warranted from the facts in evidence.

The admission in evidence of the costume provided by Moore for these women in his employ was proper, that the jury might have before them the whole of the surroundings into which this girl was placed, and that it might more intelligently determine the intent and object of those charged with recruiting victims for this den of vice.

The instructions given by the court embodied the law upon the particular subjects, and none so given is open to criticism.

We perceive no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

154 Cal. 243

PEOPLE v. QUIJADA. (Cr. 1,449.)

(Supreme Court of California. Aug. 31, 1908.)

1. CRIMINAL LAW—FILING INFORMATION—TIME OF FILING.

Under Pen. Code, § 1382, requiring a dismissal when a person, held to answer, has not been informed against or indicted within 30 days, unless good cause be shown, the fact that an important witness was unable to attend the grand jury session and give evidence within that time was good cause for not dismissing the prosecution.

2. SAME.

Where a demurrer is sustained to an indictment, and accused is remanded to await the action of a subsequent grand jury. Pen. Code, § 1382, providing that when a person is held to answer for a public offense, if an indictment or information be not found or filed within 30 days thereafter, the court must order the prosecution dismissed, unless good cause to the contrary is shown, has no application.

3. SAME—DISMISSAL—EFFECT.

Under Pen. Code, § 1387, making an order for the dismissal of an action a bar to another prosecution, if it is a misdemeanor, unless such order is explicitly made for the purpose of amending the complaint, but providing that such a dismissal shall not be a bar if the offense is a felony, in a prosecution for assault with a deadly weapon while confined in the penitentiary, an order of the court, after sustaining a demurrer to the first indictment, discharging defendant from the custody of the sheriff and remanding him to the custody of the warden until a second indictment was returned, did not amount to a formal dismissal, and was not a bar to a second indictment.

4. SAME.

Under the direct provisions of Pen. Code, § 1008, a direction of the court that the case be submitted to another grand jury prevents an order or dismissal from operating as a final judgment and bar to a subsequent prosecution.

5. SAME—APPEAL—GROUNDS OF MOTION TO DISMISS.

In a criminal prosecution, an objection that a grand juror was not qualified to act because he had been discharged as a trial juror within the year, which was not one of the grounds of defendant's motion to set aside the indictment or to dismiss, is not in strictness entitled to consideration upon appeal.

6. GRAND JURY—VALIDITY—QUALIFICATIONS OF GRAND JUROR—EFFECT.

Even if Code Civ. Proc. § 199, subd. 3, providing that a person is not competent to act as a juror who has been discharged as a juror, by any court of record, within a year, or who has been drawn as a grand juror in such court within a year, renders a trial juror who has been discharged within a year incompetent to sit upon a grand jury, this fact does not affect the validity of the indictment.

[Ed. Note.—For cases in point, see Cent Dig. vol. 24, Grand Jury, § 15.]

7. CITIZENS—CITIZENSHIP—EVIDENCE.

The prior naturalization and citizenship of grand jurors was established by the admission in evidence of the judgments of naturalization, and by a showing of their exercise of the rights and duties of citizenship.

8. ASSAULT AND BATTERY—ASSAULT WITH INTENT TO KILL—STATUTE—CONSTITUTIONALITY.

Pen. Code, § 246, imposing the death penalty upon a person undergoing a life sentence in the state prison, who, with malice aforethought, assaults another with a deadly weapon, is constitutional.

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Francisco Quijada was convicted of assault with a deadly weapon while confined in the State Penitentiary, and he appeals. Affirmed.

W. H. Renfro, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HENSHAW, J. Defendant was indicted by the grand jury of the county of Sacramento for an assault with a deadly weapon, with malice aforethought, while undergoing a life sentence in the State Prison at Folsom—an offense defined by section 246 of the Penal Code. He was tried and found guilty, and the death penalty was imposed. He has appealed from the judgment, and from the order denying his motion for a new trial.

The defendant was tried under an indictment found and returned on the 10th day of August, 1905. He had been indicted by a previous grand jury on the 11th day of April, 1905. His demurrer to this earlier indictment was sustained, and the court, being of the opinion that the objection upon which the demurrer was founded could be obviated, directed the submission of the matter to another grand jury. This latter order was made upon the 26th day of June, 1905, so that more than 30 days elapsed between that date and the day upon which the second indictment was returned. Prior to the finding of the last indictment the defendant moved the court for an order discharging him from the custody of the sheriff of Sacramento county, and directing that he be returned to the custody of the warden of the State Prison at Folsom, upon the ground that no indictment had been returned against him within 30 days. He renewed this same application in different form upon the trial, basing it upon section 1382 of the Penal Code, to the effect that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, when a person has been held to answer for a public offense, if an indictment is not found or information filed against him within 30 days thereafter. The court denied the motion, and properly. In the first place, good cause was shown, it being established that an important witness, Jolly, was unable to attend the session of the grand jury and give his evidence earlier than he did. But the section itself has no application to a case such as this, where a demurrer to an indictment has been sustained, and the prisoner remanded to custody to await the action of a subsequent grand jury. It was decided, as to a second information, in *People v. Lee Look*, 143 Cal. 221, 76 Pac. 1028, that the 30-day provision had no application, and the same rule pertains to a second indictment. See, also, *People v. Lundin*, 120 Cal. 311, 52 Pac. 807. It appears that the court, upon a writ of habeas corpus, discharged the defendant from the custody

of the sheriff of Sacramento county, and remanded him to the custody of the warden at Folsom, before the second indictment had been returned. It is contended that this order amounts to a formal dismissal of the charge, and is a bar to the second indictment. But this is in direct conflict with the provision of section 1387 of the Penal Code, and, moreover, a direction of the court that the case be submitted to another grand jury prevents an order of dismissal from operating as a final judgment and bar to further prosecution. Pen. Code, § 1008; *People v. Clarke*, 42 Cal. 623; *People v. Breen*, 130 Cal. 75, 62 Pac. 408; *People v. Kerrick*, 144 Cal. 46, 77 Pac. 711; *People v. Smith*, 143 Cal. 597, 77 Pac. 449. The motion to dismiss was, therefore, properly denied. Appellant contends that a grand juror, Thomas Waite, was incompetent to act as a grand juror, for the reason that he failed to possess the qualifications prescribed by section 199, subd. 3, Code Civ. Proc., in that he had been discharged as a trial juror within the year. This was not one of the grounds of his motion to set aside the indictment or to dismiss, and, in strictness, is not entitled to consideration upon this appeal (*People v. Renfrow*, 41 Cal. 39; *Shields v. State*, 149 Ind. 400, 49 N. E. 351; *Southern Pacific Co. v. Rauh*, 49 Fed. 701, 1 C. C. A. 416), but owing to the extreme gravity of the case, appellant's proposition may be considered upon its merits. Section 199, subd. 3, Code Civ. Proc., touching the incompetency of jurors, declares that, "A person is not competent to act as a juror: * * * (3) Who has been discharged as a juror by any court of record in this state within a year, as provided in section 203 of this Code, or who has been drawn as a grand juror in any such court as such within a year and been discharged." This provision seems to have reference to the incompetency of one to act as a trial juror, and renders incompetent to serve on a trial jury, either a trial juror who has served and been discharged within a year, or one who has served as a grand juror; but, if it does render incompetent to sit upon a grand jury a trial juror who has been discharged within the year, this fact does not affect the validity of the indictment. *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605. Appellant's further objection to certain of the grand jurors that they were aliens was overcome in each instance by evidence of their naturalization and citizenship. This proof was established by the admission in evidence of the judgments of naturalization, and by a showing of their exercise of the rights and duties of citizenship. *People v. Freeland*, 6 Cal. 98; *People v. Roberts*, 6 Cal. 215; *Boyd v. State of Nebraska*, 143 U. S. 178, 12 Sup. Ct. 375, 36 L. Ed. 103; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Providence Gold Mining Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641.

The last point urged by appellant is that section 246 of the Penal Code is unconstitu-

tional. The arguments advanced in support of this proposition received due consideration by this court in *People v. Finley* (Cal.) 94 Pac. 248, and it was there decided that the law was constitutional. We perceive no reason to change our views upon this question.

The judgment and order appealed from are therefore affirmed.

We concur: SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.

8 Cal. App. 630

ELLSWORTH v. KNOWLES et al.
(Civ. 513.)

(Court of Appeal, First District, California.
Aug. 13, 1908.)

1. CUSTOMS AND USAGES—EXPLANATION OF CONTRACT—TERMS OF PAYMENT—ADMISSIBILITY—"SIGHT DRAFT AGAINST PAPERS."

Under Code Civ. Proc. § 1870, subd. 12, providing that usage is admissible only where necessary to explain the character of a contract and for that purpose, the usage of the trade was admissible to show that a sale of apricots "sight draft against papers" meant that the seller should ship the goods and receive payment only on presentation of shipping receipt or bill of lading showing shipment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 30-33.]

2. SALES—PERFORMANCE—WAIVER—PROVISION FOR PARTIES' BENEFIT.

A provision in a contract for purchase of apricots requiring the "buyer to furnish lace paper with usual allowance for same," being, under the testimony, for the buyer's benefit, could be waived by permitting the seller to use his own lace paper.

3. CONTRACTS—PERFORMANCE—WAIVER—PROVISION FOR OWN BENEFIT.

One may waive a contract provision made for his own benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1480-1492.]

4. SALES—PERFORMANCE—SUFFICIENCY.

Where apricots were sold for August shipment, the buyer to furnish the labels free, if they were supplied before needed and before the seller was ready to fill the order, and were received and used by him, he cannot complain that the buyer did not furnish them during August.

5. WORDS AND PHRASES—"POUND"—"KILO."

The words "pound" and "kilo" designate units of weight of different systems; a pound being the unit of weight in the system in most common use in this country, while the word "kilo" is an abbreviation of the word "kilogram," which is the unit of weight of a system not in such common use in this country, but well known and understood.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 3931.]

6. SALES—PLEADING—VARIANCE BETWEEN ALLEGATIONS AND PROOF—PLEADING CONTRACT.

The complaint in an action for breach of contract alleged that defendant agreed to sell plaintiff a certain number of 12½ "pound kilo" boxes of apricots, but the written contract called for a certain number of 12½ "kilo" boxes of apricots, and the trial court based its findings on the capacity of the boxes as shown by the contract. The uncertainty of the complaint was not attacked either by demurrer or objection to evidence. *Held* that, while the allegation as to capacity was uncertain and contradictory,

under the circumstances, the finding of the trial court that the capacity was in accordance with the contract by rejecting the word "pound" was proper; the variance not being fatal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1166-1169.]

7. WORDS AND PHRASES—"KILO."

A kilo is the equivalent of 2.20462125 pounds, or practically 2½ pounds.

8. SALES—DAMAGES—MEASURE—BREACH OF CONTRACT—INTEREST—SALE OF GOODS.

By Civ. Code, § 3308, the measure of damages for breach of a seller's agreement is the excess of the value of the property to the buyer over the amount he agreed to pay for it, and section 3311 provides the measure of damages for breach of a buyer's agreement to accept, but neither section in terms allows interest. Section 3357, of the same chapter, provides that the damages provided in this chapter are exclusive of interest, except where otherwise expressly provided. *Held*, that interest should not have been allowed on damages for a seller's breach of contract.

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by E. A. Ellsworth against W. G. Knowles and another, copartners under the name of Knowles Bros. From a judgment for plaintiff and the refusal of a new trial, defendants appeal. Affirmed as modified.

William B. Hardy, for appellants. Leo B. Archer and Wm. P. Veuve, for respondent.

HALL, J. Appeal from judgment and order denying defendants' motion for new trial.

Plaintiff recovered judgment for the sum of \$912.50 as damages for failure of defendants to deliver certain apricots bought by plaintiff from defendants in 1905, and which they never delivered. Plaintiff was engaged in the business of drying, packing, and dealing in fruits at Niles, in Alameda county, while defendants were engaged in a similar business at San Jose, in Santa Clara county. The contract, the breach of which gave rise to this action, is contained in two letters, one sent by plaintiff to defendants, and one in reply sent by defendants to plaintiff. They are as follows: "Niles, Cal., July 6th, 1905. Knowles Bros., San Jose, Cal. Dear Sirs: We herewith confirm purchase from you of one car 1850-12½ kilo boxes of choice apricots at 5½, boxed, less 5%. Buyer to furnish lace paper with usual allowance for same; buyer also to furnish labels free. August shipment. Payment sight draft against papers. Respectfully yours, Edw. A. Ellsworth." And: "San Jose, Cal., July 8th, 1905. Mr. E. A. Ellsworth, Niles, Cal. Gentlemen: Your favor of the 6th inst. to hand, confirming purchase of 1850 12½ kilo boxes choice apricots at 5½ cts. boxed less 5%. Buyer to furnish lace papers with usual allowance, labels to be furnished by buyer free, August shipment, sight draft against documents. This is in order, and will receive our best attention. Yours very truly, Knowles Bros." The apricots were to be dried, and the price was 5½ cents per pound. About this there is no dispute. Defendants never delivered the apricots; and though plaintiff

sought to obtain a delivery of the apricots, and both wrote to and called on defendants, urging delivery, he never made any tender of payment therefor.

The principal point of controversy between the parties relates to the proper interpretation of the contract. Defendants contend that delivery and payment were to be concurrent acts, and that they could not be put in default without a demand for delivery, accompanied by tender of payment. Plaintiff, on the other hand, contends that the contract required the seller to deliver the apricots at his nearest shipping station (San Jose) f.o.b., procure a bill of lading, and that payment should be made on presentation of sight draft and bill of lading showing shipment of fruit. The complaint was framed upon this latter theory of the contract, which was adopted by the trial court, and findings and judgment followed in accordance therewith. In this we think the trial court was correct. The words "August shipment, payment sight draft against papers," strongly suggest that the seller was to ship the fruit, and should be entitled to payment only on presentation of papers showing such shipment: in other words, upon presentation of shipping receipt or bill of lading. But if there be any uncertainty in this regard, on the face of the contract, it was made clear by parol testimony that this was the meaning of such words according to the usage of the trade or business in which both parties were engaged. Evidence may be given of usage to explain the true character of a contract or instrument, where such true character is not otherwise plain. In such case usage is an instrument of interpretation. Code Civ. Proc. § 1870, subd. 12.

Appellants also urge that plaintiff never supplied the lace paper, and that this was an act that he was required to do before defendants could pack or deliver the apricots. But it was clearly shown that the provision, "buyer to furnish lace paper with usual allowance for same," was a provision for his benefit. One of the defendants so testified. While defendants were still trying to obtain the apricots to fill the contract, and before they finally abandoned their efforts to carry out the contract, plaintiff notified them that they could use their own lace paper. He thus waived a provision of the contract intended for his benefit. A party to a contract may waive a provision intended for his benefit. *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740. While there is some doubt from the evidence as to whether or not plaintiff supplied the labels before the end of August, it is certain that he supplied them before they were needed, and before defendants had procured any apricots to fill the order. The labels were sent to defendants, and received and retained by them to be used in marking the boxes of apricots. This was while they were representing that they would fill the order, and were trying

to buy apricots for this purpose from the growers. Under these circumstances they cannot now be heard to say that plaintiff did not comply with the contract requiring him to furnish the labels free.

The court found the market price of the fruit agreed to be delivered to have been \$912.58 more than the contract price. This finding is attacked as not supported by the evidence. The contention of appellant in this regard is predicated primarily on the claim that the complaint alleges a contract to deliver 1,850 12½ pound boxes of apricots, which we know, as a matter of arithmetic, would amount to 23,125 pounds. If that be the amount of apricots called for by the contract pleaded, it is certain that the evidence in the record does not sustain the finding. But we think counsel is in error in his construction of the allegation of the complaint. The allegation of the complaint (and which is admitted by the answer) is that defendants agreed to sell and deliver to plaintiff "1,850 twelve and one-half pound kilo boxes choice apricots at," etc. This allegation is certainly ambiguous and uncertain in its meaning; for the words "pound" and "kilo" designate units of weight and belong to different systems. The word "pound" is the designation of a unit of weight in the system in most common use in this country, while the word "kilo" is an abbreviation, sanctioned by common use, of the word "kilogram," which is the designation of a unit of weight in a system not of such common use in this country, but still a system well known and understood. The words "pound," "kilogram," and its abbreviation "kilo" are defined in the Standard Dictionary of the English language. With this understanding of the signification of the words "pound" and "kilo," it is apparent that the quantity designated by "1,850 twelve and one-half pound kilo boxes choice apricots" is uncertain. Either the word "pound" or the word "kilo" should be dropped from the expression.

The contract introduced in evidence without objection was perfectly definite and certain. It is contained in the letter of plaintiff to defendants and defendants' answer thereto, and calls for "1,850 12½ kilo boxes of choice apricots at," etc. Each letter specifies "1,850 12½ kilo boxes choice apricots," and the word "pound" is nowhere used in the letters making the contract. The court in its findings followed the language of the contract, and found that the defendants agreed to sell to plaintiff and to deliver to him "1,850 12½ kilo boxes choice apricots at," etc. No point was made upon the uncertainty appearing upon the face of the complaint, either by demurrer or objection to evidence. If the attention of counsel or the court had thus been called to the matter, doubtless the complaint would have been amended so as to conform without ambiguity or uncertainty to the facts as they existed in the contract. Doubtless the venerable and scholarly judge

who tried this cause resolved the uncertainty in the complaint in the light of the definite and certain terms of the contract, and so construed the complaint as alleging a sale of 1,850 12½ kilo boxes choice apricots. Under the circumstances disclosed by the record, we think he was correct in so doing. A kilo is the equivalent of 2.20462125 pounds, or practically 2½ pounds. A 12½ kilo box would thus contain 27½ pounds, and 1,850 of such boxes would contain 50,875 pounds. Under this view of the quantity of apricots agreed to be delivered there can be no doubt that the evidence in the record amply sustains the finding attacked.

The court in its conclusions of law decided that plaintiff was entitled to interest on the amount found as damages from the 1st day of September, 1905, to the entry of judgment, and judgment was entered accordingly for such interest. This is contrary to the rule laid down in *Hewes v. Germain Fruit Co.*, 106 Cal. 442, 39 Pac. 853, in an action for damages for breach of contract to purchase raisins, where the judgment for damages, with interest thereon to the entry of the judgment, was modified by eliminating therefrom the amount allowed as interest. The measure of damages for breach of contract to purchase property is laid down in section 3311 of the Civil Code, and for breach of contract to sell such property in section 3308 thereof. Neither section in terms provides for any interest, and both are subject to section 3357, Civ. Code, which provides that "the damages prescribed in this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." "This chapter" referred to in the foregoing section begins with section 3300, and ends with section 3360, and thus includes section 3308.

The judgment is modified by striking therefrom the words "together with interest thereon at the rate of seven per cent. per annum from the first day of September, 1905, until the entry of judgment, amounting to the sum of \$1,024.90," and, as so modified, the judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J

8 Cal. App. 607

STONER et al. v. CITY COUNCIL OF CITY OF LOS ANGELES et al. (Civ. 534.)

(Court of Appeal, Second District, California. Aug. 11, 1908.)

1. MUNICIPAL CORPORATIONS—OPENING STREETS—OBJECTIONS TO ASSESSMENTS—NOTICE OF HEARING.

Under Street Opening Act 1903 (St. 1903, p. 381, c. 268) § 19, providing that the city clerk shall, at the next regular meeting of the city council after expiration of the time for filing objection to the assessment for opening a street, lay said assessment, with all objections thereto filed with him, before the council, and the council shall hear the objections at such meeting,

or at such other time to which the hearing may be adjourned, objectors have to take notice that the objections will be heard at such next regular meeting, after expiration of the 30 days for filing objections, or at the time to which such hearing is at such meeting adjourned.

2. EVIDENCE—JUDICIAL NOTICE—CITY CHARTER.

The court will take judicial notice of the provision of the charter of a city that its council shall meet at least once a week.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 40.]

3. MUNICIPAL CORPORATIONS—OPENING STREETS—OBJECTIONS TO ASSESSMENT—LOSING JURISDICTION.

A city council having failed to take action at the next regular meeting after expiration of time for filing objections to an assessment for opening a street, either by hearing the objections or adjourning the hearing, as required by Street Opening Act 1903 (St. 1903, p. 381, c. 268), § 19, it lost jurisdiction to act in the matter, except on republication, as in the first instance, of the notice, under section 18 (page 380), of the filing of the assessment.

4. APPEAL AND ERROR—APPEAL FROM DECISION—RECORD—"JUDGMENT ROLL."

Though, where there is a return to a writ of review, the petition for the writ can serve no purpose on appeal, unless embodied in a bill of exceptions, the appeal being on the judgment roll, which, under Code Civ. Proc. § 1077, consists of the judgment, writ, and return thereto, yet a demurrer to the petition being in effect to adopt the facts in the petition as the return, the petition, on appeal from the judgment sustaining the demurrer and dismissing the writ, may be brought up and considered as the return, and therefore as part of the judgment roll.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3847; vol. 8, p. 7697.]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Petition by C. E. Stoner and others for writ of review directed to the city council of the city of Los Angeles and others. Demurrer to the petition was sustained, and the writ dismissed, and petitioners appeal. Reversed and remanded, with directions.

Chas. S. Burnell and Haas, Garrett & Dunigan, for appellants. Leslie R. Hewitt, City Atty., E. R. Young, Deputy, and Howard Robertson, Deputy, for respondents.

SHAW, J. This proceeding was instituted in the superior court of Los Angeles county to obtain a writ of review directed to the city council of the city of Los Angeles. The controversy grows out of the opening of Grand avenue, from Temple street to California street, the proceedings for the opening of which were had and taken under the street opening act of 1903 (St. 1903, p. 376, c. 268). It appears from the verified petition that appellants are the owners of lots and lands located within the district established by said council as being benefited by the opening of said street, and upon which the cost of such opening was apportioned by an assessment duly made upon the parcels of land located within the boundaries thereof. The assessment and diagram were filed with

the city clerk, who thereupon gave notice of such filing by publication for a period of 10 days; the first publication of said notice being made on the 18th day of October, 1907. On November 15, 1907, and within 30 days after the first publication of said notice, appellants filed objections to said assessment. It appears from said petition that no action was taken by said council upon these objections until Monday, December 23, 1907, at which time, as shown by the minutes of the proceedings of the city council as set forth in the petition, the "petitions, protests and communications were received and referred to their appropriate committees, to wit:

* * * No. 1,224 from the estate of T. D. Garvin, et al., protest against the assessment for the opening of Grand avenue between Temple street and California street. Set for hearing January 6th, 1908, at 11 a. m., and in the meantime referred to the city engineer for report as to frontage, and the clerk instructed to give notice in the manner required by law." On January 6, 1908, as shown by the minutes of the proceedings set forth in the petition, the engineer made his report to the effect that the protestants did not represent a majority of the frontage in said district, and, according to the minute entry of said proceedings, "the matter of the hearing of protests Nos. 1224 and 1229, Estate of T. D. Garvin and S. A. Waldron, et al., protesting against the opening of Grand avenue from Temple street to California street, coming on regularly at this time as a special hearing, the same was taken up, and Mr. Healey moved, seconded by Mr. Clappitt, that the report of the city engineer be adopted, and that the protests be denied and the assessment and diagram presented by the Board of Public Works be confirmed and adopted," which motion was adopted by a full vote. No notice of the time when said objections would be heard was served on the objectors. Upon the filing of this petition, the writ was issued as prayed for. Thereafter, instead of making a return of its proceedings as required by said writ, said respondents filed a demurrer, alleging that the petition did not state facts showing that petitioners were entitled to the writ. This demurrer was sustained, and a motion made at the time by respondents to have the writ theretofore issued dismissed was granted; whereupon a judgment of dismissal was entered in accordance therewith, from which petitioners prosecute this appeal.

The question presented by the record is the sufficiency of the verified petition to warrant the issuance of the writ. The effect of the demurrer on the part of respondents was, for the purpose of disposing of the question raised thereby, to adopt as their return the facts alleged in the petition. The question, therefore, is whether these facts entitled petitioners to the writ. By the provisions of section 18 of the street opening act of 1903

(St. 1903, p. 380, c. 268), the superintendent of streets, upon the completion of the assessment, is required to file the same with the city clerk, who shall give notice of such filing by publication for at least 10 days in a daily newspaper published and circulated in the city. Said notice shall require all persons interested, within 30 days after the date of the first publication of such notice, to file with the said clerk their objections, if any they have, to the confirmation of said assessment. Pursuant to said notice so given by publication, appellants did within the 30 days provided therefor file with the city clerk objections to the confirmation of said assessment. No other notice of the filing of said assessment, or the hearing of objections thereto, other than this publication, is required. Hence parties filing objections are not entitled to personal notice of the time and place when a hearing will be accorded upon their objections. The law fixes the time when the objections shall be heard. Section 19 of the act provides: "The clerk shall, at the next regular meeting of the city council after the expiration of the time for filing objections lay said assessment and all objections so filed with him, before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned." The objectors, therefore, were chargeable with notice that their objections would be heard at the next regular meeting of the city council after the expiration of the 30 days within which to file objections, or at such other time to which such hearing might at such meeting be adjourned. It was their duty to be present at such meeting, if a hearing was then had, or, if not had, to ascertain from the action then taken the time to which such hearing was adjourned.

By reference to section 13 of article 3 of the charter of the city of Los Angeles, of which this court will take judicial notice (Dillon's Municipal Corporations, § 83; 17 Am. & Eng. Ency. of Law, p. 936; Bituminous, etc., Paving Co. v. Fulton [Cal.] 33 Pac. 1117; People v. Potter, 35 Cal. 110; Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604), it will be seen that the city council of said city of Los Angeles shall meet at least once a week. The first publication of the notice was made on October 18, 1907, and the 30 days accorded for filing objections expired November 17, 1907, but, as shown by the record set out in the petition, the city clerk did not "lay said assessment and all objections so filed with him, before the council" until December 23, 1907—36 days after the filing thereof. It thus appears that after the objections were filed, and after the expiration of 30 days within which to file the same, they were not laid before the city council, and no action was had thereon until the expiration of a period during which, under the provisions of the charter, there were held

some four or five regular meetings of said city council, and that on December 23, 1907, without notice to the objectors, their objections were taken up and referred to the city engineer to report upon the number of feet frontage in the district represented by the objectors. It is apparent that the council was proceeding upon the erroneous theory that the objections purported to be protests of the holders of a majority of the frontage against the improvement, filed under the provisions of section 4 of the act, and not objections to the confirmation of the assessment as being inequitable. It is true by the minutes of the proceedings it appears that they adopted and confirmed the assessment, but in face of the fact that a hearing was not had at the time required by law under the publication of notice made, nor any action taken thereon at such time, we cannot indulge in the presumption that the objections were in any way considered other than as protests against the improvement, rather than objections to the assessment itself. The council, having failed to take any action at the next regular meeting after the expiration of the time for filing objections, either in the way of according a hearing or adjourning the hearing to some subsequent day, lost jurisdiction to act in the matter, except upon a republication of the notice in accordance with the provisions of section 18 of the act. The record of the proceedings may show an entirely different state of facts from that set forth in the verified petition, but the question under consideration here is the sufficiency of the petition as an affidavit to justify the issuance of the writ.

The appeal is on the judgment roll, which consists of the judgment, writ, and return thereto (section 1077, Code Civ. Proc.), and respondents contend that the petition cannot be considered on appeal for the reason that it is not incorporated in a bill of exceptions. It is true that, where a return is made, the petition or affidavit for the writ can serve no purpose on appeal, unless it is embodied in a bill of exceptions (Reynolds v. County Court, 47 Cal. 604; Rauer v. Justice Court, 115 Cal. 84, 46 Pac. 870); but, where there is interposed a demurrer (the filing of which is permissible in such cases under section 1109, Code Civ. Proc.), the effect of which for the time is to adopt the allegations of the petition as the return, the petition, upon the sustaining of the demurrer and rendition of judgment of dismissal, is substituted as and for the record in lieu of which it is accepted, and may be brought up and considered, not as the petition, but as the return, and therefore a part of the judgment roll (Stewart v. Superior Court, 101 Cal. 594, 36 Pac. 100).

The views herein expressed render it unnecessary to consider other points urged by counsel.

The judgment is reversed and the proceed-

ing remanded, with instruction to the trial court to overrule respondents' demurrer.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 698

HANEMAN v. WESTERN MEAT CO.
(Civ. 326.)

(Court of Appeal, First District, California. Aug. 17, 1908. Rehearing Denied Sept. 14, 1908; Denied by Supreme Court Oct. 15, 1908.)

1. ANIMALS—PERSONAL INJURIES—KNOWLEDGE OF VICIOUS PROPENSITIES.

The gist of an action for injuries from being kicked by a horse is the keeping of the horse with the knowledge of its vicious propensity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 228-237.]

2. SAME.

To recover for injuries received from being kicked by a horse, the evidence must show the vicious character of the horse, the owner's knowledge thereof, and the ignorance thereof of the person injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 228-237.]

3. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An employé assumes the risks ordinarily incident to his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543, 550.]

4. ANIMALS—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY—KNOWLEDGE OF VICIOUS PROPENSITY.

In an action for injuries received from being kicked by a horse, evidence held not to show knowledge by the owner of the vicious character of the horse.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Mark T. Haneman against the Western Meat Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Jesse W. Lillenthal and Jackson Hatch, for appellant. B. A. Herrington, for respondent.

COOPER, P. J. This action was brought to recover damages for injuries received by plaintiff from being kicked by a horse owned by defendant, while plaintiff was in its employ and driving the horse in connection with such employment. A verdict was rendered for plaintiff, on which judgment was entered. This appeal is from the judgment and the order denying defendant's motion for a new trial.

It is alleged that at the time of the injury plaintiff was employed, and for several months prior thereto had been employed, by the defendant to work in and about its meat market in the city of San Jose and vicinity, and to take and deliver meat to defendant's customers; that for such purpose defendant supplied plaintiff with a horse, attached by means of a harness to a meat delivery wagon; that the horse was owned by defendant, and kept for the purpose of drawing the delivery wagon, but that at all times said

horse "was vicious of temper, was of a ferocious and vicious disposition, and was of a kicking nature, possessed a habit of kicking and striking at whomsoever approached him or was within reaching distance of him"; that the vicious nature of the horse was well known to defendant, and was not known to plaintiff. If it be conceded that the horse was vicious, yet the gist of the action against defendant was keeping the horse with knowledge by the defendant of his vicious propensity. It is necessary that the evidence be sufficient to sustain the allegations of the complaint as to the vicious character of the horse, the defendant's knowledge thereof, and the plaintiff's ignorance thereof; otherwise the judgment cannot stand. It was incumbent upon the plaintiff to prove these matters, as they are of the essence of his case. The common law makes the owner of vicious domestic animals, with notice of their vicious propensities, responsible, for the reason that under such circumstances it is the duty of the owner to anticipate that such animals will commit such vicious acts as opportunity offers, and it is the duty of the owner to guard against such acts. It is not claimed that the horse was vicious at the time defendant purchased it, or that the proof shows that its general character was that of being vicious and ferocious. Certain specific acts are relied upon to show that the animal was vicious, which we will notice in detail. The horse was old. He was purchased by defendant a few months before the injury to plaintiff. At the time of the injury plaintiff had been working for defendant about eight or nine months, in different capacities in and about defendant's meat business, and had been driving the horse and delivering meat to defendant's customers for about six weeks. When injured he was driving the horse in his regular employment. He was 21 years of age. One Eddington, a witness called by plaintiff, who had been in the employ of the defendant, testified that some time prior to the time of the accident he had driven the horse, off and on, for two or three months; that on one occasion the horse kicked at him; that the horse turned toward him, and "I pulled his head the other way, and he made a bolt to start the other way. Then I pulled his head still the other way, and hit him with the whip, and it was at that time he kicked up." One Spottswood, a witness for plaintiff, testified that the horse kicked once while he was scraping the manure out of the stall from under the horse's feet, but that he might have touched the horse with his pitchfork; that the horse did not kick directly at witness, but straight out. Another witness for plaintiff, Shannon, testified that he worked for defendant five or six months, and drove the horse; that the horse could not be depended on, and that, "if you were not looking, and he got a shot at you, he would kick the top of your head off." This witness, however, did not tell of any instance

of the horse kicking or attempting to injure any one during the entire time he had been driving him. Plaintiff himself testified that the horse was large and slow, and could not be hurried; that he never had to fasten him when leaving the wagon because the horse would stand. Although defendant had been driving the horse six weeks before he was injured, he never knew of his kicking before; that he never heard of the horse being a kicker until he was kicked by him; that he was working for the defendant, with the other employes, for six or seven months, and never heard of the horse kicking at any one or of his being a kicker. During all this time one Dowdell was the manager of the defendant's business in San Jose, and had charge and supervision thereof. It does not appear that defendant or his manager had any knowledge that the horse had ever kicked at any one. Eddington testified that, after the occasion on which he states that the horse kicked at him, upon his return to the house he told about the horse having kicked at him, and that he "thinks" that Ziegenfuse and Dowdell were there at the time. Dowdell testified positively that he was not present on such occasion, never heard such statement, and that prior to plaintiff's injury he never heard of the horse kicking any one. One Ziegenfuse, a witness for plaintiff, testified that he heard Eddington make a remark one morning that the horse had kicked at him (Eddington), and that plaintiff was present sacking beef, not more than three or four feet away, when the remark was made, and that plaintiff said to witness, "What do you think of the old horse kicking Billy? (meaning Eddington)." This statement as to what plaintiff said to Ziegenfuse was not denied or in any way contradicted by plaintiff, and Ziegenfuse was plaintiff's own witness.

The above evidence does not show that the horse was vicious or that defendant had any knowledge of any act of viciousness on the part of the horse. The fact that the horse had upon one occasion kicked up when Eddington struck him with the whip, and upon another occasion, when his foot or leg was probably struck with Spottswood's fork while cleaning the stall, is not sufficient to show that he was vicious, or had a "habit of kicking at whomsoever approached him," as alleged in the complaint. We apprehend that such circumstances might be detailed in the history of the most gentle horse. If the horse was of a vicious nature, and had been in the habit of kicking, it is strange that plaintiff never heard any such thing from his fellow employes during the several months that he was employed with them in and about the meat market and in connection with the delivery of meats. It is also strange that, if such was the natural disposition and character of the horse, plaintiff continuously drove him for six weeks, and never upon any occasion knew of his kicking until the injury occurred. If the horse was a

dangerous horse, it seems reasonable that some one would have informed Dowdell of the fact. If he had a vicious character when defendant purchased him, it seems the fact could have been proven. He was then an old horse, and it does not appear that any person was ever before kicked by him. It has been said, in actions for injuries caused by being bitten by a dog, that every dog is entitled to his first bite before he becomes a biting dog. While it is true that the owner of a vicious animal, who knows that such animal is vicious, should be held liable to all persons for damages caused by the vicious acts of such animal if the owner allows such persons to be subjected to danger without warning, yet it is not the policy of the law to make the master an insurer against accidents that may happen to an employe in the ordinary course of his employment. The employe assumes the risks that are ordinarily incident to the business in which he is employed. The best trained horse may for the first time kick or run away. To hold the owner of such animal liable it must be shown that such owner failed in some duty to the party injured. In this case it is not shown that the horse was possessed of any characteristic vice, or that the defendant knew of any such vice.

The judgment and order are reversed.

HALL and KERRIGAN, JJ. We concur, upon the ground that the evidence does not show knowledge on the part of the defendant of the vicious character of the horse. We are not prepared to say that the evidence is not sufficient to sustain a finding that the horse was, in fact, vicious.

8 Cal. App. 684

MELVIN v. MELVIN. (Civ. 477.)

(Court of Appeal, Third District, California.
Aug. 15, 1908.)

1. DEEDS—"DELIVERY"—SUFFICIENCY.

To constitute delivery of a deed, it is not sufficient that there be a mere delivery of its possession, but the act must be accompanied with the intent that the deed shall become operative as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 118.

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

2. PLEADING—COMPLAINT—STATEMENT OF FACTS—SUFFICIENCY.

A complaint must state facts sufficient to constitute a present cause of action, and show that plaintiff is entitled to relief as of the time the complaint is filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 106.]

3. TRUSTS—EXPRESS TRUSTS—ENFORCEMENT.

A complaint, in an action to establish a trust in real property, which alleges that plaintiff executed a deed conveying to defendant the premises, without any consideration except the friendship for defendant, and her belief that he would treat her fairly, that the deed was delivered to defendant in trust to hold the deed as plaintiff's property, and, when called for, to

deliver the same to plaintiff, and that if it was not withdrawn and plaintiff died, the deed should be recorded, and the property should then vest in defendant, that defendant recorded the deed and repudiated the trust, states no cause of action, as it fails to show that plaintiff had any title to the land after the date of the deed; and the court may infer that subsequent thereto plaintiff parted with all her title.

4. JUDGMENT — CONCLUSIVENESS — DISMISSAL ON DEMURRER.

A judgment of dismissal of an action to establish a trust in land, rendered on a demurrer to a complaint failing to show that plaintiff had any interest in the property at the time of the bringing of the action, is not conclusive on plaintiff's right to allege, in an appropriate action, the fact that she is still the owner of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1039, 1048.]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Matilda Melvin against Herbert G. Melvin. From a judgment of dismissal, after sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

S. Solon Hall, for appellant. White, Miller & McLaughlin, for respondent.

BURNETT, J. The action was brought to have it decreed that certain real property is held by defendant in trust for plaintiff, and to compel the execution of a deed of conveyance of the same by the former to the latter. A demurrer to the complaint was sustained, and, plaintiff declining to amend, a judgment of dismissal was entered, from which the appeal is taken.

It appears from the complaint that defendant is a stepson of plaintiff, and for a long time has resided with her. The relations between them were friendly and confidential. The plaintiff has had little experience in business matters, and she confided implicitly in defendant, and believed that in everything pertaining to her interest he would act in the utmost good faith towards her. The complaint alleges furthermore "that on the 29th day of May, 1899, the plaintiff was the owner of all that real estate [describing it].

* * * That on the day last aforesaid, and long prior thereto and for a long time thereafter, she was advised and believed that a person could make and execute a deed of conveyance, conveying real estate, and that the conveyance could be retained in the possession or under the control of the grantor until his death, and if then put on record a good title to the property described therein would vest in the grantee. That being moved thereto by the friendship she cherished for the defendant, and relying upon the confidence she had in him, and believing that he would treat her fairly, and intending ultimately to vest the title to said real estate in the defendant, should he survive her, and believing that she could thereby save the expense of proceedings in probate in the event of her death, she did, on the day last aforesaid, make and acknowledge a deed of conveyance which in form conveyed to the defendant the

real estate hereinbefore described. That said deed of conveyance was made without any consideration whatever, except the friendship and good will she had for the defendant, and her faith in his integrity, and her belief that he would treat her fairly in all her dealings with him. That upon its being acknowledged by the plaintiff, said deed of conveyance was given to and accepted by the defendant in trust and as a trustee for the plaintiff, and it was agreed and understood by said defendant that he should hold said deed of conveyance for said plaintiff as her trustee and as her property, and that said trustee should keep said deed in some safe and secure place, and when called for by the said Matilda Melvin or by her order, said trustee should deliver the same to her. That if it was not withdrawn or its custody changed, and said Matilda Melvin died before the said defendant, said deed of conveyance should be recorded, and on that date the title to said property should vest in the said Herbert G. Melvin. But until her death said deed of conveyance was to remain with said Herbert G. Melvin, as her trustee, for safe-keeping, and for no other purpose." Then follow the allegations that on the 14th day of September, 1901, the deed was recorded, without the request or consent of plaintiff. That in July, 1906, the defendant repudiated the trust, and claimed to be the owner of the property, and that prior to July, 1906, plaintiff had no knowledge nor information that the defendant had repudiated or intended to repudiate the trust, or that he claimed to own the property free from any limitation. The foregoing statement covers substantially all the averments of the complaint, and makes it clear that the property is not charged with any trust, nor is the defendant a trustee in relation to the same. This is true because there was no conveyance of the property to defendant. It cannot be said that defendant holds the property in trust, when the allegations of the complaint show, beyond peradventure, that he does not hold it at all. It is expressly alleged that the deed was delivered to defendant, as her trustee, for safe-keeping, and for no other purpose. It appears also from other allegations that it was understood that no title vested in defendant, and that plaintiff should retain complete control and dominion over the deed. This is manifestly inconsistent with the contention of a transfer of the title from plaintiff to defendant. Certain phrases, indeed, are used, indicating the purpose of the pleader to declare an express trust in real property, but such a trust vests the whole estate in the trustee, subject only to the execution of the trust. Civ. Code, § 863. But here, as we have seen, no estate was vested in the so-called trustee. If any trust was created, it has relation simply to the deed of which the defendant was made the custodian or bailee, and the action is really to remove a cloud upon plaintiff's title, created by defendant's conduct in recording the

deed in violation of his agreement, or it may be considered as a suit to quiet title against the adverse claim of defendant.

That the complaint shows that no title was transferred, as there was no delivery of the deed to defendant in contemplation of law, is set at rest by many authorities, among which we cite *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772, and the same case, reported again in 137 Cal. 527, 70 Pac. 556. In the former it is said: "Here the grantor reserved the right to recall his deed upon the happening of a certain event. When that event happened he had the right to reach out and take back the deed, and such reservation is fatal to a valid delivery. The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank, the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it." In the latter opinion the well-established doctrine is announced that "to constitute delivery of a deed, it is not sufficient that there be a mere delivery of its possession, but this act must be accompanied with the intent that the deed shall become operative as such." The foregoing discussion is probably unnecessary to a decision of the question before us, but we have made the suggestions in contemplation of possible litigation growing out of the transaction that may be instituted hereafter by plaintiff.

We deem it necessary to notice only one point raised by the demurrer, as that point seems fatal to the complaint and a justification of the ruling of the trial court. It is, of course, elementary and fundamental that the complaint must state facts sufficient to constitute a present cause of action, and to show that the plaintiff is entitled to relief as of the time the complaint is filed. In other words, allegations showing only that the cause of action existed some time in the past would be insufficient. The rule, according to all the authorities, is as stated in 16 Cyc. 233: "The bill must show plaintiff's right or title in or to the subject-matter of the suit upon which he bases his claim for relief. The averment must be express and not left to inference from an exhibit and must also show an interest existing at the time the suit is brought. Such title must be stated with sufficient certainty to enable the court to see that plaintiff has such a right as warrants its interference." We look in vain for any averment in the complaint before us of a present interest in the property in controversy. There is nothing to show that plaintiff has had any title to the land since May 29, 1899. Indeed, it has been held often that the presumption is that the pleader has stated his case as strongly as he can. *Silver Creek v. Hayes*, 113 Cal.

145, 45 Pac. 191; *Fox v. Mackay*, 125 Cal. 54, 57 Pac. 672; *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, 72 Pac. 395. We have a right to infer, therefore, that subsequent to said date plaintiff parted with all of her title to said property, and at the time she brought the action she had no further interest in the same. She thus failed to state a cause of action, and the demurrer was properly sustained on that ground. For further illustration of the principle involved, we cite the following California decisions: *Hentsch v. Porter*, 10 Cal. 555; *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466. It is hardly necessary to add that this rule of pleading is not conclusive of plaintiff's right to allege in another appropriate action the fact, if it be such, that she is still the owner of the property, nor, as at present advised, if she had not parted with her interest, do we see any reason why she may not, under proper averments, maintain another action.

But the judgment upon the pleadings as presented was clearly right, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 673

AYDELOTTE v. BILLING. (Civ. 490.)

(Court of Appeal, Third District, California. Aug. 15, 1908. On Rehearing, Sept. 14, 1908. Rehearing Denied by Supreme Court Oct. 13, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS—SUFFICIENCY OF EVIDENCE.

Where there is some evidence to support a finding of the trial court, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. NEW TRIAL—GROUNDS—FAILURE TO FIND ON ALL ISSUES.

A judgment, based upon findings which do not determine all the material issues of fact, is a decision "against law," and can be successfully assailed on a motion for new trial.

3. TRIAL—FINDINGS—SUFFICIENCY—ISSUES.

Findings need not be in the identical language of the pleadings, but are sufficient if all the material issues are substantially covered.

4. SAME—NECESSITY—FACTS IMPLIED BY LAW.

No finding is required as to a fact implied by law; and hence, in an action for legal services, as the law, from the rendition of services, implies the request for them, or an agreement to pay the reasonable value thereof, an agreement to pay need not be alleged, and no finding thereon is required.

5. SAME—SUFFICIENCY OF FINDING.

In an action for legal services by a member of a firm, an issue as to the misjoinder of parties plaintiff is sufficiently determined by a finding that the services were rendered by plaintiff.

6. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—FAILURE TO MAKE FINDINGS.

In an action by a member of a firm for legal services, where the evidence showed that no services were performed by the firm, a failure to make a sufficient finding upon the issue, raised by defendant, that the services were rendered by the firm was no ground for reversal.

of a judgment for plaintiff, since it would necessarily have been adverse to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4233.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by William M. Aydelotte against Frederick W. Billing. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Carl E. Lindsay and H. C. Wyckoff, for appellant. Wm. M. Aydelotte, for respondent.

BURNETT, J. The action is for the recovery of the value of legal services. The plaintiff had judgment for \$955.95, from which, and the order denying his motion for a new trial, defendant has appealed.

Appellant states in his brief that "there are two principal points made on the appeal: First, that the evidence is insufficient to sustain the finding in favor of plaintiff for the sum of \$500 on one item (statement No. 11), contained in the bill of particulars; and, second, that the decision is against law, in that the findings do not determine all the material issues of fact." As to the first point, we deem it unnecessary to set out the evidence, but consider it sufficient to say that it does not present a question of law, as there is at least some support for the finding of the trial court. It is claimed, too, that the court below erred in failing to find, upon the allegation of the complaint, that the services were performed at the instance and request of defendant, and also upon the averment of the answer as to a defect of parties plaintiff, the contention being that the services, if any, were performed by the copartnership of Scrivner & Aydelotte. The general rule is that a judgment based upon findings which do not determine all the material issues of fact, is a decision "against law," and it can be successfully assailed on a motion for a new trial. *Knight v. Roche*, 56 Cal. 15; *Nuttall v. Lovejoy*, 90 Cal. 163, 27 Pac. 69; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828; *Kusel v. Kusel*, 147 Cal. 52, 81 Pac. 297. But it is sufficient if all the material issues are substantially covered by the findings. They are not required to be in identically the same language as the pleadings. And it is also true that, if the pretermitted finding must necessarily have been adverse to appellant, he is not "aggrieved." In *re Connors*, 110 Cal. 413, 42 Pac. 906. And no finding is required as to a fact which is implied by law. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761. In the latter case it is said: "Under the system of pleading at the common law it was requisite that the declaration, in an action of assumpsit upon an executed consideration, should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request; but this averment was unnecessary when the considera-

tion, as well as the promise, were implied from the nature of the transaction set forth in the declaration—as in an action for goods sold and delivered to the defendant, or for money loaned to him by the plaintiff. Under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged. While counsel and advice are frequently given without any request, and may be of no benefit to the party to whom they are given, yet a complaint which shows that the plaintiff rendered services to the defendant, which were received by him in person, and were presumptively at his request, and of which he has enjoyed the benefit, states facts from which the liability of the defendant therefor is presumed, and is good as against a general demurrer." If that decision states the rule correctly, it must be held that it was not necessary for plaintiff to allege that the services were performed at the instance and request of defendant, and hence that no finding thereon is required, as it is presumed, from the allegation and corresponding finding, that "plaintiff performed work, labor, and services as attorney and counsel at law for said defendant, and that the sum of \$500 is due and owing from defendant to plaintiff." In other words, from the fact of service performed the law implies the request for the service, or an agreement to pay the reasonable value of said services and renders unnecessary the allegation of said agreement. Some of the authorities hold differently, but the *McFarland Case*, supra, seems controlling here. Assuming that the issue is properly presented as to the misjoinder of parties plaintiff, it is sufficiently determined by the finding that the services were rendered by plaintiff. This necessarily excludes any other person. Again, the evidence shows that no services were performed by the partnership. Hence, if a more complete finding upon the issue had been made, it must necessarily have been adverse to the defendant, and in such case the failure to find is not ground for the reversal of the judgment. *Gillespie v. Lake*, 85 Cal. 407, 24 Pac. 891.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. In response to appellant's earnest petition for a rehearing, we deem it sufficient to call attention to the following quotation from the case of *McFarland v. Holcomb*, 123 Cal. 85, 55 Pac. 761: "In her complaint she alleges, as the basis of her claim, 'that William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of \$7,500 as a balance due plaintiff for nursing, boarding, counseling, advising,

and taking care of said William M. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." It will thus be seen that the action was for services performed, that there was no allegation that they were performed at the instance or request of Holcomb, or that there was any promise to pay. The Supreme Court, however, held that the complaint stated a cause of action. If that case is not directly in point here, or if it is to be overruled, the decision to that effect must come from the Supreme Court.

The rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 636

PEOPLE v. RUSSO et al. (Cr. 65.)

(Court of Appeal, Third District, California.
Aug. 15, 1908.)

1. CRIMINAL LAW—APPEAL—JUDGMENT ROLL—IMPROPER CONTENTS—MOTIONS.

A motion for a new trial, or to dismiss the information and proceedings thereon, cannot be made part of the judgment roll, and can only appear on appeal through bill of exceptions; the papers constituting the judgment roll being restricted by Pen. Code, § 1207, to the indictment or information and a copy of the minutes of the pleas or demurrer, a copy of the minutes of the trial, the instructions given, modified or refused, and a copy of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2790.]

2. FISH—UNLAWFUL NET FISHING—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of fishing with unlawful nets, in violation of Pen. Code, § 634.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, § 29.]

3. CRIMINAL LAW—APPEAL—REVIEW—CONCLUSIVENESS OF VERDICT.

It being for the jury to settle conflicts in testimony, an appellate court will only disturb a verdict where there is an entire lack of evidence to sustain it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

4. SAME—INSTRUCTIONS—PRESUMPTION.

It appearing that the trial court instructed on circumstantial evidence, but, the instruction not being in the record, the district court of appeal will presume that it was complete, thus showing no reversible error in an additional instruction given at the jury's request as against an objection that such additional instruction was not sufficiently explicit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3032.]

5. FISH—UNLAWFUL NET FISHING—CAPACITY OF OFFENDERS—MATERIALITY.

Under Pen. Code, § 634, prohibiting fishing with certain nets, it is immaterial to accused's guilt whether they acted as fishermen, merchants, or merchants' employes; the sole question being whether they took part in illegal fishing.

6. SAME—EVIDENCE.

In a trial for fishing with unlawful nets, the finding of fish on accused's launch, while not of itself sufficient to convict, was a circumstance which the jury could consider in determining guilt.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Nemo Russo and others were convicted of fishing with unlawful nets, in violation of Pen. Code, § 634, and they appeal. Affirmed.

G. A. Lamont and R. H. Lattimer, for appellants. U. S. Webb, Atty. Gen., and J. Chas. Jones, Asst. Atty. Gen., for the People.

CHIPMAN, P. J. Defendants were convicted of the crime of fishing for striped bass with unlawful nets. A demurrer to the information was interposed, and, we think, rightly overruled. Defendants appeal from the judgment of conviction and from the order denying their motion for a new trial. A motion to set aside the information with an affidavit explanatory of the proceedings had on said motion, the rulings of the court thereon, and exceptions thereto and the minutes of the trial in the magistrate's court are printed in the transcript, but they are not authenticated in the bill of exceptions.

Appellants claim that the motion to dismiss the information is part of the judgment roll made up by the clerk under section 1207, Pen. Code. The papers which, under that section, constitute the record, or judgment roll, are: "(1) The indictment or information and a copy of the minutes of the pleas or demurrer; (2) a copy of the minutes of the trial; (3) the written instructions given, modified or refused * * * and the certified transcript of the charge of the court; and (4) a copy of the judgment." The motion for a new trial and the minutes of the proceedings had on such a motion constitute no part of the judgment roll. *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235, where it was also held that "the clerk cannot make them a part thereof, and they should appear only in the bill of exceptions." See, also, *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578. The same is true of the motion to dismiss the information and the minutes relating thereto. They should have appeared in the bill of exceptions, the only means by which they could have been properly authenticated.

It is claimed by defendants that the evidence is insufficient to justify the verdict. Section 634 of the Penal Code is the statute defining the offense charged. It provides that "every person who, for the purpose of catching * * * striped bass * * * in any waters of the state, fish with or use any seine or net, * * * the meshes of which are, when drawn closely together and measured inside the knot, less than seven and one-half inches in length, is guilty of a misdemeanor, and is punishable," and so forth. Witness Lamontague, a hunter and fisherman, residing in the vicinity of the waters where the alleged illegal fishing occurred, and for many years familiar with the Sacramento river and the numerous connecting sloughs forming the network of islands in that region, testified that he was fishing on June 27, 1905, in *Duck*

slough and saw the defendants in the morning of that day. Witness came down Duck slough trolling for striped bass, and noticed three fishing boats and a gasoline launch and seven or eight men engaged in throwing out a net. He observed the net, and saw that the meshes were of a size less than allowed by law. He turned around to return to his home for the purpose of reporting the matter to the game and fish warden. The gasoline launch, he testified, "undertook to run over him." He went to Courtland, and telephoned Game Warden George Neale at Sacramento, who came to Courtland that evening at 5 o'clock. There is evidence that Neale, Lamontague, and three other men left Courtland that evening in a gasoline launch for the scene of the alleged unlawful fishing, night overtook them at a point below, and the next morning "before daylight" they started up Prospect slough with a gasoline launch procured from the Ryder Island dredger, and about daylight came upon defendants in a body of water called "Hackett Cut" or "Hackett slough." Neale found that he could not get to them with his launch because of the nets in the slough, and so took a rowboat with his party, which could pass over the nets, and some distance above his launch he found defendants with a gasoline launch and three fishing boats. The nets extended for over half a mile zig-zagging across the cut from shore to shore and anchored at points with railroad iron and rock to hold the nets in place, the latter so situated that there was no passageway for a launch up or down the cut. Neale testified: "I went up to the gasoline boat and these eight defendants were standing on the deck. I asked if any one of them could talk English. The younger man of the lot answered that he could. * * * I then asked him who owned those nets, and he said that he wasn't keeping cases on those nets. * * * I jumped aboard, and placed the defendants under arrest. We tried to get the launch through and the three boats over the net, but there was such a quantity of them we couldn't do it. We succeeded in dragging the nets to one side enough to get the launch and fish boats out, after being tangled up several times with the screw, and brought them to Rio Vista." Neale examined the meshes, and found them all much smaller than allowed by law. Except salmon, he noticed all kinds of fish in the nets, and striped bass among them. He found in the defendants' launch three boxes of mixed fish, striped bass included, which bore evidence of having been caught in gill nets such as these, although he could not say they were caught in these particular nets. There were other circumstances testified to tending to connect defendants with placing the nets where they were found and tending to show, in connection with the evidence already stated, that the defendants were engaged in fishing with nets of meshes smaller than allowed by law. All the defendants testified in their own behalf.

Three of them testified that they went from Rio Vista up the river with the launch to buy fish; that they did not own the nets, nor did they have anything to do with setting them. The other defendants testified that they went up to these sloughs from Rio Vista with three fish boats to get wood, and that they had nothing to do with placing the nets in the slough. There was evidence that there was no wood in that part of the country. No witness saw defendants setting the nets or taking fish from them, but the circumstances proven were such as to warrant the jury in drawing the inference that defendants had in fact committed acts forbidden by the statute and were guilty as charged. The testimony of defendants created a conflict; but it was for the jury, as the sole judges of the evidence, to reconcile any apparent conflict in the statements of witnesses. It is only in a case where there is an entire lack of evidence that the appellate court will disturb the verdict. *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014, and numerous other cases.

The remaining points made by appellants relate to the special instructions given by the court, at the request of the jury, after they had retired to the jury room for deliberation. The jury requested an instruction as to "whether the defendants have to be positively identified for the offense of setting out those illegal nets." "A juror: That is, if it must be proved by direct or circumstantial evidence. The Court: It must be proved either by direct or circumstantial evidence. I read to you the difference between direct and circumstantial evidence. Do you all understand the difference between direct and circumstantial evidence? Direct evidence would be the testimony of the witnesses who saw the net set. Circumstantial evidence would be the evidence of surrounding circumstances, which would lead you, in reason and beyond a reasonable doubt, to believe that they did set the nets. That is the difference." The criticism of appellants is that this instruction was not sufficiently full and explicit as to when the jury is warranted in convicting upon circumstantial evidence—citing *People v. Dole*, 122 Cal. 495, 55 Pac. 581, 68 Am. St. Rep. 50. None of the instructions given by the court are in the record except the special instructions above referred to. The court had given an instruction upon the point as clearly appears, and, in its absence, it must be presumed that it was correct and fully met the case made by the evidence. Without this instruction before us we cannot say that the court erred in not more fully explaining the nature of circumstantial evidence. We must presume that, when read together with others, the instructions on the subject thereof were correct. "Juror: Another question is, in regard to the engineer and the parties who had the launch, whether they went as fishermen or merchants, buying, or in the employ of a merchant buying; were they classed as fisher-

men, or as merchants, buying with those who went with the launch? The Court: That question could hardly enter within the range of the jury. What you are to determine is whether these people, no matter in what capacity they were acting, performed the illegal act. Whether they did it." We discover nothing misleading here. It was immaterial in what capacity these men in the launch went out. The sole question was: Did they take part in illegal fishing? The colloquy between the members of the jury and the court was continued by several other questions of the jury and answered by the court. The absence of the instructions given previously by the court upon the points involved makes it impossible to say that any error was committed by the court. So far as we can judge, there was none. After some statements by counsel upon both sides as to the fish found on defendants' launch, the court said: "I will give the instruction this way: That these defendants are accused of setting nets for the purpose of catching striped bass. Now, if striped bass are found upon the launch, it is not of itself sufficient to prove the guilt of the defendants, but it is a circumstance which may be taken into consideration by you in determining guilt or innocence." We see no error here.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 664

VANCE REDWOOD LUMBER CO. et al. v. DURPHY et al. (Civ. 486.)

(Court of Appeal, Third District, California. Aug. 15, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings are conclusive on appeal, where the evidence is not in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2939-2942.]

2. VENDOR AND PURCHASER—CONTRACT TO CONVEY—PAYMENT OF TAXES—VALIDITY OF PROVISION.

Const. art. 13, § 5, making void a contract of a debtor to pay any tax on any mortgage or other lien as to interest and such tax, does not invalidate a contract to convey land as to stipulated interest on the price, because it requires the purchaser to pay taxes on the land; the provision for interest and taxes in a contract being part of the consideration for the conveyance.

3. LIENS—EQUITABLE LIENS—TAXATION—CONSTITUTIONAL LAW.

Const. art. 13, § 5, making void a contract by which a debtor is bound to pay any tax on any mortgage or other lien as to such taxes and any interest specified therein, does not apply to equitable liens.

4. VENDOR AND PURCHASER—EQUITABLE LIENS—TIME OF ACCRUAL.

A vendor's equitable lien to secure the price does not arise until the purchaser defaults.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 641-651.]

5. PLEADING—ADMISSIONS.

Where, in a suit to foreclose a contract to convey on the purchaser's default, the purchaser and his assignee did not deny in their answer

the vendors' allegation that the purchaser agreed to pay specified interest upon deferred payments, interest was properly awarded as claimed.

6. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

On appeal from a judgment awarding interest on a contract, uncertain in its terms respecting interest, the court will presume that the uncertainty was removed by evidence.

7. VENDOR AND PURCHASER—INTEREST—CONTRACT CONSTRUED.

Under a contract to convey land at a specified price, requiring the purchaser to pay \$600, June 1, 1902, \$600, January 2, 1903, with specified interest upon deferred payments from January 1, 1902, and \$1,200 on January 2 of each succeeding year, with interest from January 1, 1902, until payment of the full price, it was proper, in a suit by the vendors to foreclose the contract on the purchaser's default, to award interest on the balance due from January 2, 1902.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by the Vance Redwood Lumber Company and another against B. F. Durphy and the Fieldbrook Company. From a judgment for plaintiffs, defendant company appeals. Affirmed.

A. R. Thorpe, J. H. G. Weaver, and Coonan & Kehoe, for appellant. T. H. Selvage and C. M. Wheeler, for respondents.

CHIPMAN, P. J. This is an action to foreclose a contract for the sale and purchase of land. Plaintiffs had judgment, from which defendant Fieldbrook Company appeals on the judgment roll.

The points to be decided will be fully understood from a consideration of the contract involved and the findings and decree of the court. The essential points of the contract are as follows:

"This agreement, entered into this 19th day of October, 1901, between the Vance Redwood Lumber Company, and the Eureka and Klamath River Railroad Company, corporations, the party of the first part, and B. F. Durphy, of Eureka, Humboldt county, California, the party of the second part: witnesseth: * * *

"First: Said parties do hereby agree to sell unto said second party, his heirs and assigns, and said second party hereby agrees to buy from said first parties at the rate of thirty dollars (\$30.00) per acre payable as hereinafter set forth, the following described tracts of land, in Humboldt county, California, to wit. [Land described. The grantors make certain reservations not material to the issues.] * * *

"Second. Said second party, his heirs or assigns, shall be and is hereby permitted to lay out and plat, at his own cost and expense, into lots fifty (50) by one hundred (100) feet, and thirty-three and one-third by one hundred feet, blocks two hundred (200) feet square, streets fifty (50) feet wide, portions of the aforesaid described premises and record such portion to the extent of forty (40) acres; and the manager of said first party, the Vance

Redwood Lumber Company, hereby agrees to record said plat of forty (40) acres and to convey same to said second party, his heirs or assigns, upon payment to said first party of the sum of thirty dollars (\$30.00) per acre for each parcel so conveyed, each parcel to be not less than five (5) acres at any one time or in any one conveyance until the full forty (40) acres have been paid for, at which time deed will be made to said second party, his heirs or assigns, for the balance of said forty acres.

"Third. Said second party, his heirs or assigns, may sell the whole or any portion of the aforesaid recorded tract of forty (40) acres to any person or persons, but the said second party shall pay said first parties, their successors or assigns, for the tract so sold a sum of money to be computed at the rate of thirty dollars (\$30.00) per acre, before said first parties shall be required to make deed, it is understood that said first parties shall not be required to make conveyance for less than five (5) acres at a time. In computing the acreage of the platted land so to be conveyed by said first party to said second party, due consideration shall be given to the acreage occupied by streets and alleys, and for this acreage occupied by streets and alleys said second party shall pay said first parties at the rate of thirty dollars (\$30.00) per acre.

"Fourth. Should said second party desire to record any part of said tract of land in excess of forty acres so platted, said second party, his heirs or assigns, may do so, but before so doing, said second party, his heirs or assigns, shall pay to the said first parties, their successors and assigns, a sum of money to be computed at the sum of thirty dollars (\$30.00) per acre for each additional acre in excess of said eighty acres so desired to be recorded.

"Fifth. Said second party, his heirs or assigns, shall pay said first parties on or before June 1, 1902, the sum of six hundred dollars (\$600.00) and on or before the 2d day of January, 1903, a like sum of six hundred dollars (\$600.00) with interest upon deferred payments thereupon at the rate of six per cent. (6%) per annum from January 1, 1902, and on or before the second day of January, of each succeeding year, the sum of \$1,200.00 with interest thereupon at the rate of six per cent. (6%) per annum from January 1, 1902, until the full amount constituting the selling price of said tract of land hereinabove described shall have been paid to said parties of the first part; said second party shall also pay taxes."

The following is written on the margin of the contract at this point: "It is understood that the money paid for platted lands shall not apply on the annual payments. The sums of \$1,200 per annum is to be paid over & above amt's. paid for platted lands. (Signed) A. B. Hammond. * * *

"This agreement shall be binding upon the

successors and assigns and upon the heirs and assigns of the parties hereto for a period of four years from and after the date hereof, unless earlier terminated for failure as particularly set forth herein.

"In witness whereof, the said parties hereto have hereunto set their names and seals, the day and year hereinabove set forth.

"Vance Redwood Lumber Company, per A. B. Hammond, President. Attest: Wm. G. Gosslin, Secretary of Vance Redwood Lumber Company. Eureka & Klamath River Railroad Company, A. B. Hammond, President, Parties of the First Part.

"B. F. Durphy, Party of the Second Part."

In January, 1902, certain four tracts of five acres each were sold to one Belcher, and in May, 1902, Durphy assigned these Belcher contracts to defendant Fieldbrook Company and also the Durphy contract with plaintiffs of October 19, 1901. Subsequently defendant Fieldbrook Company contracted to sell to one Boulster a seven-acre tract for the sum of \$275; also lots 7 and 8, block 35, to one Voght for the sum of \$565, which was later, by agreement, reduced to \$250.

Among other things, defendants set up in their answer that the marginal clause of the contract signed by A. B. Hammond (inserted at the end of paragraph 5) was not intended to become a part of the contract, and that Durphy never assented to it, but expressly repudiated it; also that the concluding paragraph of said contract was incorporated in the agreement by mutual mistake, and "was not intended to change the length of time that said Durphy and assigns were to have in which to pay for said land," but that it was the intention to still give said B. F. Durphy and assigns 10 years within which to pay for said land. These were the important contentions of defendants, but the court and the jury, called to determine the facts as to them, found against defendants on both issues, and the findings are conclusive, as the evidence is not brought up. Among other issues found by the jury and adopted by the court were the following: That defendants did not pay to plaintiffs the sum of \$600 falling due under the terms of the contract June 1, 1902, nor the sum of \$600 and interest falling due January 2, 1903; nor did defendants pay to plaintiffs the sum of \$1,200, and interest, falling due January 2, 1904. It was also found by the jury and the court that plaintiffs had fully performed all the acts and things by them agreed to be performed. The court further found: That of the lands agreed in said contract of October 19, 1901, to be sold by plaintiffs to defendant Durphy, said defendant has paid to plaintiffs the sum of \$600 for 20 acres of said land sold to said Belcher and by reason thereof plaintiff Vance Redwood Lumber Company has made to said Belcher deeds therefor; that defendants have not performed any of the terms of said contract of October 19, 1901, nor have they paid to plaintiffs any money on account of said

contract, except said sum of \$600 for the 20 acres of land sold to said Belcher; that defendants have made contracts with numerous persons, agreeing to sell to such persons certain portions of said land, other than said 20 acres sold to said Belcher, and have received large sums of money upon said contracts, without procuring to be vested in said persons the legal title to said portions of said lands so contracted to be sold. The findings then set forth the contracts with Boulster and Voght heretofore referred to. It is further found that plaintiffs, at the instance of defendant Durphy and under his direction, platted a forty-acre tract of said land, known as survey 83, dividing it into lots and blocks and streets, which became a part of the town known as Fieldbrook, and also likewise platted another tract of said land known as survey 84, which also became a part of said town, both of which surveys were duly recorded. It is also found, further, that by their "acts and conduct defendants misled and deceived plaintiffs in relation to carrying out said contract, and induced them to act to their prejudice in a manner other than, and different from, the manner in which they would have acted had they not been so misled and deceived." It is also found that on April 15, 1905, the said Voght made demand upon plaintiff Vance Lumber Company that it execute to him a conveyance of said lands described in his said contract; that thereafter on said day said plaintiff delivered to him a quitclaim deed for the land in his said contract described, receiving, as consideration therefor, the sum of \$100, and that said conveyance was made with defendants' consent; that in the event that defendants carry out the terms of their said contract of October 19, 1901, and make the payments therein called for on their part, within 90 days from the date hereof, the said \$100 "will constitute a credit to be allowed defendants upon the amount now remaining unpaid by defendants, in the carrying out and complying with the payments called for upon their part to be made, under said contract of October 19, 1901, the amount of said payments being hereafter more particularly set forth." As conclusion of law, the court found that the contract of October 19, 1901, as set out in plaintiffs' second amended complaint, was duly made and executed between plaintiffs and said defendant Durphy at the time and in the manner alleged in said complaint, and that the same was assigned by defendant Durphy May 7, 1902, to defendant Fieldbrook Company, and said company is now the owner thereof.

The court adjudged by its decree as follows: That "defendant Fieldbrook Company may have 90 days from the date hereof (July 14, 1906), within which time to make to plaintiffs the payments called for by said contract of October 19, 1901, as modified by the allowance of the said credits hereinbefore allowed by reason of the amounts received by plaintiffs from the sale of the said parcels

of land to the said J. A. Boulster and John Voght," particularly specified as follows: "Said defendant Fieldbrook Company shall pay to plaintiffs within 90 days from date hereof \$10,200, with interest thereon at the rate of 6 per cent. per annum from January 2, 1902, deducting therefrom the sum of \$275, together with interest thereon at the rate of 7 per cent. per annum from August 25, 1904, and deducting also the sum of \$100, with interest thereon at the rate of 7 per cent. per annum from the 15th day of April, 1905; said amounts of \$275 and \$100, so to be deducted with interest, being the amounts heretofore received by plaintiffs from the said Boulster and the said Voght. All of said amounts of interest to be computed up to the day upon which payment is made." Upon payment as above being made, it is decreed that plaintiffs convey to defendant Fieldbrook Company all of said land, except that described in the contracts of Belcher, Boulster, and Voght. It is further decreed that, should defendant Fieldbrook Company fail to make said payments as directed by the decree, the defendants, and each of them, "be barred and forever foreclosed of all claims, rights, demands, and equities of, in, and to said contract of October 19, 1901, and of, in, and to the lands therein specified and set forth, other than the said lands so sold to" said Belcher, Boulster, and Voght, and upon such failure of defendant Fieldbrook Company said contract of October 19, 1901, is declared annulled and of no effect.

Appellants contend that the judgment is not supported by the findings in the following two particulars: (1) That the contract in question constituted a lien by which plaintiffs obligated defendants to pay the taxes, and hence plaintiffs, under section 5, art. 13, of the Constitution, were not entitled to any interest; (2) but if entitled to interest, they were not entitled to interest, as found, on \$10,200. Appellants discuss the first point at considerable length, but in our view it is without merit. This provision of the Constitution is as follows: "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." We do not think this provision applies to the contract here, for it does not attempt to require the second party to pay taxes "on money, or any mortgage, deed of trust, or other lien." If the clause of the contract reading "said second party shall also pay taxes" means anything, it is that second party shall pay taxes on the land contracted to be sold. *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109, was just such a case as this, where the remedy here sought was enforced. The contract there provided that the vendee should pay the taxes. The precise question

now raised was not decided, but it is not likely that it would have been overlooked had it been thought to possess merit. Mr. Jones says: "Lien by contract exists only when it is expressly agreed that a party may retain the property as security for work done or expense incurred in support of it. There must be something more than a contract for the payment of the purchase price. The law implies no lien from such a contract." 1 Jones on Liens, p. 4. Again: "In the one case (where title passes) the vendor has a lien without any title, and in the other (where title does not pass) he has the title without any occasion for a lien." 2 Jones on Liens, p. 57. In the present case it seems to us that the provisions for payment of interest and taxes, like the payments of the principal, constitute part of the consideration for the purchase. And it is not reasonable to suppose that the parties to the contract had in mind that an attempt would be made to levy a tax upon the purchase price of the land, for to tax both land and contract would be double taxation. It is not necessary to consider the vendor's equitable lien to secure the purchase price paid, if he had any, for, first, the Constitution does not refer to such a lien; and second, the vendee was not in default, in which case alone the vendor's lien arises. 3 Pomeroy's Eq. Juris. § 1263. Appellant cites: Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272, Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, and Kent v. Williams, 114 Cal. 537, 46 Pac. 462, as supporting their view. We do not so regard them.

The findings that plaintiffs are entitled to interest under the contract are clearly justified, and the only remaining question is, did the court correctly impose it? Appellant's contention is that the contract did not authorize interest on \$10,200 from January 2, 1902. The entire purchase price for the 360 acres was \$10,800, being \$30 per acre. The court found that defendants had paid \$600, and no more, which left \$10,200 still due. Provision is made for allowing appellant principal and interest of the contracts of sale to Belcher, Boulster, and Voght, so that these items may be laid out of consideration. The terms of the contract in regard to interest are not free from doubt and uncertainty.

Plaintiffs alleged in their complaint that under the contract defendant Durphy agreed to pay interest at the rate of 6 per cent. upon deferred payments "until the full amount constituting the selling price of said tract of three hundred and sixty acres of land hereinabove described, shall have been paid to said parties of the first part." There is no denial of this construction put upon the contract by plaintiffs. In their answer the principal issues raised upon the meaning of the contract related to the so-called marginal note, above pointed out, and to the clause limiting the time of final payments to four

years, defendants claiming that they were to have 10 years in which to pay for the land. In their answer defendants distinctly state that the original understanding, as well as the understanding found in the contract, was, that the annual payment of \$1,200 was to be made "with interest at the rate of six per cent. per annum on deferred payments until the full amount constituting the selling price of said land should have been paid to plaintiffs herein." It seems to us that the court would have been justified upon the pleadings to award interest as the findings state it. Besides, if at the trial the question was presented in view of the uncertainty arising out of the language used in the contract, we must presume that it was removed by the evidence. Furthermore, we think, when examined in its entirety, the contract is susceptible of the construction placed upon it by the court in the matter of interest.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 689

HUFF (BRIGGS, Intervener) v. SWEETSER et al. (Civ. 484.)

(Court of Appeal, Third District, California. Aug. 15, 1908.)

1. VENDOR AND PURCHASER—CONVEYANCE—EFFECT.

E., having contracted to sell the premises in controversy to intervener in 1898, conveyed the property in 1901 to O., who in 1905 conveyed to plaintiff, intervener receiving a new contract from him for a conveyance of the premises. Held that both the legal and equitable title thereby passed to plaintiff and intervener.

2. JUDGMENT—LIEN—DOCKET.

A subsequent innocent purchaser from a judgment debtor, conveying by her married name property acquired under such married name, takes title freed from the lien of a judgment docketed against the debtor by her maiden name.

3. SAME—MARRIED WOMEN—NOTICE.

A married woman being authorized by Civ. Code, § 1187, to acquire property and convey it in her name, a person dealing with her, with respect to property so acquired, is not put on inquiry as to her business transactions while unmarried because of the fact that he knew her as a single woman.

4. SAME—LIEN—DOCKET.

The formalities of the statute regulating the docketing of judgments must be substantially complied with, in order that the judgment shall be a lien on the judgment debtor's real estate.

5. SAME—NAME.

A judgment must be docketed against the judgment debtor in his correct name.

6. SAME—SCOPE OF LIEN.

Under the rule that a judgment creditor acquires only such rights as the judgment debtor had, a judgment did not become a lien on land, acquired by the judgment debtor subject to a pre-existing contract to convey the same to intervener, by the fact that intervener's contract was not recorded until after the judgment was docketed.

7. SAME.

Where land was conveyed to a judgment debtor subject to a contract by the grantor to convey the same to intervener, and the land was thereafter conveyed by the debtor to plaintiff,

intervener's equities, entitling him to the land freed from the lien of the judgment, were not destroyed by a new contract of sale between plaintiff and intervener, which was merely a novation of the original contract.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by James Huff against Mrs. M. J. Sweetser and another, in which Joe Briggs intervened. Judgment for plaintiff, and intervener and defendants appeal. Affirmed.

Will. M. Beggs and W. C. Kennedy, for appellants. Rogers, Bloomingdale & Free, for respondent.

CHIPMAN, P. J. The action was to have it adjudged that a deficiency judgment, docketed against the land claimed by plaintiff, is not a lien thereon, and for an injunction restraining defendants from selling said land upon an execution. Plaintiff had judgment as prayed for. Defendants moved the court, under sections 663 and 663½ of the Code of Civil Procedure, to set aside and vacate the conclusions of law and amend the same, and to amend the judgment in accordance with the amended conclusions of law. The motions were denied, and defendants appeal from the judgment and the orders.

About all of the facts essential to a comprehension of the issues appear in the findings of the court, which latter are supported by the evidence. It appears therefrom that on October 1, 1898, one E. L. Emerson was the owner of the premises in question, and upon that day executed a contract for the sale thereof to intervener Briggs for the consideration of \$1,600, payable in installments as follows: Eight hundred dollars within three years and \$800 in five years from said date, with 8 per cent. annual interest, which said contract was recorded June 12, 1905. On November 27, 1901, said E. L. Emerson conveyed said premises to Grace B. M. Odell, and this deed was duly recorded December 4, 1901. Prior to February 15, 1905, on which date Grace B. M. Odell and her husband, Frank Odell, conveyed said premises to plaintiff, intervener Briggs paid various sums on account of said contract of purchase, amounting in the aggregate to \$1,269.73, and at the time plaintiff received said deed from said Grace B. M. Odell, as aforesaid, he executed and delivered to said intervener Briggs a contract for the conveyance of said premises for the sum of \$1,000, which contract was duly recorded March 25, 1905, and at all times since the execution of said contract by said Emerson to said Briggs the latter was, and now is, in possession of said premises. The name of plaintiff's said grantor, Grace B. M. Odell, was formerly Grace B. M. Emerson, and she was married to her said husband, Frank Odell, October 28, 1899. Prior to her said marriage, to wit, on May 1, 1897, she had joined with others in the execution of a certain promissory note, secured by mortgage, to defendant Mrs. J. M. Sweetser, presumably up-

on land other than that in question, executing the same in her name, at that time, of Grace B. M. Emerson; that subsequent to her said marriage, to wit, on July 25, 1901, an action was commenced, wherein the said Grace was one of the defendants, for the foreclosure of a prior mortgage upon the premises covered by the mortgage of the said Sweetser, in which the latter was made defendant as a subsequent mortgagee. Mrs. Sweetser appeared in said action, and filed a cross-complaint, for the foreclosure of her said mortgage, and on May 17, 1902, a decree was duly rendered in said cause, wherein, among other things, it was adjudged that there was due and owing to Mrs. Sweetser, upon her said mortgage at the date of the decree, the sum of \$6,175. After said sale, and after applying the proceeds thereof, there remained a deficiency due said Sweetser amounting to \$6,236.44, for which amount a deficiency judgment was docketed in her favor, on June 28, 1902, "against said Grace B. M. Emerson, and in the name of Grace B. M. Emerson" (and others), upon which said judgment there remains due the sum of \$3,814.75, with interest. At the commencement of this action, and at the time of the entry and docketing of said judgment, the true and correct name of said judgment debtor was Grace B. M. Odell, and not Grace B. M. Emerson. It is further found that at the time plaintiff Huff purchased said premises from said Grace B. M. Odell, and executed the contract of sale thereof to intervener Briggs, "neither plaintiff nor Briggs had any notice or knowledge of the aforesaid judgment of said Sweetser against said Grace B. M. Emerson, nor that she claimed any lien by virtue thereof, upon said premises; but they did know Grace B. M. Emerson, both before and after her said marriage." On April 1, 1905, defendant Sweetser, claiming said judgment to be a lien upon the premises in question, caused execution to be issued upon her said deficiency judgment, and caused the same to be levied thereon by defendant Ross, sheriff of Santa Clara county, and under and by virtue of the said execution the said sheriff proceeded to advertise said premises for sale, and said defendants intend to and will sell said premises for the satisfaction of said judgment, unless restrained by judgment and order of the court. As conclusions of law the court found (1) that said judgment is not, nor was, a lien upon said premises; (2) that plaintiff Huff and intervener Briggs are entitled to a judgment perpetually enjoining defendants from selling said premises under said judgment, together with costs of suit.

The contention of appellants is (1) that the judgment docketed June 28, 1902, constituted a lien on the premises; (2) that plaintiff and intervener had actual and constructive notice of said judgment lien; (3) that the findings and conclusions of law are not justified by the evidence. As to the evi-

dence, it is principally documentary and undisputed. Plaintiff testified that, when he took the deed to the property, he had no knowledge of the judgment of Mrs. Sweetser against Grace B. M. Emerson; that he knew her when unmarried, and knew of her marriage to Odell. Intervener Briggs testified to his purchase under the contract with E. L. Emerson in 1898; that he knew Grace B. M. Emerson, both before and after her marriage; that up to February, 1905, he had paid all that was due on his contract, except \$1,000, and that he now pays his interest and other payments to plaintiff Huff, and not to Emerson; that plaintiff Huff advanced the money to pay off a mortgage upon the land. Frank Huff, son of plaintiff, testified that he attended to the business for his father, paid off the old mortgage on the land, "and had Mrs. Odell give my father a deed to secure him for the \$1,000 which he advanced. The land is worth about \$2,000." He further testified that he had known Mrs. Odell both before and after her marriage. He testified: "I did not have the records searched to see whether there was any judgment against Mrs. Odell or Mrs. Emerson. I took their word that it was all right. Both Emerson and Mrs. Odell said it was all right; that there was nothing against the land, except this mortgage which we paid off." Mrs. Sweetser testified that she never knew or heard of intervener Briggs or his contract with Emerson, or plaintiff Huff, until this suit was commenced. The above is the entire testimony.

There is no evidence to support appellants' contention that plaintiff and intervener had actual notice of the judgment. There is no evidence that after her marriage the judgment debtor "was commonly known by the name of Grace B. M. Emerson," as claimed by appellants. That respondents had personal acquaintance, during all the mentioned times, with Grace Emerson, is not evidence of knowledge of or notice to respondents that there was a judgment against her. In point of fact plaintiff was assured by both E. L. Emerson and Grace Odell that there were no liens, except the mortgage lien which plaintiff discharged. When Emerson conveyed to Mrs. Odell in 1901, the deed was made expressly subject to Briggs' contract, and also subject to the mortgage which plaintiff paid off. Briggs having paid up his contract except \$1,000, Mrs. Odell conveyed her interest to plaintiff, in consideration of his paying this amount by paying off the mortgage, and plaintiff then gave the new contract to intervener Briggs. The legal and equitable title thus passed to plaintiff and intervener, and as to their relation to each other in respect of the title defendants are not concerned. The pivotal question in the case is this: Was plaintiff charged with constructive notice of Mrs. Sweetser's deficiency judgment lien at the time Mrs. Odell conveyed to him? It is doubtless true that by her mar-

riage Grace Emerson could not avoid the effect of the lien so far as she was concerned. Appellants cite the case of *Bogart v. Woodruff*, 96 Cal. 609, 31 Pac. 618, as "on all fours with the case at bar," and so it would be if the question were between the judgment creditor and the judgment debtor. So, also, would be in point the numerous other cases cited, as between these two persons. But there remains still the other question whether a subsequent innocent purchaser from the judgment debtor, conveying by a different name property acquired under this different name, takes title subject to the lien of a judgment docketed against this judgment debtor by another name? It must be remembered that Grace B. M. Emerson married Odell in October, 1889, and took title to the land in November, 1901, as Grace B. M. Odell, and that the judgment was not docketed against her, in the name of Emerson, until June, 1902.

Grants are to be recorded in one set of books and mortgages in another. Civ. Code, § 1171; Pol. Code, § 4235. Indexes are to be kept by the recorder showing the names of grantors and grantees, mortgagors and mortgagees. Pol. Code, § 4236. The judgment docket is to be kept as directed in section 672, Code Civ. Proc., showing, among other things, the judgment debtors and judgment creditors. "The names of the defendants must be entered in alphabetical order." Section 4204, Pol. Code, requires the county clerk to keep a general index, divided in columns, showing, among other things, the plaintiffs and defendants in all suits. It was admitted that a judgment was docketed in favor of Mrs. M. J. Sweetser against Grace B. M. Emerson. No other docket entry is shown. Conceding that it was plaintiff's duty to search the record, what would he have found had he done so? He would have found, under the letter E in indexes of deeds, the conveyance of E. L. Emerson to Grace M. Odell, in November, 1901. Looking under letter E for any judgment against Emerson prior to the date of this conveyance, he would have found none, for no judgment was docketed until June, 1902. Searching further under letter O for judgments against Odell subsequent to Emerson's deed, he would have found none. Here his duty would ordinarily have ended in protecting himself against constructive notice of liens affecting the property. But it is urged that because he knew that Grace B. M. Odell was the same person previously known by him as Grace B. M. Emerson, he was thus put upon inquiry, which, if pursued, would have led to the knowledge of the Emerson judgment lien. It will doubtless be presumed that Mrs. Odell was previously a single woman, and was known by her maiden name. But as a married woman may acquire property and may convey it in her name when married (Civ. Code, § 1187), we do not think that a person dealing with her, with respect to property thus acquired, is put

upon inquiry as to her business transactions while unmarried, because of the single fact that he knew her as a single woman. *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347, is cited by appellants. As we understand that case, it decides that if the true owner conveys property by his true name, though it be different from the name by which he acquired it, the conveyance, when recorded, will operate as constructive notice of the transfer of the title, and will take precedence of a subsequently recorded deed to the same land, executed in the name by which it was acquired, although the subsequent grantee was an innocent purchaser for value. By way of illustration, the court said: "If land be conveyed to an unmarried woman, who afterwards marries and becomes a widow, and then conveys the land by her last name, there can be no doubt that the record of the deed would impart notice to a subsequent purchaser."

* * * In such cases the subsequent purchaser buys at his peril." But the lien created by a judgment is not a transfer or conveyance of the property. *Wilcoxson v. Miller*, 49 Cal. 193. It is not a specific lien on the real estate of the judgment debtor, but is merely a general lien, and is subject to all prior liens, either legal or equitable. The lien is not an interest in the real estate of the judgment creditor, he having neither a *jus in re* nor a *jus in rem*, as regards the debtor's property; the lien merely confers the right to levy thereon to the exclusion of other adverse interests subsequent to the judgment. These principles are laid down and fully supported by cited authorities in *Metz v. State Bank of Brownville*, 7 Neb. 165. The statute in Nebraska relating to the docketing of judgments and keeping indexes is somewhat similar to ours; and it was held, in the case just cited, that judgments do not become liens upon real estate until properly indexed, and that purchasers are not required to search for judgment liens further than to examine the proper index. The judgment in that case was against William Hall, no judgment having been entered against the other defendants. But the index showed the defendants to be "Hill, Theodore & Co.," the other defendants. Hall subsequently conveyed the property involved, and it was held that the index imparted no notice, and that the purchaser was not called upon to search beyond the index. It was said: "A subsequent purchaser, however, is affected with such notice as the index entries afford; and, if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril. But the index in this case imparted no notice to the plaintiff, it being—'Defendants'—'Hill, Theodore & Co.' " We need not hold that under our statute an examination of the index to the judgment docket would be sufficient, or that it would be necessary for the purchaser to examine the judgment docket as well as

the index. Had he done so in the present case, we do not think he would have found anything to put him upon inquiry as to possible judgments against Mrs. Odell under the name of Emerson. Indeed, it is doubtful whether such a judgment would have imparted constructive notice, or would be treated as a lien affecting the rights of a purchaser from the judgment debtor in some other name. It was held in *Davis v. Steeps et al.*, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Am. St. Rep. 51, that a docket of a judgment against Edward Davis is not, under a statute requiring the entry to set out "the name at length of each judgment debtor," constructive notice to a bona fide purchaser of a judgment against E. A. Davis or Edward A. Davis. The court said: "It is only through the medium of a sufficient and legal docketing of the judgment that it can become a lien on the real estate of the judgment debtor; and it is the duty of the judgment creditor to see to it, if he would secure such lien, that his judgment is properly docketed, for, as against a bona fide purchaser for value, any material defect or omission in that respect is the fault of the judgment creditor, and the loss, if any, occasioned thereby will be regarded as his own"—citing cases. In order to create a lien the judgment alone is insufficient. It must be properly docketed, and the formalities of docketing, as required by the statute, must be substantially complied with. 17 Am. & Eng. Ency. of Law, 775, 776, and notes; *Eby v. Foster*, 61 Cal. 282. Among other essential requisites to a proper docketing of the judgment is that it be docketed against the judgment debtor in his correct name.

Briggs' contract with Emerson was not recorded until after the Sweetser judgment was rendered and docketed. His rights, however, were not affected by this fact. The judgment creditor is regarded as requiring such rights only as a debtor had. 24 Am. & Eng. Ency. of Law, 123, 124, and notes, and there is nothing in our registration act to change this rule. See *Wilcoxson v. Miller*, supra, in which the opinion was written by the distinguished jurist who tried this case. Nor were Briggs' equities destroyed by the new contract made with plaintiff Huff. It was but a novation of the Emerson contract, and substitution of the then owner of the property in Emerson's stead. The equitable principles involved in the transaction will be found considered in *Darrrough v. Kraft Company Bank*, 125 Cal. 272, 57 Pac. 983, and cases there cited. Huff paid off a mortgage existing prior to the Sweetser judgment, and equity would treat him as assignee of that mortgage, if necessary to protect his interests.

We think the case was rightfully decided, and the judgment and orders are therefore affirmed.

We concur: HART, J.; BURNETT, J.

8 Cal. App. 647

BUSH v. WOOD et al. (Civ. 428.)

(Court of Appeal, Third District, California.
Aug. 15, 1908.)

1. TRIAL—NONSUIT—NATURE AND GROUNDS.

A motion for nonsuit presents a question of law for the court, and amounts to a demurrer to the evidence, or an objection that, admitting all the proved material facts, they do not in law entitle plaintiff to the relief asked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 372.]

2. SAME.

While the court may in its discretion grant a motion for a nonsuit, made at the close of the evidence for both parties, where upon all the evidence it is clear that it would be the court's duty to set aside any verdict rendered against defendant, yet, when the motion is made at the close of plaintiff's case, the evidence, whether erroneously admitted or not, if relevant to the issues, must be given full effect, and any conflict between the witnesses cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 374.]

3. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

While the master is bound to use all reasonable precautions for the safety of the servant, and to provide him with suitable machinery kept in a safe condition, and the use of defective and unsafe machinery with his knowledge will render him liable for an injury therefrom to a servant, who is ignorant of its condition and in the exercise of ordinary care, where a servant works with or near a piece of machinery insufficient for the purposes for which it was employed, or for any reason unsafe, with knowledge or means of knowledge of its condition, he assumes the risk, and cannot recover for injuries sustained thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

4. SAME—NOTICE TO MASTER OF DEFECTIVE MACHINERY—LIABILITY TO SERVANT—APPLICATION OF RULE.

While a master is liable to his servant, who, knowing the defects in machinery, is injured thereby, where the master has been notified of the defects, and has not repaired them within a reasonable time, except where the danger from the defects was such that none but a reckless man would incur it, yet the rule does not apply to an experienced sawmill foreman, thoroughly familiar, presumably, with the mechanical operations of a mill, and who realized the added danger of unloading large saw logs down an incline by a pinch bar, which method he had adopted, because a bull-wheel by which the logs were usually unloaded was out of order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 625-647.]

Appeal from Superior Court, Sonoma County; Thos. H. Denny, Judge.

Personal injury action by George H. Bush against E. K. Wood and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

T. J. Butts and W. F. Cowan, for appellant. James W. Oates, for respondents.

HART, J. The plaintiff, having sustained personal injuries through the alleged negligence of the defendants, brought this action to recover a judgment for damages therefor in the sum of \$25,000. The cause was tried by the court, a jury having been waived by all the parties, and upon the close of plain-

tiff's case, and upon motion of the respondents, the court granted a judgment of nonsuit, from which, supported by a bill of exceptions, this appeal is taken.

The complaint alleges that on the 28th day of June, 1906, while exercising and performing his duties as "mill" foreman of the Markham Lumber Company, a corporation, which was and had been for a long time engaged in the manufacture of lumber, and of which corporation the defendants Stevens and Wood are alleged to be the owners, the plaintiff sustained serious injuries through the operation of defective machinery used in connection with the business of defendants. It appears from the complaint, as well as from the evidence, that "saw logs" which were prepared for manufacture into lumber at the sawmill were carried from the woods by means of cars run upon tracks; that the "cars carrying such logs were run upon such tracks to a point opposite to said sawmill, where said logs were then unloaded and lowered from said car down a steep incline 28 feet to a landing 13 feet wide, from which landing said logs were rolled by means of a steel wire cable onto a carriage, and thereby thence conveyed to the saws in said mill by which the same were sawed into lumber." It is further alleged that prior to the time plaintiff was injured the manner of unloading the logs from said cars was by means of a steel wire cable operating on a bull-wheel and shafts; that over a month prior to the day on which plaintiff sustained the injuries complained of the shafting on which said cable and bull-wheel were operated "became dangerous and unsafe for use, and the same could not be used with safety in the customary or any manner, and plaintiff notified defendants that the same was unsafe, but defendants neglected and refused to restore the same, so as it could be used with safety; but, on the contrary, said W. S. Stevens, as superintendent" of said corporation, "directed one B. Caligari, who was then and there in the employ of said defendants, and wholly under the control and direction of said Stevens as such superintendent, to unload a car load of logs then standing opposite said mill by rolling said logs from said car down said incline by means of a pinch bar and jack-screw, and said B. Caligari in pursuance of said directions and instructions, and without the knowledge of plaintiff, proceeded to carry out said instructions and commenced to unload said logs from said car by means of a jack screw and pinch bar and roll the same down said incline onto said landing." At the time of the accident, and just before Caligari commenced to unload the logs from the car, plaintiff was engaged in fastening the cable around a saw log, then resting on the landing, "for the purpose of rolling said log onto the carriage for conveyance to the saws," and while plaintiff was thus engaged, said Caligari, so the complaint avers, "without notice or warning to plaintiff, unloosened

and allowed several of said logs to roll from said car down said incline with great force, and one of said logs, about 22 feet in length and 30 inches in diameter, and weighing about 1,500 pounds, rolled down said incline with great force and struck plaintiff with great violence," fracturing the bones of his left leg in four different places, one of said fractures being above and three below the knee, and also dislocating the kneecap. It is further alleged that the effect of the injuries thus received was to render plaintiff for many months thereafter incapable of performing his ordinary duties as a sawmill foreman, in which capacity in various sawmills he had been employed for many years, etc., and that he will permanently suffer from said injuries.

After the plaintiff had put in all his evidence, the court, upon motion of the defendants, granted a nonsuit, and the only question presented upon this appeal is therefore whether the court was, under the evidence adduced by plaintiff, justified in allowing the motion therefor. The defendants specified a number of apparently different grounds upon which they asked that plaintiff be nonsuited, but they all in effect amount to the contention that plaintiff, by his own testimony, discloses that his injuries were received through his own negligence, and not through that of the defendants. A motion for nonsuit presents a question of law for determination by the court. The motion is tantamount to a demurrer to the evidence, or an objection that, admitting all the proved material facts to be true, said facts do not in legal effect operate in favor of the plaintiff, or, in other words, do not entitle him to the relief asked for by him. *Goldstone v. Ice Co.*, 123 Cal. 625, 56 Pac. 776; *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *Nonrefillable Bottle Company v. Robertson* (Cal. App.) 96 Pac. 324, and cases therein cited. It is also one of the settled rules governing a motion for a nonsuit upon the close of plaintiff's case that the evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given by the court the benefit of its full probative strength, and that any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. *Wasserman v. Sloss*, *supra*; *Archibald Est. v. Matteson*, 5 Cal. App. 441, 90 Pac. 723, and cases therein cited. It is also true that, on motion for a nonsuit, the evidence must be taken most strongly against the defendant (*Goldstone v. Ice Co.*, *supra*), and, if the plaintiff has introduced proof sufficient to make out a *prima facie* case under the allegations of his complaint, the motion, if made on the close of his case, should be denied (*Janin v. London, etc.*, Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 92 Am. St. Rep. 82; *Nonrefillable Bottle Co. v. Robertson*, *supra*; *Archibald Est. v. Matteson*, *supra*). From the forego-

ing, it is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony presented or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purposes of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading. It is scarcely necessary to suggest that the situation as to the last-mentioned proposition is somewhat different where a motion for a nonsuit is made after all the testimony for both sides has been put in; that is to say, it is a well-established rule that the trial court may, in the exercise of its discretion, grant a motion for a nonsuit, made at the close of the evidence for both plaintiff and defendant, "where, upon all the evidence, it is clear that if a jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial." *Estate of Morey*, 147 Cal. 507, 82 Pac. 57, and cases therein cited.

Having thus stated some of the rules by which the courts must be guided in the determination of the disposition which should be made of a motion for a nonsuit, we will now, by the light of those rules, proceed to examine the evidence produced by the plaintiff to ascertain whether in our opinion the court below erred in its ruling on the motion in the case at bar. It may be premised that, if the evidence presented by plaintiff discloses that he was himself guilty of negligence which proximately contributed to the accident in which he sustained the injury of which he complains, then, of course, the ruling of the court on the motion was proper and should be upheld. The testimony of the plaintiff, who was the only witness who testified concerning the circumstances immediately attending the accident causing his injury, shows these facts: That plaintiff up to the time of the accident had had about five years' experience as a foreman of lumber mills, having worked at other mills prior to his employment by the defendants; that he had, when the accident occurred, worked in that capacity for defendants for about a year; that the defendant Stevens, who was general superintendent of the corporation defendant, employed him; that his duties were, to use his own language, "to keep the mill going"; that when the mill became "short a man"—that is, when one of the employes became incapacitated temporarily or left the service of the corporation permanently—it was the duty of plaintiff to take the place of such man until the latter was restored to capacity or another man procured to discharge the particular duties of the position; that one Caligari was on the day of the accident operating the tramway or railroad used for the purpose of conveying large saw logs from the "lumber camp" to a point 40 feet from the mill; that

at this point Caligari would unload the logs so that they would descend a 26-foot incline to the "landing," from where they were conveyed to the sawmill; that prior to the 10th or 11th day of May, 1906, the logs were unloaded from the logging car by a bull-wheel and cable operated by means of levers, and that, when the logs were thus unloaded, the man on the car put the cable over the log while yet on the car, and then signaled the man who worked on the landing and who started the bull-wheel by the manipulation of the levers; that there was comparatively little danger incident to the unloading of the logs in the manner thus briefly described; that on or about the 11th or 12th day of May, 1906, the bull-wheel and shaft used for the purpose of unloading the logs got out of order so that they could not be used; that thereafter, and until including the 28th day of June, 1906, on which day the plaintiff was injured, the work of unloading the logs from the car was conducted by means of a pinch bar and a jackscrew—that is, the man on the car would, when necessary, raise the logs above the level of the car with the jackscrew, and then throw them off by means of the pinch bar, so that they would slide down the incline to the landing, a distance of 26 feet—that this method of unloading the logs, was more dangerous than unloading them by means of the bull-wheel and cable, and that plaintiff knew that there was increased danger and risk in thus unloading them; that on the day of the accident the man who had been accustomed to attending to the duty of receiving the logs at the landing and thence conveying them to the mill had given up his position, and the plaintiff, in pursuance of his duties as foreman, was at the landing in his place for the purpose of performing said duty. Plaintiff testified that on several different occasions he spoke to Stevens, the superintendent, about the condition of the bull-wheel, and requested him to have it repaired; that he told Stevens several times that it was "unsafe to operate that bull-wheel with the machinery that he had there; asked him to shut the mill down, and he says: 'Oh, no, we can't do that; we will have to keep going.'"

The plaintiff then described the manner in which he was injured as follows: "There was just one log on the landing, everything cut up and just one—just one log—on the landing, and I had a piece of old wire cable there. We couldn't get nothing, and I was putting that piece of old wire cable, I should judge about 20 feet long, around a log to connect it with the bull-wheel to take it to the carriage to saw it up in boards, and, while I was passing this wire cable around there, these logs were turned loose upon the car with the pinch bar and jackscrews without me having any warning whatever, and my leg was broken in four places and a dislocation of the kneecap. Q. Was there anybody there whose duty it was to fasten this cable around the logs and put

them on the carriage so they could go into the saw? A. No; there was nobody there. I had to do it. Q. If you hadn't done it, it would not have been done? A. No, sir; it would not have been done. Q. And that was the only log there was on the landing? A. Just the one. I simply put in the wire cable around so they could connect it and take it to the carriage. Q. Did you have any warning when these logs came down? A. No, sir; none whatever. Q. Do you know how many came down? A. I think two and possibly three, because a man using a pinch bar on a lot of logs you can't really tell sometimes where they are going or how many comes down, but there was two came down anyhow on me; for after I fell to the ground I recognized there was two logs there." On cross-examination the plaintiff repeated that he knew it was much more dangerous to unload the car with a pinch bar than by means of the bull-wheel and cable, for by the former method the logs were liable to go in any direction—that is, they would not likely remain while descending the incline in the track over which it was intended they should roll down to the landing, as they would by the bull-wheel and cable, and, therefore, one would have to be on his guard more—that the man at the car, when unloading the logs by means of the bull-wheel, could and would give a signal warning to the man at the landing, and thus give him an opportunity to avoid collision with the logs. The witness Howard, who was a section hand on the railroad, testified that there was more danger of accident by unloading the logs with the jackscrew and pinch bar than with the bull-wheel and cable. Caligari also so testified. This witness said that from the car from which he unloaded the logs he could plainly see the man at the landing, and that he knew of no reason why the man at the landing could not see him. He further testified that he requested Stevens several times to have the bull-wheel repaired so that it could be used.

The foregoing represents a fair epitome of all the testimony given on behalf of plaintiff and upon which the court below granted the nonsuit. We think the nonsuit was properly ordered, for we are of the opinion that plaintiff shows by his own testimony that but for his own negligence the injuries he sustained would not have been received. He was a man of experience as a foreman of lumber mills, and certainly, if he were not possessed of more than ordinary ability and intelligence in the line of the duties of the position he occupied, he would not have been invested with the responsible authority and duties of so important a position. Men who are selected to immediately oversee and direct the operations of a business of the importance and magnitude of a sawmill in which large quantities of lumber are manufactured are ordinarily so selected because of their peculiar experience and ability in that line of activity. Where a man may not be so employed upon

the considerations suggested, the exception and not the rule is encountered. The plaintiff in the case here claims to be, and no doubt is, a capable person in the position of foreman, and director of such a business. His own testimony shows that he was aware of the defective condition of the machinery with which the logs were conveyed from the car to the "landing" for over a month prior to the day on which he was injured, and it also shows that he knew that the unloading of the logs by means of the jackscrew and crowbar involved increased risk and danger of accidents. Notwithstanding this knowledge, he undertook the work of receiving the logs at the "landing," and in so doing assumed, we think, whatever additional risk might be involved in the discharge of that duty under those circumstances. The rule is well stated in *McGlynn v. Brodie*, 31 Cal. 380, as follows: "Where a party works with, or in the vicinity of, a piece of machinery insufficient for the purposes for which it was employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery." Of course, it is the duty of the employer to use all reasonable precautions for the safety of those in his service. "He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant ignorant of its condition and in the exercise of ordinary care, he should compensate the person thus injured through his neglect." *Buzzell v. Laconia Man. Co.*, 48 Me. 113, 77 Am. Dec. 212, and cases therein cited. See, also, footnotes in last citation.

We have not, in the consideration of the question here, measured by the circumstances under which plaintiff's injuries were received, overlooked the long line of cases holding that a master will be responsible to his servant who, having full knowledge of the defectiveness of the machinery, and while exercising due care, sustains injuries through the operation of such defective machinery, where the master has previously been made cognizant of such defectiveness and has omitted to repair such machinery within a reasonable time after such notice. *Patterson v. Pittsburg & Connellsville R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Parody v. Chicago, etc., Ry. Co.* (C. C.) 15 Fed. 205; *Buzzell v. Laconia Man. Co.*, supra. The principle, however, upon which it is held that the master is liable under the circumstances mentioned proceeds upon the theory that the servant, although fully aware of the increased danger of his employment growing out of

the defectiveness of the machinery, "rests upon the judgment of his superiors, who requested him to continue its use, hoping that by extra care and skill he might avert accidents" until the machinery is properly repaired. *Patterson v. Pittsburg & Connellsville R. Co.*, supra. Or, as it has been expressed in another jurisdiction, "it is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. * * *" *Clarke v. Holmes*, 7 Hurlst. & H. 937. But, as we have seen, we have here a man who, in one sense of the term, was himself a master; a man who was an experienced mill foreman, thoroughly familiar, presumably, with all the mechanical contrivances and operations of the mill, and who, according to his own testimony, keenly appreciated and realized the added risk and danger incident to the unloading of large saw logs and their precipitation down an incline by means of a pinch bar. The fact, of which he undertakes to make much to his own advantage and in support of the claims of his complaint, that under the regular or proper method of unloading the logs there was a way, habitually practiced, in which a signal warning was given him by the man at the car when the logs were started down the incline, and that no such signal could be given where the logs were sent down from the car with a pinch bar, is itself a strong circumstance disclosing the absolute necessity for the exercise of extraordinary care on the part of the man at the landing in the discharge of his duties there under the pinch bar method of unloading the car. While the testimony shows that Stevens was the general superintendent of the plant and the business and employed plaintiff, it also shows that plaintiff had immediate management and control of the operation of the mill, and possessed knowledge of the effect of unloading the logs with a pinch bar equal if not superior to that of Stevens. There is therefore no reason or room for the application of the principle we have been discussing to the facts of this case. If plaintiff were an ordinary workman, without special experience as a lumber mill man, occupying only an ordinary position at the mill, itself not carrying or involving duties requiring special or more than ordinary skill, there might then be reason for holding the master liable after he had been apprised of the defect in the machinery, rendering it unusually dangerous; it appearing that plaintiff had exercised, in the performance of the duties of his employment when the accident occurred, the care demanded by the new circumstances created by the defectiveness of the machinery. But the rule of which we are speaking has this qualification:

"If the defect was so great that obviously, with the use of the utmost skill and care, the danger was imminent, so much so, that none but a reckless man would incur it, the employer would not be liable." *Patterson v. Pittsburg & Connellsville Railroad Co.*, supra. The plaintiff declared as a witness that where the logs were thrown down the incline without the use of the cable, there being then no means by which they could be controlled after they left the car, they were likely to go down the incline in a haphazard manner, or not remain within the track over which they would otherwise pass. Therefore an experienced person at the landing, having full knowledge of the increased hazard to which he was subjecting himself, would be charged with the exercise of unusual caution and alertness in the performance of the service he was thus engaged in. It was the duty of plaintiff, under the circumstances, to have been constantly on his guard so as to prevent damage which he might reasonably have anticipated would otherwise occur. Failing to do so, the injuries he sustained were consequently due wholly to his own fault, and he cannot therefore fasten liability therefor upon the defendants. In other words, viewing the testimony in the strongest and most favorable light to plaintiff's contention, as it is our duty to do, we think, as it has been our purpose to make clear, that it shows that the accident and consequent damage would not have occurred but for his own culpable negligence.

There is no evidence in the record, disclosing negligence upon the part of Caligari who was a fellow servant, and hence the discussion in the briefs relative to the alleged liability of the defendants for the negligence of a co-employé of plaintiff need not be noticed.

The judgment, for the reasons herein given, is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(154 Cal. 310)

LAURENCE v. KILGORE et al. (Sac. 1,615.)
(Supreme Court of California. Sept. 24, 1908.
Rehearing Denied Oct. 23, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings of fact on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. PRINCIPAL AND AGENT—ACTIONS—RECOVERY BY PRINCIPAL—CONDITIONS PRECEDENT.

The suit not being for rescission of contract, but by a principal to recover what he had given his agent in excess of the amount the agent had paid for property in buying it for him, the agent having falsely represented that he had paid more, plaintiff is not required to return the property, or do else towards placing defendant in statu quo, as a condition of maintaining the action.

Department 1. Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by E. R. Laurence against J. N. Kilgore and others. Judgment for plaintiff. Certain defendants appeal. Affirmed.

Nicol & Orr and W. Goodwin Williams (N. J. Manson, of counsel), for appellants. Plummer & Dunlap, for respondent.

SHAW, J. The only appeal remaining in this cause is that of defendant Massie from the order denying his motion for a new trial.

Kilgore, acting as agent for Laurence, who was absent from the state, bought for Laurence a farm of Claiborne at the price of \$8,750, taking the deed in his own name. He represented to Laurence that the price was \$20,330, and that he had taken title in his

own name for convenience in making the purchase, and upon this representation obtained from Laurence \$10,166.50 of the supposed purchase price, in cash, and a note to himself and Massie for the unpaid portion of the price, whereupon he conveyed to Laurence. Massie received the note without consideration. On discovering the truth, Laurence brought this suit against the defendants to recover of Kilgore the sum of \$1,416.50, being the excess of the money paid by him to Kilgore, over the price paid by Kilgore to Claiborne, and to cancel the note to Kilgore and Massie. Judgment was given against Kilgore for the sum claimed and against all the defendants for the cancellation of the note.

The main point argued is the insufficiency of the evidence to sustain the finding of the court that Kilgore was the agent of Laurence to buy for him the land of Claiborne. The most that can be said in favor of the appellants is that the evidence is in substantial conflict on the subject. Under the rule of law governing the power of this court on appeal, we cannot consider the weight of the evidence in such cases, and must take the fact as found by the trial court.

The suit is not for the rescission of the contract, and hence the plaintiff was not required to return the land, or place the defendant in statu quo, as a condition of maintaining the action.

No other points are presented.

The order is affirmed.

We concur: **ANGELLOTTI, J.; SLOSS, J.**

8 Cal. App. 612

PEOPLE v. HUNTINGTON. (Cr. 138.)

(Court of Appeal, First District, California.
Aug. 13, 1908. Rehearing Denied by
Supreme Court Oct. 13, 1908.)

1. CRIMINAL LAW—FORMER JEOPARDY—CONVICTION AS ACQUITTAL OF HIGHER GRADE OF OFFENSE.

A conviction of manslaughter, while the information charges murder, is an acquittal of first and second degree murder, and on a retrial, after reversal, accused can only be tried for manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 366, 387, 389, 394.]

2. HOMICIDE—REVIEW—PROCEEDINGS IN LOWER COURT.

On the second trial of accused, charged with murder by performing a criminal operation on decedent, had after the reversal of a conviction of manslaughter, evidence that death was caused in an attempt to perform a criminal operation on decedent was admissible to prove accused guilty of manslaughter, though it proved murder, for which he could not be tried.

3. INDICTMENT AND INFORMATION—"MURDER"—"MANSLAUGHTER"—ATTEMPT TO PROCURE ABORTION—CONVICTION UNDER CHARGE OF MURDER.

Under Pen. Code, §§ 187, 189, defining murder as the unlawful killing of a human being with malice aforethought, and defining murder in the first and second degrees, and section 192, defining manslaughter as the unlawful killing of a human being without malice, and di-

viding manslaughter into voluntary and involuntary manslaughter, and section 274, making it a felony to perform a criminal abortion, an unlawful killing with malice aforethought is "murder," and is also "manslaughter," because it is the unlawful killing of a human being, though it cannot be logically classed as voluntary or involuntary manslaughter, and under a charge of murder by attempting a criminal abortion, a verdict of manslaughter may be returned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 593.]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342, 4632-4637; vol. 8, pp. 7715, 7726, 7727.]

4. SAME.

Under an ordinary indictment or information for murder, accused may be convicted of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 593.]

5. HOMICIDE—REVIEW—PROCEEDINGS IN LOWER COURT.

Where, after reversal of a conviction of manslaughter under an indictment for murder, the people have the right, at the second trial, to put accused on trial for manslaughter, evidence as to the death, the time and place thereof, and the circumstances, and accused's acts in connection therewith is admissible.

6. CRIMINAL LAW—EVIDENCE—SELF-SERVING DECLARATIONS.

The law will not permit one who intended to perform a criminal act to make declarations, a day or two before the act, as to the lawful purpose in mind, and then introduce such declarations to justify himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 928-935.]

7. SAME.

Where accused claimed that an operation was not criminal, but was a lawful operation, the exclusion of evidence, that accused had borrowed from a physician instruments to perform a lawful operation, on the ground that there had been no proof as to the use of such instruments, was not erroneous, where leave was given to renew the offer, which was not done.

8. SAME—APPEAL—REVIEW.

It is the province of the court on appeal to pass on questions of law, where there is sufficient evidence to justify the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2986.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Ralph A. Huntington was convicted of manslaughter, and he appeals. Affirmed.

Peter F. Dunne and Robert Ferral, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The information charges the defendant with the crime of murder by the unlawful and felonious killing, with malice aforethought, of Jennie McKown on the 27th day of October, 1900, in the city and county of San Francisco. The case has formerly been before the Supreme Court. On the first trial the defendant was convicted of manslaughter, and on appeal the judgment was reversed, upon the ground that the court erred in giving an instruction upon

the subject of manslaughter, where the whole theory of the prosecution during the trial was that defendant was guilty of murder in causing the death of deceased by an attempt at criminal abortion; no claim being made that death resulted from a lawful act in performing a surgical operation upon deceased without due caution and circumspection. *People v. Huntington*, 138 Cal. 261, 70 Pac. 284. The court there remanded the cause for a new trial. It is settled by a long line of decisions in this state that the verdict of manslaughter in the first trial and the judgment entered thereon operate, as matter of law, to acquit the defendant of all higher offenses, to wit, murder in the first degree and murder in the second degree. *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *People v. Backus*, 5 Cal. 275; *People v. Apgar*, 35 Cal. 391; *People v. Smith*, 134 Cal. 453, 66 Pac. 669; *Huntington v. Superior Court*, 5 Cal. App. 288, 90 Pac. 141. The cause, after a long delay, came up for a second trial in the superior court in June, 1907, and the jury returned a verdict of manslaughter, upon which judgment was entered, sentencing the defendant to a term of four years in the state prison at San Quentin. Defendant made a motion for a new trial, which was denied, and hence this appeal from the judgment and order.

The main contention of defendant is that the court received evidence which showed, or tended to show, that the death was caused in an attempt to perform a criminal abortion upon deceased, and hence the crime proved was murder, and not manslaughter, and that defendant could not be convicted of manslaughter where the evidence shows that the crime was murder in killing deceased by attempting to produce an abortion. It was clearly the theory of the district attorney and of the trial judge that all the facts might be proven, and that upon such facts the jury might return a verdict of manslaughter, even though the crime was in fact murder. It is not disputed that such verdict might have been returned if the case had not been tried before, and the defendant, by reason of the law, acquitted of murder. The district attorney, in the course of his opening statement, said: "From these and a variety of other circumstances we expect to show that this girl was pregnant, that the defendant knew of her pregnancy, and that he undertook to relieve her of that condition, and that, in his attempt to perform the operation, he caused her death." And the judge in instructing the jury said: "If you find from the evidence in this case to your satisfaction to a moral certainty, and beyond a reasonable doubt, that the defendant Ralph A. Huntington did, on or about the 27th day of October, 1900, at the city and county of San Francisco, knowingly and intentionally perform, or attempt to perform, the operation of curettement on Jennie

McKown while she was pregnant, for the purpose of causing her a miscarriage, when the same was not necessary to save her life, and that, by reason of such performance or attempt to perform such operation said Jennie McKown lost her life, it will be your duty, in view of the former verdict in this case, to find the said defendant guilty of manslaughter." In our opinion the evidence was admissible if it tended to prove the defendant guilty of manslaughter, although it proved more, to wit, the crime of murder. Murder is defined as "the unlawful killing of a human being with malice aforethought." Pen. Code, § 187. It is divided into degrees as follows: "All murder which is perpetrated by means of poison, or lying in wait, torture, or any other kind of willful, deliberate, premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree; all other kinds of murder are of the second degree." Section 189. Manslaughter is "the unlawful killing of a human being without malice." Section 192. If the defendant caused the death of deceased by the use of an instrument or means with intent to procure a miscarriage, the killing was unlawful, because such act is expressly made a felony by statute. Pen. Code, § 274. There is ample evidence in the record to sustain the implied finding of the jury to the effect that the death was caused by defendant in an attempt to produce a miscarriage of deceased, who was pregnant. It is not necessary to give such evidence in full, or to discuss the evidence as to the defendant's acquaintance with the unfortunate girl, who met her death while in the full bloom of youth and vigor. In fact counsel for the defendant do not claim that the evidence is insufficient to support a verdict of murder; but they insist that the evidence shows the crime to have been murder, and that the defendant has been already acquitted thereof. This argument is based upon the Code, which divides manslaughter into two classes: "(1) Voluntary, upon a sudden quarrel or heat of passion; (2) involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection." It is not claimed by the people that the killing was done in the performance of a lawful act in an unlawful manner, or without due caution or circumspection; nor is it claimed that it was done in the commission of an unlawful act not amounting to a felony, for the very reason that, if the defendant was attempting to procure a miscarriage of deceased, who was pregnant, he was doing an unlawful act which was a felony. The result of the argument of appellant's counsel, if carried to the extent claimed, would be to hold that if the act which defendant performed was unlawful, but not a felony, he is

guilty of manslaughter; while if the act was a felony, he is not guilty of manslaughter, but of murder. We do not think it incumbent on the court to give such narrow, technical interpretation as to the true meaning of the statute. If the killing was unlawful, with malice aforethought, it was murder, and it was also manslaughter, because, by the very definition of the statute, it was the unlawful killing of a human being. It is none the less manslaughter because we cannot logically place it under one of the headings of section 192 as being voluntary or involuntary. If the killing was manslaughter, it is not important that it be classified. The statute does not distinguish the kinds of manslaughter in prescribing the punishment, but, on the contrary, makes the punishment not exceeding 10 years' imprisonment for manslaughter; and the question as to whether any case falls under the one head or the other does not appear to be material. It is not necessary for us to pause in this case and reverse the judgment of conviction because we might not be able to classify the manslaughter as being voluntary or involuntary. The main question is whether or not the evidence shows the defendant to be guilty of manslaughter. The evidence is sufficient to justify the verdict that the deceased came to her death by the unlawful act of the defendant. The law only requires that the acts claimed to constitute the crime should come within the prohibition of the statute when interpreted by the plain rules of common sense. We have been cited to no case which is in conflict with what we have said. It is said in McClain on Criminal Law, § 335, after speaking of the classification of manslaughter into voluntary and involuntary: "All these classes are characterized, on the one hand, by the presence of some wrong, and on the other by the absence of malice aforethought, so that a short definition of manslaughter would be, criminal homicide without malice aforethought. This distinction is sometimes embodied in statutes, in which case it is necessary to refer to the common law to determine what killings are, and what are not, within the statute. Manslaughter is not a degree of murder, but a distinct crime, included, however, in the crime of murder." The same author says further (section 347): "The cases of manslaughter already discussed are those where the killing is intentional, but under such provocation as to indicate the absence of malice, and reduce the offense to manslaughter. But there are also cases of unintentional homicide amounting to manslaughter, just as there are cases of unintentional homicide amounting to murder, the difference being as to the magnitude of the wrong which was intended and from which death has resulted. Thus if a wrongful blow is given resulting in death, the act will not be less than manslaughter, even though the blow was one in its nature not likely to cause death, or other-

wise shown to have been inflicted with intent to cause death. Death resulting from an act wrongful per se, such as attempting to procure an abortion when not necessary to save the life of the woman, will be manslaughter at least."

In speaking of the various definitions of manslaughter, and the various criticisms thereof, it is said by Bishop in his *New Criminal Law* (volume 2, § 737): "Though the subject does not admit of a defining so exact and short as to satisfy equally the demands of the law and of literary taste, the following is proposed: Manslaughter is any such dangerous act or omission, feloniously done or suffered contrary to one's legal duty, as results in the death of a human being within a year and a day. Now this definition includes murder, and properly, because an indictment for manslaughter may be sustained while the proof is of murder." It is said in Wharton on Homicide (3d Ed.) § 92: "So it is open to the jury to ignore the doctrine of implied malice in such case, and a verdict of manslaughter may be properly rendered in a prosecution for a killing done in the perpetration, or attempted perpetration, of a felony." And again (section 376): "At common law if life was destroyed in the commission of or attempt to commit an abortion, whether the woman was quick with child or not, it was murder, or at least manslaughter." And section 378: "By statute in Illinois, and perhaps in some of the other states, it is expressly provided that if any person shall, in the attempt to procure the miscarriage of a pregnant woman, thereby cause her death, the person so offending shall be deemed guilty of murder, and shall be punished as the law requires for such offense. Such a statute brings the crime under the general rule which governs and controls murder committed by other means; and in such case a verdict of manslaughter may be found by the jury as well as in a case of prosecution for murder of any other kind." In *Peoples v. Commonwealth*, 87 Ky. 487, 9 S. W. 512, one of the leading cases, the defendant was convicted of manslaughter, where death resulted in the use of means to procure an abortion, and the verdict was upheld. The court said: "All the authorities agree that if, from the means used, the death of the woman results, it is either murder or manslaughter." In *State v. Alcorn*, 7 Idaho, 599, 64 Pac. 1014, 97 Am. St. Rep. 252, the defendant was tried upon an indictment charging murder and found guilty of manslaughter, and the judgment was affirmed, the court holding that the contention of defendant that because the indictment charged murder the verdict of manslaughter could not be upheld was without merit. In *Earl v. People*, 73 Ill. 320, the defendant was prosecuted on an indictment for murder, under a statute which provided that any person who causes the death of a pregnant woman, in an attempt to produce an abortion, shall be deemed guilty of murder.

A verdict of manslaughter was returned, and the court upheld it, and also held that the trial in such case should be conducted as an ordinary trial for murder. The remarks of the court are applicable to this case, and are as follows: "By the express provision of the statute the crime for which the plaintiff in error was indicted is declared to be murder. Unless there is some provision in the law which would take the crime of murder caused by an abortion out of the application of the general rule which governs and controls the same crime produced in another manner, then the rules of law which apply to and govern ordinary cases of murder must be held to control the case at bar. The act declares the attempt to produce the miscarriage of a pregnant woman, which causes the death of such woman, shall be murder, and the penalty for the crime is the same as if murder had been committed in a different manner. An indictment is required as in other cases. The trial is conducted in all respects as is required where a criminal is on trial for murder caused by killing in some other manner; and, in the absence of a law prohibiting a verdict of manslaughter we are aware of no reason why a verdict of that character may not be found by a jury as well in a case of this character as under any other indictment for murder." This case was upheld and followed in the later case of *Howard v. People*, 185 Ill. 552, 57 N. E. 441, and the court held that "the lesser crime, manslaughter, is included in the greater, murder." The subject is very fully discussed and the cases cited in a note to *State v. Power* (Wash.) 63 L. R. A. 902. The author of the note concludes by stating that, while causing the death of a woman by procuring or attempting to procure her miscarriage was usually regarded as murder at common law, yet under statutes classifying homicide, "it is usually regarded as either murder or manslaughter."

It is needless to quote further from authorities. The above are directly in point to the effect that, under a charge of murder by attempting to procure an abortion, a verdict of manslaughter may be returned and will be upheld. Our own courts have in principle decided the same way, and it has always been held that, under an ordinary indictment or information for murder, the defendant could be convicted of the lesser offense manslaughter. *People v. Muhlnner*, 115 Cal. 303, 47 Pac. 128; *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245. In the latter case it is said: "But inasmuch as the offense of manslaughter is necessarily involved in the offense of murder, we cannot see that the defendant was prejudiced by instructions defining the latter crime, and in telling the jury that, if the evidence warranted a conviction of murder, they should find the defendant guilty of manslaughter, and could not, in view of the plea of former conviction find him guilty of murder. The facts on which the information charging murder

was based did not change when, by reason of the former conviction for the lesser offense, the defendant was acquitted of the greater. At the second trial the same evidence would go to the jury whether it pointed to murder or only to manslaughter (Pen. Code, § 1180), and this same evidence would have gone to the jury had the information charged manslaughter instead of murder. In effect, the instruction was that, although the jury might regard the evidence as establishing the crime of murder as defined by the court, the jury must render a verdict of guilty of manslaughter only. Clearly if murder was made out, so necessarily also was manslaughter." While there are expressions in *People v. Huntington*, supra, giving countenance to defendant's contention, a careful examination of the case will show that it does not conflict with what has here been said. Not only is this so, but the case was remanded for a new trial. The court knew that the result of the verdict of manslaughter was to acquit the defendant of murder, and it could only remand the cause for a new trial for manslaughter. The new trial was for manslaughter, and the verdict was guilty of manslaughter. And so of *Huntington v. Superior Court*, supra. The question there was as to whether or not the defendant could again be tried for murder, and it was held that he could not. It was there said: "A man should not be tried for one crime and found guilty of another and different crime, unless the different crime is included in the charge for which he is being legally tried. Now in the charge of murder is included the lesser offense of manslaughter; and in a proper case, where the defendant is being tried for the crime of murder, a jury may find the lesser offense of manslaughter." It being conceded that the people had the right to put the defendant on trial for manslaughter, it must follow that evidence as to the death, the time and place thereof, and the circumstances, and defendant's acts in connection therewith was admissible. If this were not so, we would have the strange case of the people having the right to try the defendant for manslaughter, but being deprived of the right to prove such crime. Such is not the law.

The defendant claimed that the operation which was performed by him upon the deceased was the lawful operation of curettage, performed by instrumental treatment of the inner womb for the removal of a condition therein of endometritis; that he was not in any way attempting to produce an abortion. He called one Dr. Depuy as a witness, and proposed to prove by such witness that he borrowed a curette, dilator, and irrigator with which to perform the operation; and that he, the defendant, made the contemporaneous statement to Dr. Depuy that he

wanted such instruments for the purpose of performing such operation upon deceased. After objections had been made to this line of questions as to such declarations, the record shows the following to have occurred, while the attorney for the defendant was explaining what he desired to prove: "Mr. Dunne: One day before the operation—if the operation was upon the 27th, that it was upon the 26th that Dr. Huntington obtained the instruments, made the declaration to this doctor as to his purpose in obtaining them, and inviting him to be present at the operation. The Court: Has proof been offered that the instrument was used—the curette? Mr. Dunne: If it has not been offered in the case, it will be offered. That is a mere question of the order of proof (argument). The Court: The objection will be sustained at this time without prejudice to the renewal of the offer. Mr. Dunne: We note an exception." The objection which had been interposed to this line of questions leading up to the offer was that the declarations were incompetent, irrelevant, and immaterial and hearsay; that no proper foundation had been laid. It is evident from an examination of the record that no question was asked of the witness as to the mere fact of the defendant having borrowed the instruments from him, but the questions were each accompanied by the question as to the statement or declaration of the defendant made to Dr. Depuy at the time he desired to borrow or procure the instruments. The statements, made by defendant to Dr. Depuy the day before the attempted operation as to the purpose for which he desired them, would be clearly self-serving declarations. It was not a declaration forming part of the transaction, and made while it was in progress. The law would not permit a party who intended to perform an act that was criminal to make statements or declarations a day or two before the act as to the lawful purpose in mind, and then introduce such declarations to justify himself. Not only this, but the court placed its ruling upon the ground that there had been no proof offered as to the use of the curette, and sustained the objection, with leave to renew the offer. Defendant's counsel never renewed the offer. Defendant testified in his own behalf that he performed the operation for endometritis and used curettes; that he procured a curette from Dr. Depuy. We find no ruling prejudicial to the defendant. He appears to have had a fair trial, and the jury passed upon the question of his guilt. It is our province to pass upon questions of law where there is sufficient evidence to justify the verdict. There being no error in the record, the judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 737

FOX v. MONAHAN et al. (Civ. 355.)

(Court of Appeal, First District, California.)

Aug. 24, 1908.)

1. MONEY RECEIVED (§ 17*)—PLEADING—ALLEGATIONS.

The approved and usual form of a count for money had and received is that defendant is indebted to plaintiff in a certain sum for money had and received by the defendant to and for the use of plaintiff.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 55; Dec. Dig. § 17.*]

2. MONEY RECEIVED (§ 1*)—GROUNDS OF OBLIGATION.

The action for money had and received will lie whenever defendant has received money which in equity and good conscience he should pay to plaintiff.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. MONEY RECEIVED (§ 17*)—PLEADING—ALLEGATIONS—SUFFICIENCY.

Allegations that money was earned by plaintiff's assignors as their share of commissions from the sale of property, and was collected by defendants and appropriated to their own use, state a cause of action for money had and received as against a general demurrer, though it is not expressly alleged that the money was received by defendants for the use of plaintiff's assignors; it appearing that defendants had collected money which in equity and good conscience belonged to plaintiff's assignors.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 55, 56; Dec. Dig. § 17.*]

4. MONEY RECEIVED (§ 17*)—PLEADING—ALLEGATIONS—SUFFICIENCY.

Allegations that defendants became indebted to plaintiff's assignors in a certain sum, money had and received by defendants from such assignors at the special instance and request of defendants, is insufficient on general demurrer as a count for money had and received; there being no allegation, either direct or inferential, that the money was received for the use of plaintiff's assignors, and its payment to defendants of itself raising no presumption that it was paid for the use of plaintiff's assignors.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 55, 56; Dec. Dig. § 17.*]

5. PLEADING (§ 8*)—CONCLUSIONS OF LAW—ALLEGATION OF INDEBTEDNESS.

The general allegation of indebtedness in an action for money had and received is a mere conclusion of law, and insufficient in the absence of averment of facts supporting it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 15; Dec. Dig. § 8.*]

6. APPEAL AND ERROR (§ 1212*)—DISPOSITION OF CAUSE—PROCEEDINGS AFTER REMAND.

In an action on two counts for money had and received, the demurrer being overruled as to the first count and sustained as to the second, on remand the issues as to the first count need not be retried, and, after retrial of the second count, judgment may be given on the first count in accordance with the findings already made, and, on the second count, pursuant to the findings on retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by J. M. Fox against John Doe Monahan and others. From a judgment for

plaintiff, defendants appeal. Reversed and remanded for further proceedings as directed.

Leon Samuels, for appellants. H. H. Davis, for respondent.

HALL, J. This is an appeal upon the judgment roll from a judgment for plaintiff and against defendants in the sum of \$346.65.

The complaint is in two counts, each of which was attacked by defendants by a general demurrer, which was by the court overruled as to each count, and it is this action of the court which is now chiefly relied on for a reversal of the judgment.

The first count, if good at all, sets forth a cause of action for money had and received by defendants to and for the use of plaintiff's assignors. The point intended to be raised by the demurrer is that it is not alleged that defendant had or received or collected the money sued for for the use or benefit of plaintiff's assignors. In this respect it must be confessed that plaintiff's complaint is not a model of good pleading, and is a departure from the usual and approved form for a count for money had and received. The approved and usual form for this count is very simple, consisting simply in stating that the defendant is indebted to the plaintiff in a certain sum "for money had and received by the defendant to and for the use of plaintiff." 1 Chitty, Pl. (16th Am. Ed.) 362. In the first count of plaintiff's complaint, it is not expressly alleged that the money was had or received by defendants to or for the use of plaintiff's assignors; but it is alleged that the money was earned by plaintiff's assignors as their share of commissions from the sale of certain real property, and was collected by defendants and appropriated to their own use. It thus appears that defendants collected money belonging to plaintiff's assignors. Having collected money belonging to plaintiff's assignors, equity and good conscience required that they should pay it over to the parties entitled thereto. This they refused to do. The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to the plaintiff. The count now under discussion is not in a form that is to be commended; but we think that in the face of an attack by general demurrer only it sufficiently appeared that the money sued for had been received for the use of plaintiff's assignor.

The demurrer to the second count, however, should have been sustained. In this count the allegations attacked are "that within the two years next last past, and at the city and county of San Francisco, state of California, the said defendants became indebted to Fox-Valentine Company in the sum of \$55, money had and received by said defendants from said Fox-Valentine Company, at the special instance and request of defendants." Here

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

there is no allegation, either direct or inferential, that the money was had or received for the use or benefit of Fox-Valentine Company (plaintiff's assignors). The fact that the money was paid by Fox-Valentine Company to defendants raises no presumption or implication that it was so paid for the use of the payor. On the contrary, where money is paid by one person to another, the presumption is that it was due to the latter. Section 1963, subd. 7, Code Civ. Proc.; *Williams v. Brunson*, 41 Wis. 418. In *Williams v. Brunson*, supra, the allegations were to the effect that defendant had received from the clerk and agent of plaintiff sums of money to the amount of \$1,005 of the money of plaintiff, that plaintiff demanded payment thereof of defendant, and that defendant has not paid any part thereof, but is now justly indebted to the plaintiff in the sum of \$1,005. It was held that this stated no cause of action, and that a general demurrer should have been sustained. In *State v. Sims*, 76 Ind. 328, the form of the allegation was the same as in the second count in the case at bar, and it was held that it stated no cause of action. See, also, *Roldan v. Power et al.*, 14 Misc. Rep. 480, 35 N. Y. Supp. 697. The general allegation of indebtedness is a statement of a mere conclusion of law, and is insufficient in the absence of a statement of facts supporting such indebtedness. *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Curtis v. Richards*, 9 Cal. 33; *Cal. State Tel. Co. v. Patterson*, 1 Nev. 150 (Reprint 124); *Camplin v. Eads* (Ky.) 24 S. W. 1068; *Holgate v. Broom*, 8 Minn. 243 (Gil. 209); *Butts v. Phelps*, 79 Mo. 302; *Moore v. Hobbs*, 79 N. C. 535. There being in the second count no allegation, either direct or by implication, that the money was had or received for the use of plaintiff's assignors, the count stated no cause of action, and the general demurrer thereto should have been sustained.

Defendants also ask to have the judgment reversed because the complaint was never amended by inserting the true name of the defendant sued under the fictitious name of John Doe Monahan; but as the judgment must be reversed for the reasons already stated, and the case remanded for further proceedings when the amendment may be made, it is not necessary to pass upon the merits of this contention. But see *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766. Upon the return of the case to the trial court, there will be no necessity for a retrial of the issue arising upon the first count of plaintiff's complaint; but the court may, after disposing of such issues as may arise out of the second count, proceed to give judgment in accordance with the findings already made upon the issues arising out of the first count, and such findings as shall be made on the issues arising out of the second count.

The judgment is reversed, with directions to the trial court to sustain the demurrer to the second count of the complaint, with leave to plaintiff to amend his complaint as to such count if he shall so desire, and for further proceedings in accordance with the foregoing opinion.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 713

In re CREELY. (Cr. 148.)

(Court of Appeal, First District, California.
Aug. 31, 1908.)

1. CONTEMPT (§ 34*)—POWER TO PUNISH—SUPERIOR COURTS.

The right of every superior court of record to punish for contempt of its authority or process is inherent, and essential to its existence and to the due administration of justice.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 102; Dec. Dig. § 34.*]

2. CONTEMPT (§ 14*) — ACTS CONSTITUTING "CONTEMPT"—INTERFERENCE WITH JURY.

A jury while deliberating on their verdict is an appendage of the court, and one attempting to influence a juror at such time is guilty of "contempt," under Code Civ. Proc. § 1209, declaring that disorderly behavior toward the judge while holding court, and any other unlawful interference with the proceedings of the court, shall be contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 37, 38; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

3. CONTEMPT (§ 54*)—PROCEEDINGS TO PUNISH—AFFIDAVIT—SUFFICIENCY.

An affidavit by a juror that accused said, in the hearing of all the jurors on their way from a hotel to the jury room to deliberate on the trial of R., "Don't convict my friend R.," sufficiently charges a contempt of court, without averring that the language was used with an unlawful intent to influence the jury.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 146; Dec. Dig. § 54.*]

Application of Dr. Edward J. Creely for a writ of habeas corpus for his discharge, after his conviction for contempt of court. Writ discharged, and petitioner remanded.

Alfred H. Cohen and Jas. H. Creely, for petitioner. W. H. Langdon, for respondent.

COOPER, P. J. The verified petition for writ of habeas corpus in this case states that the petitioner is unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco, by reason of a judgment and order made by Hon. M. T. Dooling, acting judge of the superior court of the city and county of San Francisco, adjudging petitioner guilty of contempt of court; said contempt being constructive, and not occurring in the presence or hearing of the court. The petition states that the affidavit on which the citation was issued did not give the court jurisdiction, and "did not show on its face, or at all, a case of contempt, and that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said affidavit utterly fails to state any facts which, in point of law, do or might constitute a contempt on the part of this petitioner." Upon this petition the court, under the duty imposed upon it by law, made an order granting the writ, making it returnable before the court on June 11, 1908, and expressly directed that "a copy of the petition and order be served upon the district attorney" at least 10 days before the hearing. At the time so set for hearing the petitioner appeared in person, and by his attorneys, but no one appeared from the district attorney's office. The return then made by the sheriff was not sufficient, as it did not contain a copy of the affidavit on which the order to show cause had issued, nor did it contain a copy of the judgment. Petitioner's attorney asked that the petitioner be discharged, by reason of such defective return and failure of the district attorney to appear, but the court declined to discharge the prisoner, and made an order continuing the case, so that the return might be amended, and the district attorney given a further opportunity to appear in support of the judgment. No further return was made to the writ during the month of June or July. The month of July being the vacation month, the judges not all being present on the regular motion day, the matter was continued to the regular motion day, August 24, 1908. On the last-named day, and not before, another return was made and filed in court by the sheriff, giving the order in full, and the copy of the affidavit on which the proceeding is based. The district attorney, however, did not appear to argue the said matter, nor has he filed any brief to assist the court in the determination thereof. We have, however, without any aid from the district attorney, given the matter as full investigation as the time at our disposal would justify, for the reason that the matter is one of importance to the orderly administration of justice as well as to the liberty and constitutional rights of the petitioner. The affidavit was made by Isaac Penny, one of the jurors of the panel in the case of *People v. Abraham Ruef*, and is, after giving the title, as follows: "Isaac Penny, being duly sworn, deposes and says: That on the 29th day of April, 1908, the impaneling of a jury was duly completed in the above-entitled court, to try the above-entitled cause of *People of the State of California v. Abraham Ruef*, case No. 840, and that affiant was duly sworn as a member of said jury, and that the other members thereof so duly impaneled were John Koenenman, Patrick Connolly, Robert Trost, Edwin Mohrig, William M. Leverone, John Louis Vermeil, Valentine Franz, F. J. W. Anderson, James E. Lennon, S. R. Crooks, and W. F. Swift. That on the 18th day of May, 1908, the taking of testimony in said cause was completed, and the argument of counsel commenced, and that on the 19th day of May, 1908, the argument of counsel in said cause was completed, and

said jury was duly instructed by said court upon the law in said case, and, having signified its desire to retire for deliberation, four deputy sheriffs of said city and county of San Francisco were duly sworn in open court by the clerk of said court, at the direction of the judge thereof, to keep the members of said jury together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so themselves, nor for either of them to do so himself, unless by order of the court, or to ask them whether they had agreed upon a verdict, and to return them into court when they had so agreed, or when ordered by the court; and that said jury thereupon retired for deliberation in the custody of said four deputy sheriffs, so sworn as aforesaid, to a private and convenient place, and commenced to deliberate upon the evidence in said cause for the purpose of reaching and returning a verdict thereon in said cause; and that said jury continued to remain in the custody of said deputy sheriffs, so sworn as aforesaid for the purpose as aforesaid, to and until the 21st day of May, 1908, and that on said day, while said jury was so in the custody of said deputy sheriffs, for the purpose aforesaid, and while they were being brought by said deputy sheriffs from the St. Francis Hotel in this city and county, where they had been kept together by said deputy sheriffs during a part of the preceding night, and while they were thus being taken to the aforesaid private and convenient place for them to further deliberate, to wit, to the jury room of the above-entitled court in department No. 6 thereof, and while they were all together in the custody of said deputy sheriffs, so sworn as aforesaid for the purpose as aforesaid, one Dr. Edward J. Creely passed them in a buggy at the corner of Leavenworth street and Golden Gate avenue in this city and county, on said 21st day of May, 1908, and in passing them called out to said jury, and said in a loud and distinct tone of voice, so that this affiant and each of the other members of said jury and the deputy sheriffs, who were so in charge of said jury, could and did hear him, 'Don't convict my friend Ruef.'" An order to show cause having issued upon this affidavit, the petitioner appeared before the Honorable M. T. Dooling, and offered himself as a witness, and testified in his own behalf. He was granted a full hearing, and allowed by the court to give his version of the affair. The court found and recited in the order or judgment as follows: "That all the facts and things stated and contained in said affidavit of Isaac Penny are true, and occurred in the city and county of San Francisco, state of California. That at the time the said Creely made said remark to said jury, and the members thereof, and so conducted himself as set forth in said affidavit, said Creely was personally acquainted with one of said deputy sheriffs, in charge of said jury, and knew him to be such deputy sheriff, and was also ac-

quainted with Edwin Mohrig, one of said jurors in said above-entitled cause, and knew that he was a juror in said cause; and that prior to said occurrence the said Creely had, in the morning of the same day, read in the morning newspapers that the said jury in the above-entitled cause was deliberating thereon in the custody of said officers, and stood seven for acquittal and five for conviction; and that at that time the said Creely further knew that the said persons to whom he addressed said statement and remark were, and constituted, the jury in the above-entitled cause, and that they had not been discharged, but were still deliberating upon their verdict, and further then and there believed that they were then on their way to court in custody of said deputy sheriffs. That the said Dr. Edward J. Creely, then and there in the said city and county of San Francisco, made said remark, and so conducted himself as above set forth, willfully, unlawfully, knowingly, and contemptuously, and the said Creely did then and there thereby willfully, knowingly, contemptuously, and unlawfully interfere with the process and proceedings of the above said entitled court."

There is no question but that the facts found by the court show a flagrant contempt, but the petitioner insists that the affidavit does not state facts sufficient of themselves to show that petitioner intended to commit a contempt of court. Certain acts are made contempt of court by section 1209 of the Code of Civil Procedure, among which are the following: "(1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court tending to interrupt the due course of a trial or other judicial proceeding. * * * (9) Any other unlawful interference with the process or proceedings of a court." The right of every superior court of record to punish for contempt of its authority or process is inherent in the very nature of its organization, and essential to its existence and protection, and to the due and orderly administration of justice. It is said by Blackstone, in his commentaries: "Laws without competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the Supreme Courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant in every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." The Supreme Court of the United States in *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205, said: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the

United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." It was said by Bacon, in his *Essay on Judicature* (No. 56): "The place of justice is a hallowed place, and therefore not only the bench, but the foot place and precincts and purprise thereof ought to be preserved against scandal and corruption." The trial jury, in charge of the officers of the law, was an appendage of the court, acting under the authority of the court, and part of the machinery by which Ruef was being tried. It was not only essential that the jury at the time it was selected should be fair and impartial and without prejudice, but the ends of justice required that it should remain so to the time when its verdict should be finally returned. It is the duty of every good citizen to uphold the laws of the land, and maintain due respect for the courts. When any one so far forgets his duties as a citizen as to unlawfully interfere with the proceedings of the courts by attempting to influence a juror who has been sworn to try the case, he should be promptly brought before the court, and such punishment meted out to him as will deter him and others from again attempting the same thing. If a court should allow its jury to be spoken to, to be solicited or advised, by strangers as to the case, or as to the course it should pursue during the progress of the trial, the trial would be a miscarriage, and the court would be held up to scorn and contempt. To the credit of the people be it said it seldom occurs that any one so far forgets himself as to attempt to address or influence a jury or a juror, either before or after the trial has commenced, but in all cases where such conduct has been brought to the attention of the court, the party found guilty has been promptly punished.

This brings us to a discussion of the claim of petitioner that the language used is not stated in the affidavit to have been used with any unlawful intent, or with any intent to influence the jury. The language is that petitioner "called out to said jury, and said in a loud and distinct tone of voice, so that this affiant and each of the other members of said jury and the deputy sheriffs who were so in charge of said jury could and did hear him, 'Don't convict my friend Ruef.'" It was not necessary for the affidavit on which the proceedings were based to state any more than the facts, and they appear to be fully stated. The fact that the petitioner called out to the jury in a distinct tone of voice "Don't convict my friend Ruef" appears to be all the fact that could be stated. No one but petitioner could look into his mind and tell the intent, object, and purpose of the remark. The remark itself from its very language tends to establish that petitioner knew Ruef was on trial, that the jury to whom the remark was made had charge of the case, and the power to either

convict or acquit. Petitioner saw the jury and the deputy sheriffs in charge of them—four in number—and knew that Ruef was being tried. He must be presumed to have intended the ordinary consequences of his own deliberate act. If he in fact did not know that it was the jury in the Ruef Case, it was strange that he should have addressed them in such language. No other body of men could convict Ruef. Petitioner was given his day in court, his explanations heard, and, after such hearing, the trial court, who saw him and listened patiently to his evidence, found that he made the remark “unlawfully, knowingly, and contemptuously.” If petitioner knew he was speaking to the Ruef jury, as he must have known, and as the language addressed to them shows, and as the court finds that he did know, and if he used the words set forth in the affidavit (which he does not deny), he committed a flagrant violation of all rules of propriety, and interfered with the authority and proceedings of the court. The case of *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409, is relied upon by petitioner, but it is not in conflict with what has here been decided. In that case it was claimed that the petitioner had violated an injunction prohibiting him from “intimidating or preventing any person from patronizing the restaurant business of one Jean Pon.” The court in its opinion said: “It still remains that there is not the slightest intimation contained in the affidavit, to the effect that petitioner had any knowledge that said Mary Duran was a patron of said Jean Pon, had ever been in his restaurant, or had ever been in the place known as No. 1129 Dupont street, or that he had any knowledge of facts reasonably tending to show such a situation of affairs.” In the case at bar the very words addressed to the jury, reasonably at least, tended to show that the petitioner knew that he was addressing the jury which was still deliberating on the Ruef Case.

Let the petitioner be remanded and the writ discharged.

We concur: HALL, J.; KERRIGAN, J.

8 Cal. App. 711

CALIFORNIA FRUIT GROWERS' ASS'N OF LOS ANGELES et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 562.)

(Court of Appeal, Second District, California. Aug. 31, 1908.)

1. CORPORATIONS (§ 557*)—ACTIONS—APPOINTMENT OF RECEIVERS—GROUNDS—COMPLAINT.

A complaint, in an action by stockholders, which shows that all the stock, except plaintiffs', was fraudulently issued; that the directors had been guilty of fraudulent practices, and had abandoned the corporation, and a majority of them were in jail, and which prays for the removal of the directors and the cancellation of the fraudulent stock and for a receiver—al-

leges facts showing the impracticability of effecting the removal of directors by a two-thirds vote of the stockholders, under Civ. Code, § 310, and authorizes the court, in the exercise of its equitable jurisdiction, to remove directors of the corporation and take charge of the property thereof through a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2223; Dec. Dig. § 557.*]

2. APPEAL AND ERROR (§ 101*)—ORDERS APPEALABLE—ORDER APPOINTING RECEIVER OF CORPORATION.

An order appointing a receiver of a corporation, in a suit by stockholders praying for the removal of the directors thereof, the cancellation of stock fraudulently issued, and the appointment of a receiver to preserve the property of the corporation, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 683; Dec. Dig. § 101.*]

3. PROHIBITION (§ 3*)—ADEQUACY OF REMEDY BY APPEAL—EFFECT.

A right of appeal from an order confers an adequate remedy, and prohibition does not lie, though jurisdiction to grant the order does not exist.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 5; Dec. Dig. § 3.*]

4. CORPORATIONS (§ 557*)—RECEIVERS—APPOINTMENT—JURISDICTION.

Under Code Civ. Proc. § 565, authorizing the appointment of a receiver of a corporation on the application of a stockholder, etc., the appointment of a receiver of a corporation may be made ex parte.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2230; Dec. Dig. § 557.*]

5. APPEAL AND ERROR (§ 80*)—APPEALABLE DECISIONS—RECEIVERS—ORDERS FOR SALE OF CORPORATE PROPERTY.

Where the object of the appointment of a receiver of a corporation was originally to preserve its property, but circumstances arose which necessitated a sale of the corporate property as a means of preserving to the corporation its interest, an order for a sale is so independent of the suit itself as to make the order therefor substantially a final decree for the purposes of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 494; Dec. Dig. § 80.*]

Application for writ of prohibition by the California Fruit Growers' Association of Los Angeles and another against the Superior Court of Los Angeles County and another, to restrain the court and its receiver from selling personal property belonging to the California Fruit Growers' Association of Los Angeles. Demurrer to the petition for the writ sustained, and writ dismissed.

Richardson & Martin, for petitioners John D. Works, A. A. Hancock, and T. R. Archer, for respondents.

PER CURIAM. This is an application for a writ to restrain the court and its receiver from selling certain personal property belonging to said fruit growers' association. The petition for the writ sets out all of the proceedings connected with the original appointment of the receiver, from which it appears that the association is a corporation organized under law, governed by a board of five directors; that these directors had all

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 97 P.—49

been guilty of fraudulent practices, and the majority of the board was then confined in jail, and each and all of the directors had abandoned the corporation and its assets and interests; that all of the stock other than that owned by the plaintiffs in that proceeding was fraudulently issued, but was outstanding, and certain of the directors claimed to own and hold the same. The special and general prayer of the complaint comprehends the removal of the directors, and, if the court finds the stock fraudulently issued, to cancel the same, and for the appointment of a receiver pending the action to preserve the property of the corporation. The court had jurisdiction to appoint a receiver under the allegations of the complaint. The proceeding was not directed toward closing up the affairs of the corporation, or an attempt to dissolve the same, but merely a proceeding directed against the individual directors, whom it sought to remove, and to place the assets of the corporation in safe hands. That a court of equity may remove directors of a corporation, if deemed necessary, when they have proven unfaithful is determined in *Wickersham v. Crittenden*, 93 Cal. 32, 28 Pac. 788. Such an order appointing a receiver is an appealable order, and which right of appeal confers an adequate remedy, and prohibition will not lie, even where jurisdiction does not exist. *Jacobs v. Superior Court*, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204. It must follow that, where the unfaithful trustees have all abandoned their trust, pending such proceedings for their removal the court may, through the agency of a receiver, take charge of the property of the corporation, if necessary for its preservation. The facts alleged were such as to develop the impracticability of effecting the removal of the trustees through the provisions of section 310, Civ. Code, for until the validity of the outstanding stock was determined, it would not be possible for the stockholders to correct the evils through the provisions relating to the removal and election of directors, as in that section provided. The appointment of a receiver may be made *ex parte*. Code Civ. Proc. § 565; *Real Estate Associates v. San Francisco*, 60 Cal. 227.

While the object of the appointment of the receiver was originally to preserve the property of the corporation, still circumstances might arise which would involve the necessity for a sale of a portion thereof, as one of the means of preserving to the corporation its interests, as where charges and expenses of care would absorb the property, or where it was likely to become valueless by reason of its perishable nature, or other attendant circumstances which might require the same. An order for such sale would be so far independent of suit itself as to make the order therefor substantially a final decree for the purpose of an appeal. *Los Angeles v. Los Angeles City Water Company*,

134 Cal. 123, 66 Pac. 198. An appeal lying from such an order, there can be no need of a writ of prohibition, and it will not lie. *Grant v. Superior Court*, 106 Cal. 326, 39 Pac. 604. The petition for this writ then shows upon its face, that the order for the appointment of a receiver was within the jurisdiction of the court, and if the order of the court authorizing the sale of part of the property pending hearing was improvidently made, an appeal therefrom could be had. The petition does not state facts entitling the petitioner to a writ of prohibition, and the demurrer of respondents is well taken. An order will be entered sustaining the demurrer of respondents to the petition for the writ, and dismissing the writ.

154 Cal. 325

SAVAGE v. SMITH et al. (S. F. 5,068.)

(Supreme Court of California. Oct. 6, 1908.)

APPEAL AND ERROR (§ 113*)—DECISIONS REVIEWABLE—FORM OF ORDER—SETTING ASIDE DEFAULT—"ORDER AFTER JUDGMENT"—"INTERLOCUTORY ORDER."

An order setting aside a default before entry of judgment thereon is not appealable; it not being an "order after judgment" or an "interlocutory order," within Code Civ. Proc. § 963, making appealable interlocutory orders entered in actions to redeem mortgaged property or in partition suits, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 766; Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 4, p. 3715.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by M. J. Savage against Lizzie D. Smith and others. From an order setting aside a default before entry of judgment thereon, plaintiff appealed, and the appeal was dismissed. On rehearing. Rehearing denied.

R. N. Countryman, for appellant. Andros & Hengstler, for respondents.

PER CURIAM. The appeal in this case is from an order vacating and setting aside the default of defendant—an order made before the entry of any judgment in the action. It was dismissed from the bench upon the ground that such orders are not appealable.

Appellant, petitioning for a rehearing of the motion to dismiss, earnestly contends that in taking the appeal he followed a rule of practice established by the decision of this court in *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152. It is true that in that case the court, speaking of an order setting aside a defendant's default, said that it was an "appealable order." The expression was careless and inaccurate, and in the connection in which it was used meant no more than that it was an order reviewable on appeal from the judgment, and was for that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reason not reviewable in certiorari; that being the point to be decided. Certainly it is not true that an order setting aside a default in an action, where no judgment has been entered upon the default, is the subject of a separate appeal. It is in no sense an order after judgment, and it is not one of the interlocutory orders enumerated in section 963 of the Code of Civil Procedure. It may be that it would be a more convenient practice if an appeal were allowed from such orders, but the Legislature has not so provided.

Rehearing denied.

154 Cal. 317

Ex parte YOUNG. (Cr. 1,452.)

(Supreme Court of California. Oct. 6, 1908.)

1. STATUTES (§ 63*)—EFFECT OF INVALIDITY—ORDINANCES.

A county ordinance, enacted under the provisions of a void statute, is invalid.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 63*; Constitutional Law, Cent. Dig. § 47.]

2. COUNTIES (§ 55*).

A county ordinance, regularly passed and promulgated by the board of supervisors in conformity with the requirements of County Government Act 1897 (St. 1897, p. 452, c. 277) for ordinances of boards of supervisors, is not invalidated by its recital of its adoption under the unconstitutional section 13 of the same act (page 454), providing for the adoption of ordinances by direct vote of the people; the recital being merely surplusage.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 55.*]

3. COUNTIES (§ 55*)—POWERS OF BOARD OF SUPERVISORS—POWER TO ADOPT ORDINANCES—ORDINANCES PROHIBITING LIQUOR BUSINESS.

A board of supervisors of a county has authority to prohibit the business of selling liquor, independent of County Government Act 1897 (St. 1897, p. 454, c. 277) § 13, attempting to confer on the electors power to adopt ordinances.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 55.*]

4. EVIDENCE (§ 387*)—COLLATERAL ATTACK ON ORDINANCES.

The record of a public body, required by statute to be kept in writing, cannot be contradicted by oral evidence; and hence, where the record shows that an ordinance was duly adopted by a board of supervisors itself, it cannot be shown in collateral proceedings, by affidavits of members of the board, that the action of the board simply proclaimed the adoption of the ordinance by the people.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1702; Dec. Dig. § 387.*]

5. COUNTIES (§ 55*)—ORDINANCES—POWER TO PROHIBIT LIQUOR BUSINESS.

A county ordinance prohibiting the keeping of any place where liquor is sold was not invalid, as applied to one engaged in the business of growing grapes for the manufacture and sale of wine and who had large quantities of wine on hand when it was adopted, as being in conflict with the general laws promoting the viticultural industry, and hence was authorized by Const. art. 11, § 11, authorizing counties

to make such police regulations as are not in conflict with the general laws.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 55.*]

6. EMINENT DOMAIN (§ 63*)—COMPENSATION—PROHIBITION LAWS.

A county ordinance prohibiting the business of selling intoxicants is not invalid, as taking property without just compensation, though it prohibits the sale of liquor then owned and practically destroys its value.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 63.*]

7. CONSTITUTIONAL LAW (§ 295*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—EXERCISE OF POLICE POWER—PROHIBITION LAWS.

A county ordinance prohibiting the business of selling intoxicants is not invalid, as depriving the owner of property without due process of law, though it prohibits the sale of liquor then owned and practically destroys its value.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Dec. Dig. § 295.*]

In Bank. Habeas corpus by Joseph Young against Theo. Lacy, sheriff of Orange county. Writ dismissed, and petitioner remanded to custody.

C. W. Pendleton, for petitioner. S. M. Davis, Dist. Atty., for respondent.

LORIGAN, J. The petitioner was convicted of maintaining, in the county of Orange, a saloon where intoxicating liquors were sold, contrary to the provisions of ordinance 49 of that county entitled: "An ordinance prohibiting the business of selling * * * intoxicating liquors within the county of Orange," etc., and sues out this writ, under which he attacks the validity of said ordinance and the legality of his imprisonment upon conviction for a violation of it.

The validity of this same ordinance was heretofore presented for determination to the District Court of Appeal for the Second Appellate District at the instance of one George Yung, convicted under it, and who likewise questioned its validity upon habeas corpus proceedings. That court held the ordinance valid, and, as far as the objections which were there urged are concerned, we think, correctly so. Application of George Yung on Habeas Corpus (Cal. App.) 94 Pac. 594. The present petitioner makes the same points here against the validity of the ordinance as were urged there, with some additional ones.

The principal claim made as to its validity is that it was passed and enacted under the provisions of section 13 of the county government act of 1897 (St. 1897, p. 454, c. 277), which in the case of Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236, was declared to be unconstitutional by this court. If this were true, the ordinance, of course, would be invalid. But we are satisfied that upon the record before us it appears otherwise. The section of the county

government act in question contemplated the framing of an ordinance by the people of the county to be submitted to the voters thereof for their adoption, and if a majority were in favor of it, and upon a canvass of the vote by the board of supervisors it so appeared, that that fact was to be proclaimed by the board, and the ordinance would then have the same force and effect as though adopted and ordained by the board of supervisors itself. This is the only action on the part of the board which the section required where the voters themselves selected and adopted the ordinance. The board was not required to pass or adopt it. It only proclaimed the fact that the electors had done so. It appears, however, from the record before us, that the board of supervisors not only proclaimed the fact of the adoption of the ordinance by the electors, but proceeded further and regularly passed and adopted the ordinance as an ordinance of the board of supervisors, and duly published it in the manner that the law required ordinances passed and adopted by the board to be published. Their action was of a dual effect. They proclaimed the ordinance as adopted by the electors, and further passed and adopted it as an ordinance of the board itself.

It is true that, following the enacting clause of the ordinance, which is in the form prescribed by section 26 of the act as the enacting clause of ordinances passed and adopted by the board itself, there is the recital "as an ordinance of the county of Orange under and in accordance with the provisions of section 13 of an act entitled 'An act to establish a uniform system of county and township governments,' approved April 1, 1897, it is ordained as follows," the various sections of the ordinance being set forth. It is insisted that, from the reference to the provisions of section 13 in the above recital accompanying the passage of the ordinance, the board must be deemed to have passed it solely by reason of its adoption by the electors and in conformity therewith, notwithstanding that the formalities prescribed for the adoption of ordinances by the board itself were followed. We cannot agree with this reasoning of petitioner. There can be no question but that the board of supervisors, independent of section 13, attempting to confer on the electors the power to adopt an ordinance of this character, had authority itself to pass such an ordinance, and that the ordinance in question was passed and adopted in all respects so as to fully exercise that power. Under such circumstances it is of no moment that the board, while exercising its unquestionable power and in the prescribed way, misrecited the source from which such power was derived. It was not necessary to the validity of the ordinance that the board should have at all stated therein the source from which it derived its authority to enact it. There is no provision of law in this state requiring that this be

done. It is sufficient that the power to do so exists, and the validity of an ordinance is not affected by the fact that the ordinance incorrectly states a source of power, as long as the power to enact is given. All the reference to section 13 of the act is in the title to the ordinance following the enacting clause. There is no statute which requires ordinances of the board of supervisors to be entitled. *Ex parte Haskell*, 112 Cal. 421, 44 Pac. 725, 32 L. R. A. 527. So that, entitling the ordinance being unnecessary, the entitling portion, with its reference to section 13 must be treated as mere surplusage. See, as discussing these propositions, with a citation of authorities in support of them, *Matter of George Yung*, supra.

In addition to the point made against the validity of the ordinance in the District Court of Appeal in the *George Yung* matter, it is claimed to be shown here, by certain affidavits accompanying the petition for the writ which were not presented on the *Yung* hearing, that as a fact the ordinance was not passed by the board of supervisors as a separate and independent proposition, but the action of the board was directed solely to the adoption of the ordinance as adopted by the electors under section 13 of the county government act. These are affidavits of three out of five persons who were members of the board when the record of the proceedings of that body shows that the ordinance was passed, and in which they state that the only vote of the board was as to proclaiming the fact of the adoption of the ordinance by the voters, and that no separate or independent vote of the board was taken in adopting said ordinance as an ordinance of the board itself. But the record of the proceedings of the board shows directly to the contrary—that the ordinance was passed and adopted by the affirmative vote of every member of the board. The attempt is by the affidavits to contradict that record—a record of a public body which is expressly required by the statute to be kept in writing and to show by parol evidence that its recitals are untrue. That may not, however, be done. This attack on the record, it is to be observed, is being made in a collateral proceeding, and extrinsic evidence is not admissible in such a proceeding to control or contradict the record. As said in *Dillon on Municipal Corporations* (4th Ed.) § 299: "Parol evidence in a collateral action cannot be received to contradict the record of a public corporation required by statute to be kept in writing, or to show a mistake in matters as therein recorded." See, also, *Mayhew v. of Logansport v. Crockett*, 64 Ind. 319; *Weir District of Gay Head*, 95 Mass. 129; *City v. State*, 96 Ind. 311. The wisdom of this rule is illustrated in this very proceeding, because countervailing affidavits of the two other members of the board and the then district attorney of the county were filed on behalf of the respondent. The affidavits of

the members of the board state that, in addition to proclaiming the adoption of the ordinance by the electors, it was deemed best by the members of the board to pass and adopt it as an ordinance of the board, and it was accordingly unanimously done. The affidavit of the district attorney was to the effect that, being in doubt as to the validity of the ordinance as adopted by the voters, he advised the board to pass and adopt it as an ordinance of the board, and the board unanimously did so.

In his traverse to the return of respondent, petitioner set forth that he had for many years been engaged in the business of growing grapes for the manufacture of wine, and manufacturing it; that at the time the ordinance was passed he owned and possessed great quantities of wine, which he had then on hand and has now, and which under the terms of the ordinance he is prohibited from selling, and is thus deprived of his property; that the ordinance thus operated as a taking of his property for the benefit of the public without just compensation and without due process of law, and for these reasons it is violative of the fourteenth amendment to the federal Constitution and of sections 1, 13, and 14 of article 1 of the Constitution of this state; that the ordinance is also in restraint of trade, because it discourages the carrying on in this state of the important industry of viticulture and the manufacture of wines and brandies.

As far as the objection is concerned that this ordinance is in restraint of trade, or, in other words, in conflict with the general laws promoting and fostering the viticultural industry of this state, which is really the ground of petitioner's complaint, that point is disposed of adversely to him in *Ex parte Campbell*, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418, where a similar proposition was under consideration. This being true, the county of Orange could constitutionally pass "all such local, police, sanitary and other regulations as are not in conflict with the general laws." Const. art. 11, § 11.

Section 2 of the ordinance in question provides that it shall be unlawful for any person "to keep, maintain or carry on * * * within the county of Orange * * * any tippling house, dramshop, cellar, saloon, bar, barroom, sample room, or any other place, by whatever name known, where vinous, spirituous, distilled, malt, mixed, or other intoxicating liquors are either directly or indirectly sold, given away, or otherwise disposed of." It was upon a complaint drafted in the language of the section that petitioner was convicted and sentenced. This quoted provision of the ordinance is directed solely to prohibiting the selling or dispensing of intoxicating liquors in any tippling house, dramshop, saloon, barroom, or other kindred place, "and that the power to license or regulate tippling houses is a constitutional right, which may be enforced as a police regulation

through proper legislation, is no longer an open question." *Ex parte Campbell*, supra.

Nor is legislation of this character subject to the constitutional objections that the person is thereby deprived of his property without just compensation and due process of law. As said in *Black on Intoxicating Liquors*, p. 115, § 83: "The most serious and weighty objections to the validity of prohibitory legislation have been such as regarded its effect upon rights and property in existence at the time of its enactment. Such a law, as a rule, saves no privileges previously acquired, makes no exception in favor of the disposition of liquor existing in the state at its passage, and although it practically destroys the value of such liquor, as also of breweries and distilleries then in operation, yet provides no compensation for their owners. Yet it is settled by the immense preponderance of authority, that if a state, by statute or constitutional provision, entirely prohibits the manufacture and sale of intoxicating liquors within its jurisdiction, such enactment is not constitutionally objectionable on the ground of its 'depriving' persons affected of their 'property without due process of law,' notwithstanding its effect may be to destroy a business theretofore lawful, and seriously to impair the value of property held at the time and adapted to the continuance of such business, and that without compensation. Though some slight doubt of the correctness of this view was expressed in some of its earlier decisions, the Supreme Court of the United States has now explicitly adopted it, and the question must therefore be regarded as finally put at rest."

The cases which counsel cites in support of his constitutional objections to the ordinance are the earlier decisions of the Supreme Court of the United States which the author in the quotation just made refers to. The later decisions of that tribunal are against the contention of petitioner and conform to the statement contained in the quotation from *Black*. Some of these cases are *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346. In the *Mugler* Case, first cited, in discussing this question, the court said: "It is true that, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under any obligation, that its legislation on that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, the supervision of the public health and the public morals is a governmental power, continuing in its nature, and 'to be dealt with as the special exigencies of the moment may require,' and that 'for this purpose, the

largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co. v. Massachusetts*, 97 U. S. 32, 24 L. Ed. 989: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.'"

There are no other points in the case which require consideration.

The writ is dismissed, and the petitioner remanded to custody.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

154 Cal. 312

In re HEYWOOD'S ESTATE. (S. F. 4,982.)

(Supreme Court of California. Oct. 6, 1908.
Rehearing Denied Nov. 5, 1908.)

1. APPEAL AND ERROR (§ 622*)—TRANSCRIPT—TIME TO FILE—COURT RULES.

Under court rule 2 (78 Pac. vii), providing that, when a party appealing from a judgment has given notice of motion for a new trial before perfecting the appeal, the time to file the transcript in the Supreme Court does not begin to run until the motion has been disposed of, the time for the filing of a transcript on appeal in any proceeding in which a new trial is authorized does not begin to run until the motion for a new trial has been disposed of.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2732-2735; Dec. Dig. § 622.*]

2. NEW TRIAL (§ 2*)—CAUSES IN WHICH AUTHORIZED.

A motion for a new trial does not lie in proceedings under Code Civ. Proc. §§ 1465, 1466, to set apart a homestead, or exempt personal property, or for family allowance.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

3. APPEAL AND ERROR (§ 624*)—PERFECTING APPEAL—FILING TRANSCRIPT—TIME.

Where a motion for a new trial does not lie, the pendency of proceedings preparatory to such motion does not extend the time for the filing of the transcript in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2737-2742; Dec. Dig. § 624.*]

4. APPEAL AND ERROR (§ 628*).

Where counsel for appellant did not claim to be ignorant of decisions of the Supreme Court that a motion for a new trial does not lie in that proceeding, nor assert that the failure to file the transcript on appeal was due to a belief that the time did not begin to run until after his proposed motion for a new trial was disposed of, the pendency of the motion did not excuse lack of diligence in filing a transcript.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

5. EVIDENCE (§ 178*)—BEST EVIDENCE—JUDGMENT—DESTRUCTION—EFFECT.

Orders of the court, though destroyed, are effectual; for, after proof of destruction, the

contents may be established by any competent secondary evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 583; Dec. Dig. § 178.*]

6. APPEAL AND ERROR (§ 543*)—PREPARATION OF RECORD—DUTY OF APPELLANT.

One appealing from orders which have been destroyed must restore the same, as authorized by St. 1906 (Ex. Sess.) p. 73, c. 55, so as to furnish the court with a copy of the orders, as required by Code Civ. Proc. § 951.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2411; Dec. Dig. § 543.*]

7. APPEAL AND ERROR (§ 787*)—WANT OF PROSECUTION—DISMISSAL.

Appeals from orders in the settlement of an estate were perfected in January, 1906. The records in the cause were destroyed in April following. On March 16, 1908, a petition for the restoration of the records was filed by appellant, who offered no excuse for the delay, though he could have proceeded at any time to restore such records. No transcript was on file in June following, when a motion to dismiss the appeals was heard. Held that, in view of Code Civ. Proc. § 57, providing that appeals in probate cases shall have precedence, the delay required dismissal of the appeals.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3129, 3130; Dec. Dig. § 787.*]

In Bank. Appeal from Superior Court, City and County of San Francisco.

In the matter of the estate of Franklin Heywood, deceased. From orders in proceedings to set apart a homestead, exempt personal property, and for family allowance. Agnes B. Heywood appeals. On motion to dismiss appeals for want of prosecution. Appeals dismissed.

See, also, 84 Pac. 834.

J. B. Reinstein and W. P. Johnson, for appellant. Timothy J. Lyons, Powell & Dow, Mr. Sullivan, and Theo. J. Roche, for respondents.

SHAW, J. Motion to dismiss three several appeals for want of prosecution. On November 18, 1905, in the estate of Franklin Heywood, deceased, the superior court made three orders whereby it denied the respective applications of Agnes B. Heywood, widow of said deceased, to have a probate homestead set apart to her, to have the exempt personal property set off, and for a family allowance. There were three separate petitions, but all of them were tried together. From each of these orders the widow appealed to this court. The appeals were perfected on January 15, 1906. No transcript on either appeal has ever been filed in this court, nor has the clerk of the superior court been requested to certify to any such transcript. The notices of the motions to dismiss the appeals were given on March 6, 1908. Rule 2 (78 Pac. vii) of this court requires the transcript on appeal to be filed in this court within 40 days after the appeal is perfected, except in certain specified cases. Unless these appeals come within the exceptions, or unless good cause

for the delay is shown, the appeals must be dismissed as provided in rule 5 (78 Pac. viii).

1. Rule 2 (78 Pac. vii) provides that, "when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal," the 40 days does not begin to run until the motion has been disposed of. In each of these cases the appellant, before perfecting her appeals, had duly given and filed a notice of intention to move for a new trial, proceedings under these notices of intention are still pending, and the motion for a new trial has neither been decided nor dismissed. If the notice of intention to move for a new trial is to be considered as the "notice of motion for new trial," mentioned in rule 2 (78 Pac. vii), and a new trial is authorized in such proceedings, it would follow that the appellant's time for the filing of transcript on appeal has not yet begun to run, and the motion to dismiss the appeal, in that event, should be denied.

But it is settled by the decisions of this court that a motion for new trial does not lie in proceedings under sections 1465 and 1466 of the Code of Civil Procedure to set apart a homestead, or exempt personal property, or for family allowance. In *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235, the widow filed a petition in the matter of the administration of her husband's estate, asking for a family allowance. Written objections to the allowance asked for were filed. The issues were tried, findings made, and an order entered granting the allowance. It was held that the Code did not authorize a motion for a new trial in such cases. In *Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090, the widow filed a petition asking that a probate homestead be set apart to her, with certain property exempt from execution, and a family allowance. The children of the deceased filed written contests to the petition, and issues thus raised were tried by the court. Findings of fact and conclusions of law were made in favor of the widow, and an order was made accordingly. It was held, following *Leach v. Pierce*, supra, that a motion for new trial was not a proper procedure to review the order. The rule laid down in these cases determines the question in the case at bar. There being no authority for a motion for a new trial after such orders, it follows that the pendency of proceedings preparatory to such motion would not bring this case within the exception of rule 2, nor extend the time to file the transcript.

2. We do not think the appellant has shown good cause for the long delay, or reasonable diligence in the prosecution of the appeals. The case of *Leach v. Pierce*, supra, was decided in the year 1892, and that of *Shipman v. Unangst* on February 5, 1907. Appellant's counsel do not claim to have been ignorant of these decisions, nor do they say that the failure to file any transcript on the appeals was due to a belief on their part that the time therefor would not begin to run until

after their proposed motion for new trial was disposed of. The pendency of the attempt to obtain a new trial, under these circumstances, does not excuse or justify the lack of diligence.

A proposed bill of exceptions, which we may presume could have been used on the appeal, was served on the respondents' counsel in March, 1906. It was not settled at the time of the great fire of April 18, 1906, in which all the official records in the cause were destroyed. The proposed bill, however, was not destroyed; but the settlement thereof was delayed until January 5, 1907. Perhaps the general disturbance following the great disaster of April, 1906, may be a sufficient excuse for this delay. In order to present the appeal to this court, it would be necessary for the appellant to furnish the court with a copy of the orders appealed from. Code Civ. Proc. § 951. To enable them to do this it was deemed necessary to have a copy of the orders restored to the record, in order that the clerk might certify thereto. The act of June 16, 1906 (St. 1906 [Ex. Sess.] p. 73, c. 55), authorizes a proceeding to that end. No such proceeding was inaugurated until March 16, 1908, almost two years after the record was destroyed. The principal reason upon which counsel found their claim of an excuse for the delay in filing the transcript is that the record had not been restored, and that the delay in restoring it was caused by the conduct of counsel for the respondents.

Upon the hearing it was argued that it was the duty of the respondents to restore the record, and that until they did so the appellants were justified in delaying the prosecution of the appeal. This contention is unfounded. The orders, although destroyed, were nevertheless valid and effectual. After proof of destruction, any competent secondary evidence would be admissible to prove their contents. *Ames v. Hoy*, 12 Cal. 19; *Estate of Warfield*, 22 Cal. 64, 83 Am. Dec. 49. The statute of 1906 itself recognizes the admissibility of such secondary evidence, as there would be no other means of proving the record proposed to be restored. The respondents, therefore, could rely upon the orders as they stood, and were under no absolute necessity to have the record restored in order to preserve their rights. The appellant was endeavoring to overthrow those orders, and a restoration of the record thereof was by her considered necessary to enable her to do this. The duty was on her to effect a restoration of the records if she would escape the responsibility for unreasonable delay in the prosecution of her appeals. The final question, therefore, is, has she been sufficiently diligent in seeking such restoration, or, if negligent, is her neglect excusable?

It appears that the only copy of the respective petitions and objections thereto filed in court, constituting the pleadings in the matters, saved from the fire, was a copy in

possession of Agnes Maud Lyons, a daughter of the deceased, and a respondent herein. On October 3, 1906, her attorney, Lyons, delivered these papers to Mr. Johnson, one of the attorneys for appellant, in order to enable him to frame copies of the findings and decrees to be used in procuring an order restoring the records, and Johnson then agreed that he would proceed immediately in the matter of such restoration. He had conducted the trial of the cases, and, being thus familiar with the facts, the drawing of new findings and decrees would not be a matter of much difficulty, and should not have required many hours of his time, with the aid of these papers. He did nothing whatever in the matter. Appellant's counsel, in their affidavits, say that on the occasion of the settlement of the bill of exceptions, in January, 1907, Mr. Dow, one of respondents' counsel, agreed that he would prepare these decrees and orders, and that from that time until December, 1907, they were depending on him to do so. Dow and Lyons each denies the making of this agreement. Their denials are corroborated by the admitted fact that the copies above mentioned were not then given to Dow, but were retained in the possession of Johnson. This is inconsistent with the existence of agreement that Dow should prepare the drafts. Dow would need the papers in Johnson's possession to enable him to redraft the findings, and yet Johnson did not then deliver them to him, but kept them until after the filing of notice of motion to dismiss the appeals on March 16, 1908. Appellant's counsel admit that in December, 1907, they ceased to rely on Dow for the preparation of these new findings and orders. No explanation or excuse whatever was offered of the fact that Johnson retained the only copy of the pleadings in existence, nor of the delay and failure from January to December, 1907, to turn them over to Dow, while at the same time relying on Dow to draw anew the findings and awaiting his action in the matter, when he must have known that Dow could not proceed without them.

Nor is any sufficient excuse offered for their delay in proceeding in the matter after December, 1907, when they ceased to rely on Dow, until March 16, 1908, when the petition for restoration of the records was at last filed by them. It thus appears that the delay from January, 1907, to March 16, 1908, was really caused by the inaction of counsel for appellant. Although they had it in their power at any time to proceed to restore the records, and although it was their duty to do so, nothing effective was done in the matter until after they were served with notice of motion to dismiss the appeals. The appeals had then been pending for more than two years, and even at the time of the hearing of these motions, on June 1, 1908, no tran-

script was on file, and the best showing counsel could make was that a petition to restore the record had been filed in the superior court on March 16, 1908, that the matter had been postponed by that court from time to time, and was still pending and undetermined. The statements in the affidavit of appellant's counsel indicate that during the entire two years of their delay it was their practice to give all other business coming to their office precedence over the business of preparing the papers for these appeals, and we are constrained to believe that this is the principal cause of the delay. The policy of the law favors the speedy settlement of the estates of deceased persons, so much so that the Legislature has provided that appeals to this court in probate cases shall take precedence over all other cases except those to which the people of the state are parties. Code Civ. Proc. § 57. That this is a wise policy no one will deny. The continued delay that has taken place in this case in the prosecution of appeals of this character should not be encouraged or tolerated.

It is ordered that the appeals be dismissed.

We concur: LORIGAN, J.; SLOSS, J.; HENSHAW, J.

8 Cal. App. 730
PEOPLE v. CARLSON. (Cr. 99.)

(Court of Appeal, Second District, California.
Sept. 8, 1908.)

1. WITNESSES (§ 237*)—EXAMINATION—QUESTIONS ASSUMING FACTS IN ISSUE.

On trial for embezzlement, where it appeared that it was the duty of accused, as assistant cashier, to make deposits of his employer's money and to make duplicate deposit slips, one for the bank and the other for his employer's cashier, and that he made a slip for the cashier as evidence of a day's deposit, which was for a larger amount than the one he presented to the bank, which showed the sum actually deposited, and that the larger amount was entered by him in the pass book, a question asked a witness, whether, when he or his employes took the money to the bank, he or they made the entry in the book, was not improper, as assuming that the money had been delivered to accused.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 829-832; Dec. Dig. § 237.*]

2. EMBEZZLEMENT (§ 38*)—ADMISSIBILITY OF EVIDENCE—POSSESSION OF PROPERTY.

The deposit slips in accused's handwriting and a leaf from the pass book with his entry thereon were admissible to show that accused actually had in his possession his employer's money to the larger amount specified for deposit, and to show the manner of perpetrating the crime.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 61-66; Dec. Dig. § 38.*]

3. CRIMINAL LAW (§ 535*)—EVIDENCE—CONFESSIONS AND ADMISSIONS—PROOF OF CORPUS DELICTI.

There being sufficient evidence that a crime had been committed by some one, accused's ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

missions and confessions, voluntarily made, were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Frank A. Carlson was convicted of embezzlement. From the judgment, and an order denying a new trial, he appeals. Affirmed.

Charles M. Ackerman, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was accused by information of embezzling a sum of money from William Randolph Hearst. The jury returned a verdict of guilty. From the judgment pronounced thereon, and from an order denying a motion for a new trial, defendant appeals.

The first point presented is that the court in propounding a question to a witness, assumed a fact in dispute, which, being an infringement of the jury's province, prejudiced defendant. Defendant effected the embezzlement while assistant cashier of a newspaper owned by Hearst, through the manipulation of certain deposit slips and pass book entries. It was a part of his duty to make deposits in bank of the moneys belonging to Hearst, and to make out in duplicate deposit slips, showing the items and amounts of the daily deposits—one of these slips for delivery to the cashier of the newspaper, and the other to present to the bank in connection with the money for deposit. Defendant accordingly made out Exhibit A, showing a deposit of \$2,037.19, and the items entering therein, which he gave to his superior as evidence of that day's deposit. He, however, when making the deposit at the bank, substituted another slip, which showed only \$1,537.19, and this latter amount only he deposited; but defendant, in his own handwriting, entered in the pass book an amount corresponding with the slip left with the cashier of the newspaper. The question asked by the court was in connection with previous evidence in relation to such entry in the bank book, and was: "I want to know, when you took, or your employes took, that money to the bank to deposit, any of you people made the entry in the book." There was no objection urged to the question, and we are unable to discern its objectionable character.

The question did not involve any statement or assumption that the money in question had been delivered to defendant. These deposit slips, in defendant's handwriting, and a leaf from the pass book, with the entry thereon above specified, in defendant's handwriting, were admitted in evidence, and, in our opinion, were competent, in connection with other evidence tending to show that defendant ac-

tually had in his possession, as the property of Hearst, the larger amount specified for deposit, and as tending to show the manner employed by defendant in the perpetration of the crime.

There was ample evidence, properly received, showing that a crime had been committed by some one, and therefore the admissions and confessions of defendant, made voluntarily, were properly received in evidence; and, altogether, the record discloses with unusual clearness the fact of defendant's guilt as charged.

There is nothing in the record to prejudice defendant, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

154 Cal. 351

PECK v. NOEE et al. (Sac. 1,627.)

(Supreme Court of California. Oct. 9, 1908.)

1. STATUTES (§ 281*)—PRESUMPTIONS—LAWS OF OTHER STATES.

The courts of a country are presumed to know only their own laws, and the laws of other countries must be averred and proved, like any other fact of which courts do not take judicial notice; and, where a party seeks either to recover or defend under a foreign law, the law must be pleaded and proved like any other fact.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 380; Dec. Dig. § 281.*]

2. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

The courts of a state will, in the absence of proof to the contrary, presume that the laws of other states are the same as the laws of the forum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

3. CORPORATIONS (§ 268*) — LIABILITY OF STOCKHOLDERS—ACTIONS—COMPLAINT.

A complaint, in an action by a creditor of a corporation to enforce the liability of stockholders, which alleges that the corporation was created under the laws of Nevada, that it had been doing business in designated counties in California, and that the debts sued on were contracted in California, stated a good cause of action, the laws of Nevada being the same as those embodied in Const. art. 12, § 3, and Civ. Code, § 323, making stockholders liable for corporate debts; and defendants must plead and prove, as an affirmative defense, that the laws of Nevada exempted them from liability.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 268.*]

4. TRIAL (§ 396*)—FINDINGS BY COURT—ISSUES.

Code Civ. Proc. § 462, providing that the statement of any new matter in the answer is deemed controverted by plaintiff, allows proof by plaintiff, without pleading the same, of any affirmative matter in avoidance of new matter pleaded in the answer, and whether facts establish an affirmative defense pleaded in the answer is an issue raised by the law on the answer, and a finding of such facts is within the issues.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 396.*]

5. APPEAL AND ERROR (§ 219*)—OBJECTIONS NOT RAISED BELOW—ISSUES—REVIEW.

Where the appeal is on the judgment roll alone, or where no objection was made to the admission of evidence, and the trial was had on the theory that the fact established by the evidence was in issue, the objection that the finding of fact was outside of the issues will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1323; Dec. Dig. § 219.*]

6. CORPORATIONS (§ 271*) — LIABILITY OF STOCKHOLDERS—ACTIONS—FINDINGS.

Where, in an action by a creditor of a Nevada corporation to enforce the liability of stockholders for debts contracted in California, while the corporation was doing business in designated counties therein, the answer alleged that the Constitution of Nevada provides that corporators of domestic corporations should not be individually liable for the debts of the corporations, a finding that the corporation was organized under Act Nevada March 16, 1903, providing for a general corporation law for the purpose of doing business in the designated counties in California, that defendants were, at the time of the organization of the corporation, and have

remained, residents of one of the designated counties, that they were the original corporators of the corporation, and that when the debts sued on were incurred, they were directors and officers, was within the issues raised by the law on the answer, and authorized a judgment against defendants under the rule that when a corporation is formed in one state, and by the express terms of its charter is created to do business in another, and business is done therein, it must be assumed that the charter contract was made with reference to its laws.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 271.*]

Department 1. Appeal from Superior Court, Plumas County; J. D. Goodwin, Judge.

Action by Frank F. Peck against M. J. Noee and another. From a judgment for plaintiff, defendants appeal. Affirmed.

James T. Boyd, A. N. Salisbury, and H. B. Wolfe, for appellants. L. N. Peter, for respondent.

SHAW, J. This is an appeal from the judgment upon the judgment roll alone. The action is by the plaintiff for himself, and as assignee of 27 other persons, against the appellants, as stockholders of the Hathaway Mill & Lumber Company, a corporation organized under the laws of the state of Nevada and doing business in California, to enforce their alleged liability, as such stockholders, to the plaintiff as a creditor of the corporation. The only question presented for consideration on the merits of the case is whether or not the stockholders of a corporation organized in Nevada are individually liable, under the laws of California, for the debts of the corporation incurred in doing business in California.

The complaint alleges that the Hathaway Mill & Lumber Company is, and has been, ever since May 5, 1903, a corporation, created under the laws of Nevada, that during all that time it had been doing business in the counties of Plumas and Sierra in this state, and that the several debts sued on were contracted in this state during that period. These allegations, and indeed all the allegations of the complaint, were admitted. As an affirmative defense, the defendants alleged that the Constitution of the state of Nevada contained the following provision: "Dues from corporations shall be secured by such means as may be prescribed by law: Provided, that corporators of corporations formed under the laws of this state shall not be individually liable for the debts or liabilities of such corporations." The finding is that this allegation is true. In addition thereto, however, the court found that said Hathaway Mill & Lumber Company was organized on May 6, 1903, "under and by virtue of that certain act of the state of Nevada, and entitled 'An act providing a general corporation law, approved March 16, 1903' (Laws 1903, p. 121, c. 88) for the purpose and with the intention of doing business in the counties of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plumas and Sierra, state of California." Other findings were made, to the effect that the appellants Noee and Ramelli were, at the time the corporation was organized, and ever since have been, residents of Plumas county, Cal., that they were the original organizers and corporators of said corporation, and that, when the debts sued on were incurred, they were directors thereof, and, respectively, secretary and vice president. The respondent claims that these findings bring the case within the principle laid down by the United States Supreme Court in *Pinney v. Nelson*, 183 U. S. 145, 22 Sup. Ct. 52, 46 L. Ed. 125, and are sufficient to support the judgment. The preliminary objection of the appellants that these findings are outside of the issues and must be disregarded is untenable. The complaint stated a good cause of action to enforce a stockholder's statutory liability, if the laws of Nevada on that subject are the same as our own. Const. art. 12, § 3; Civ. Code, § 323. It contained no allegation as to the effect of the laws of Nevada. "The courts of a country are presumed to be acquainted only with their own laws. Those of other countries are to be averred and proved, like any other facts of which courts do not take judicial notice." *Norris v. Harris*, 15 Cal. 254, quoting *Monroe v. Douglass*, 5 N. Y. 452. "Where a party seeks to either recover or defend under a foreign law, such law must be pleaded and proved like any other fact." 9 Ency. Pl. & Pr. 542; *Roots v. Merriwether*, 71 Ky. 400; *Kan. Pac. R. Co. v. Cutler*, 16 Kan. 568; *O'Sullivan v. Griffith* (Cal.) 95 Pac. 875, and cases there cited. The courts of this state take notice of its own laws, and, as above stated, in the absence of plea or proof to the contrary, presume that the laws of other states are the same. A good cause of action was therefore set forth in the complaint, on its face. The defendants were required to plead and prove the laws of Nevada as an affirmative defense, if they claimed they were exempted thereby from the operation and effect of the laws of this state. This they did in their answer. There is no provision for a reply in our system of pleading, and the statement of any new matter in the answer is "deemed controverted" by the plaintiff. Code Civ. Proc. § 462. This is held to allow proof by the plaintiff, without pleading the same, of any affirmative matter in avoidance of the new matter pleaded in an answer. *Moore v. Copp*, 119 Cal. 433, 51 Pac. 630; *Wixson v. Devine*, 67 Cal. 345, 7 Pac. 776; *Curtiss v. Sprague*, 49 Cal. 301; *Colton v. Raynor*, 57 Cal. 588. The question whether or not facts existed which would make the affirmative defense pleaded in the answer unavailing was therefore an issue raised by the law upon the answer, and a finding of such facts was clearly within the issues of the case. We do not wish to be understood as conceding that the appellants are in a position to make this objection. It appears to be established that,

where the appeal is upon the judgment roll alone, or where it appears that no objection was made to the admission of evidence of a fact, and the trial was had upon the theory that the fact was in issue, the objection that the finding of fact was outside of the issues will not be considered on appeal. *McDougald v. Hulett*, 132 Cal. 163, 64 Pac. 278; *Krasky v. Wollpert*, 134 Cal. 343, 66 Pac. 309; *Beardsley v. Clem*, 137 Cal. 332, 70 Pac. 175; *Ill. T. & S. Bank v. Pacific Railway Co.*, 115 Cal. 285, 47 Pac. 60; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497; *Moore v. Campbell*, 72 Cal. 251, 13 Pac. 689; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186.

We take the finding above quoted to mean that the articles of incorporation of the Hathaway Mill & Lumber Company declared that it was the purpose of the corporation to do business in California. It is not claimed that this is not its meaning and effect. Under these circumstances the case of *Pinney v. Nelson*, supra, is controlling to the effect that the liability of stockholders, individually, to the creditors of the corporation, for debts incurred by the corporation in doing business in California, is governed by the laws of California on the subject. That case involved a stockholder's liability, under California law, for debts of a corporation organized in Colorado, and declaring in its articles that it was organized to do business in the state of California. The court said (page 147 of 183 U. S., page 54 of 22 Sup. Ct. [46 L. Ed. 125]): "Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the state in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation, and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so, that other law will control. That the parties have some other law in view, and contract with reference to it, is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract, and the purpose with which it is entered into." On page 151 of 183 U. S., page 55 of 22 Sup. Ct. (46 L. Ed. 125), the court states its conclusion in the matter thus: "When a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business." These principles clearly show the liability of the defendants here and fully sustain the judgment of the court below.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

154 Cal. 393

BECKWITH v. SHELDON et al.
(Sac. 1,510.)

(Supreme Court of California. Oct. 13, 1908.
Rehearing Denied Nov. 12, 1908.)

1. TRUSTS (§ 110*)—CONSTRUCTIVE TRUST—EVIDENCE—WEIGHT.

Evidence in an action to establish a constructive trust in an irrigation enterprise *held* to show confidential relations between decedent and defendants.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

2. WATERS AND WATER COURSES (§ 133*)—IRRIGATION—APPROPRIATORS—RIGHTS

Decedent having posted notices of appropriation of water for an irrigation project, he and his associates could proceed under such notices to perfect their rights so as to make them valid against all others, excepting those with prior and superior rights to the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 133.*]

3. TRUSTS (§ 110*)—CONSTRUCTIVE TRUST—FACTS SHOWING RELATION.

Decedent posted notices of appropriation of water intending to acquire a partly completed irrigation canal, and use it in distributing the water appropriated. Being without sufficient means, he interested defendants; it being agreed that a corporation should be formed to carry on the enterprise. Decedent conveyed all his rights to defendants in trust, to be conveyed by them to the corporation on its formation. Afterwards one of the defendants obtained individually a lease on the canal, and posted notices of appropriation substantially covering decedent's notices. *Held*, that decedent and defendants were partners in the enterprise until the formation of the corporation, and that defendants were trustees of the partnership, holding, as such, the rights conveyed by decedent.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

4. WATERS AND WATER COURSES (§ 133*)—LOCATION—IDENTITY.

Notices of appropriation of water posted within 200 feet of the place where decedent posted his, both apparently being intended for an extensive irrigation project, were in substantially the same place.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 133.*]

5. TRUSTS (§ 108*)—CONSTRUCTIVE TRUSTS—IRRIGATION PROJECT—EVIDENCE.

Decedent posted notices of appropriation of water intending to acquire the C. canal, a partly completed irrigation canal, for use of distributing the water appropriated. Being without sufficient means, he interested defendants; it being agreed that a corporation should be formed to carry on the enterprise. Decedent conveyed all his rights to defendants in trust, to be conveyed by them to the corporation on its formation. The contemplated corporation was not organized, and defendants, to defraud decedent, organized another corporation and acquired independent rights, including a lease of the canal. One of defendants and the corporation posted notices of appropriation at substantially the same place where decedent posted his. Decedent's administrator sues to establish a trust in the property, for an accounting, etc. *Held*, that he could show that the corporation excavated a canal extending from where its notice was posted to the upper end of the C. canal and completed the C. canal; that the C. canal district owned a strip of land extending from the upper end of the canal to the river, and covering decedent's water location, as well as the later locations by

defendants and the corporation, and that the land was included in the lease; that one of defendants, when negotiating for the lease, said that he could and would acquire decedent's right for use in connection with the canal, and that those rights were necessary to the scheme he proposed to carry out because they were superior to the right of the irrigation district, and that he intended to post new notices of appropriation to protect those rights, and the administrator could also show the extent and value of the C. canal, notice to the corporation of decedent's rights and of his interest in common with the defendants, and the time elapsed since the district had done any work under its irrigation scheme or toward the completion of the canal; that the corporation paid the rent reserved in the lease; and that the line of the proposed canal described in decedent's appropriation notices was identical with the line of the C. canal.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 108.*]

6. TRUSTS (§ 366*)—ESTABLISHMENT—PARTIES—DEFENDANTS.

Persons claiming interest in property which plaintiff claims is held in trust for his benefit are proper parties defendant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 581; Dec. Dig. § 366.*]

In Bank. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by B. De La Beckwith, Byron D. Beckwith's administrator, against Willard M. Sheldon and others. From a judgment for defendants, plaintiff appeals. Reversed.

A. L. Shinn, J. W. Dorsey, R. M. F. Soto, S. C. Denson, and Ernest M. Weyand, for appellant. Chas. L. Donohoe, Frank Freeman, F. H. Gould, and Morrison & Cope, for respondents.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendants. The appeal was taken within 60 days after the rendition of the judgment and the evidence is presented by a bill of exceptions.

We are of the opinion that certain findings are contrary to the evidence, and that the court below erred in excluding evidence offered by the plaintiff. To get a clear understanding of the matter, it will be necessary to state as briefly as possible the facts alleged in the complaint.

Prior to November 30, 1901, the Central Irrigation District, a district organized under the act of March 31, 1897 (St. 1897, p. 254, c. 189), was the owner of a large canal some 40 miles in length, extending from a point near the northern side of Glenn county into the county of Colusa. It is not alleged, but it appears from the evidence offered and excluded, that this canal was not connected with the Sacramento river at its upper end, that it was not completed for its entire length, and that it had been constructed at an expense of several hundred thousand dollars. The canal was so situated that it could be used in distributing water from the Sacramento river to irrigate many thousand acres of land situated in Glenn and Colusa coun-

ties, west of the Sacramento river. We will hereafter refer to it as the "Central Canal." On November 30, 1901, the plaintiff's intestate, Byron D. Beckwith, posted three notices of appropriation of water, each for a flow of 150,000 inches, measured under a 4-inch pressure, of the waters of the Sacramento river, and had the same duly recorded, each stating that it was his purpose to divert the waters of said river at the point where the notice was posted, and distribute the same over a large part of the lands on the west side of the Sacramento river in the counties of Glenn, Colusa, Solano, and Yolo. It was the purpose and plan of said Beckwith to acquire the said Central canal, and the other property connected therewith, and use the same in the distribution of the water appropriated, by making a connecting canal extending from the proposed place of diversion to the upper end of the said Central canal. Within 60 days thereafter he commenced excavation on the proposed canal, and thereafter prosecuted the same with diligence. Plaintiff had not sufficient means to carry out this large enterprise, and, in order to secure assistance therein on September 20, 1902, he entered into an agreement with the defendants Willard M. Sheldon and J. D. Schuyler, whereby they were to become interested in the said property and enterprise. This agreement provided that the said parties should within 60 days form a corporation, to be known as the Sacramento Canal Company, with \$1,000,000 capital stock; that Beckwith should thereupon convey to said corporation all water appropriations made or owned by him of the waters of the Sacramento river, and all rights of way and canals in which he had any interest connected with or to be used in connection therewith; that work was to be commenced at once toward obtaining rights of ways and selling water rights, and that Sheldon and Schuyler would furnish funds therefor and for all other necessary purposes in carrying on and operating the proposed corporation; that Beckwith was to receive \$10,000 and one-third of the capital stock of the corporation as compensation for conveying said property to the corporation; and that each party was to be employed by the said corporation while they remained stockholders therein. At the same time Sheldon and Schuyler advanced to Beckwith \$400 as a part of the money due him under the contract, and Beckwith executed to them a deed, conveying to them all of his water rights and other property referred to in the contract in trust, to be by them conveyed to the said corporation as soon as the same was formed. Thereupon Sheldon and Schuyler took charge of the Beckwith rights, and on January 12, 1903, they obtained a lease from the Central Irrigation District to Sheldon for the period of 50 years of all the said Central canal and the property connected therewith. They did not organize a corporation under the name of the Sacramento Canal Company. On February 20,

1903, Sheldon, Schuyler, and others incorporated the Central Canal & Irrigation Company for the purpose of securing in its name the water rights and properties of Beckwith, and in pursuance of said purpose Sheldon and Schuyler secured in the name of said corporation rights of way and other property for the formation of the irrigation system, including the rights of way and property of Beckwith aforesaid. On February 22, 1903, Sheldon posted two notices of appropriation of water of the Sacramento river, each for 5,000 cubic feet per second thereof, at substantially the place where Beckwith had previously posted one of his notices, and for the appropriation of substantially the same water previously appropriated by Beckwith. This was done fraudulently for the purpose of acquiring an independent claim or right to the said appropriation and water rights. Sheldon and Schuyler thereupon represented that they would not be able to carry out the original contract according to its terms, because it was necessary to interest other persons therein and to give such other persons a larger interest therein than the original contract contemplated. In consequence of these representations Beckwith and the said defendants on April 8, 1903, executed another contract. This contract provided that the prior contract of September 20th should be canceled and annulled, that Sheldon and Schuyler should proceed to organize the corporation to be named the Sacramento Canal Company, and should cause it to issue bonds not exceeding \$1,000,000, bearing interest at 5 per cent.; that all the water rights, rights of way, and all other things held by either of the parties thereto, or in their interest, connected with the said canal scheme, should be by them conveyed or transferred to said corporation when organized; and that thereupon Beckwith should receive for the property which he should thereby convey to said corporation the sum of \$50,000 in said bonds at par, which should be in full payment and satisfaction of all his rights and demands upon the corporation, or upon the other parties to the contract, or upon the property so to be conveyed to said corporation. It will be noted that at that time Sheldon apparently still held the lease of the Central canal and a claim to water under his notices of appropriation of February 22, 1903. This contract was executed by Sheldon and Schuyler without any intention of performing the same. They wholly and entirely refused to comply with said contract or any part thereof, and did not at any time organize any corporation as provided for therein, but they secured in their own name and in the name of the Central Canal & Irrigation Company valuable rights of way, easements, and property connected with and necessary to the said proposed enterprise, and made numerous contracts for rights of way and for the distribution of the water to be diverted from the river in the name of the Central Canal & Ir-

rigation Company, and made conveyances or agreements for sale of the water to be diverted by them through the canals of the said Central Canal & Irrigation Company. On October 28, 1903, the Central Canal & Irrigation Company posted at about the same point as that at which the plaintiff's notices of appropriation were posted another notice of appropriation of water of the Sacramento river, to be used for the same purposes, claiming 5,000 feet thereof per second. The defendants Sheldon and Schuyler deny that plaintiff has any right or interest in any water of the Sacramento river, and they have failed and refused to deliver to Beckwith any of the bonds provided for in the contract of April 8th. All the acts which they have done, as alleged, were done with the intent to cheat, wrong, and defraud the plaintiff. The Central Canal & Irrigation Company acquired its water rights; they being substantially the same as those possessed by the plaintiff, with full knowledge of the plaintiff's rights and interests therein as proposed in the original enterprise or scheme. The prayer of the complaint is that the property so alleged to be held by the defendants be decreed to be held by them and each of them in trust for the plaintiff, for an accounting of all property and profits received by defendants, that plaintiff recover \$50,000 as damages, and for general relief. There are other more specific prayers which need not be mentioned.

The court found that the notices of appropriation posted by Sheldon on February 22, 1903, were not posted at substantially the same point as the notices of location posted by Beckwith on November 30, 1901, and that Sheldon's notices were not made for the purpose of acquiring claims or rights to water independent of those of Beckwith. It also found that no confidential or fiduciary relation at any time existed between Beckwith on the one hand and Sheldon and Schuyler on the other, and that the appropriation of water attempted to be made by Beckwith in 1901 lapsed and became void within 60 days thereafter, because Beckwith failed to proceed with due or proper diligence in constructing the work for the diversion of the water claimed therein.

There was evidence tending to show that Beckwith's work in pursuance of his notices of 1901 was not of sufficient magnitude and was not prosecuted with sufficient diligence to comply with the requirements of the statute. Hence, if Sheldon and Schuyler, or the Central Canal & Irrigation Company, did not stand in confidential relations to Beckwith with respect to these appropriations, and were in a position to act entirely independent of him, it may be that they could have made other locations in substantially the same place and for the same purpose without being answerable therefor to Beckwith. But the finding that there were no confidential relations existing between Beckwith, Schuyler, and Sheldon was directly

contrary to the evidence. Beckwith had posted his notices of appropriation claiming water, and was proceeding with some degree of diligence to do the work required by the statute. The evidence clearly shows that he began the work before the 60 days had elapsed. By entering into the contract with him, Schuyler and Sheldon recognized that he had some rights in the matter, and they agreed to act in concert and harmony with him, and to assist him in carrying on the large enterprise which he had conceived and brought to their attention. He had conveyed to them all rights which he possessed under his notices. It does not appear that any other person then claimed the right to divert the same water. So long as third persons did not intervene, there can be no doubt that Sheldon, Schuyler, and Beckwith could go on under the Beckwith notices, and, by proper steps, could perfect their rights so as to make them legal and valid against all third persons, except, of course, those having prior and superior rights in the waters of the river. Schuyler and Sheldon had received this conveyance, and had agreed to hold the said rights and convey the same to the contemplated corporation when it was formed. Subsequently Sheldon obtained a lease of the Central canal, a canal some 40 miles in length, and that lease must have had considerable value. He also posted notices of appropriation practically at the same point as that at which the notices of Beckwith were posted, and whatever rights he may have had under that notice were also of some value. Both of these rights he agreed by the contract of April 8th to convey to the proposed corporation, "The Sacramento Canal Company." Under these circumstances there can be no question but that the three parties were, in substance and effect, at least until conveyances were made as provided in the contract of April 8th, copartners in the enterprise of inaugurating and carrying out the proposed scheme for the diversion and distribution of the water of the Sacramento river for irrigation over the large territory available therefor, and that Sheldon and Schuyler were also trustees of Beckwith and the partnership, holding as such the water rights conveyed to them by Beckwith. *Stewart v. Douglass*, 148 Cal. 514, 83 Pac. 699. Confidential relations therefore did exist between them.

The finding that the location of the notices posted by Sheldon and by the Central Canal & Irrigation Company was not substantially in the same place as those posted by Beckwith is also contrary to the stipulation which should have been admitted. It showed that one at least of the Beckwith notices was posted within less than 200 feet of the place where one of the notices of Sheldon and the notice of the company were posted, both being posted in the same place. Plaintiff also offered to prove that the com-

pany excavated a large canal beginning at the point where its notice was posted and extending to the upper end of the Central canal, and also completed the latter canal by connecting the disconnected parts thereof, and began the distribution of water upon a large scale, and this evidence should have been admitted. The purpose of Beckwith in posting his notices was to obtain water of the Sacramento river, and to divert it at a point where it would be practicable to carry it from the river into the said canal of the Central Irrigation District, and to use the said canal as a part of the proposed irrigation system to carry water to the lands proposed to be irrigated. The exact point at which the diversion was to be made was not important. The main object of the scheme was to obtain a large quantity of water of the river, carry the same into the said Central canal, which was only a few miles away, and distribute the same to a certain territory. It is perfectly clear from the evidence that the appropriation intended to be made by the defendants was for precisely the same purpose, and was made at a point fully as convenient, but no more so, for conducting the water into the former canal as that of Beckwith. It is also plain that the water which they intended to appropriate was the same water as that which Beckwith intended to appropriate, and that their appropriations were made upon the supposition that his rights had lapsed, and that they were at liberty to entirely disregard his rights and obtain the same water indirectly by means of another appropriation. Under these circumstances, in view of the relations between the parties, the slight difference between the proposed places of diversion is not important or material, and it would not be true that the diversion was not made at substantially the same place as that intended by Beckwith.

Evidence was offered by the plaintiff to the effect that at the time of the execution of the lease from the Central Irrigation District to Sheldon the district owned a strip of land extending from the upper end of the Central canal to the river and covering the site of the Beckwith water locations, as well as that of the later locations of Sheldon and the canal company, and that said land was consequently included in the lease. The exclusion of this evidence was error. The property leased, aside from the canal itself, was described in general terms as "all real property owned by" the district in connection with its canal. It was proper, therefore, to show by proof that the general description contained in the lease included this particular property, and that this property included the sites of the several water locations. The theory of the plaintiff was that Sheldon had obtained this lease for the benefit of the three parties to the contract of September 20, 1902, and held it in trust for

use in the common enterprise in which they were engaged. It was important, therefore, to show what property the lease included, and its location with respect to the general design. The evidence offered would also tend to prove that the new water locations were made in aid of the common plan, and not antagonistic thereto. For like reasons the court should have admitted the proof of the declarations of Sheldon at the time he was negotiating for the lease, including his bid therefor, to the effect that he could and would acquire the Beckwith water rights for use in connection with the Central canal, and that those rights were necessary to the scheme he proposed to carry out, because they were superior to the right of the irrigation district, and that he intended to post new notices of appropriation in order to protect those rights. Evidence should have been admitted in regard to the extent and size of the Central canal and its value. Such facts would show the magnitude of the enterprise and the reasons for the desire of Beckwith to obtain assistance therein. While not very important, this would throw some light on the purposes, motives, and intentions of the parties. The evidence tending to show notice to the Central Canal & Irrigation Company of the right of Beckwith and of his interest in common with Sheldon, and the evidence to show the time that had elapsed since the Central Irrigation District had done any work in the prosecution of its irrigation scheme, or toward the completion of the Central canal, should also have been admitted. The proof of payment by the Central Canal & Irrigation Company of the rent called for by the lease to Sheldon should have been allowed. It tended to show, what seems to have been disputed, that that company took over the lease soon after its organization, that this was the purpose of Sheldon when that company was organized, and that it was really the corporation contemplated by the original contract, although it was given a different name. The difference of the name would be of no importance if it were in fact intended to serve the same purpose. The court should also have allowed plaintiff to prove that the line of the proposed canal described in Beckwith's appropriation notices was identical with the line of the Central canal.

Certain other persons, parties defendant, filed general demurrers to the complaint, which the court sustained, and thereupon rendered judgment in their favor. The complaint alleges that each of them claims some right, estate, and interest in the property which the plaintiff claims is held in trust for his benefit, but that said claims were without right. They were therefore proper parties defendant in the action, in order that their interests may be bound by the judgment. The demurrers should have been overruled. There was no demurrer for un-

certainly or ambiguity. It is probable that the failure of the court below to perceive the relevancy of the evidence excluded was due to the vagueness, ambiguity, and lack of coherence in the complaint. It should be amended and the facts stated more directly and clearly and in more orderly fashion.

We do not think it necessary to discuss the other alleged errors.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

154 Cal. 363

PEOPLE v. BESOLD. (Cr. 1,423.)

(Supreme Court of California. Oct. 9, 1908.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—ORDERS APPEALABLE.

An order denying a motion for a continuance is not appealable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2585; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1151*)—APPEAL FROM JUDGMENT—ORDERS REVIEWABLE.

Under Pen. Code, § 1173, subd. 2, authorizing the taking of exceptions to the refusal to postpone the trial on motion of accused, an order denying a motion for a continuance is reviewable on appeal from a judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3045; Dec. Dig. § 1151.*]

3. CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—DENIAL OF CONTINUANCE.

The appellate court cannot review a refusal of a continuance, unless the motion, evidence, and ruling are shown by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.*]

4. CRIMINAL LAW (§ 563*)—CORPUS DELICTI—EVIDENCE—CONFESSIONS—WEIGHT AND SUFFICIENCY.

The prosecution must offer evidence to show the commission of the crime charged, and the want of it cannot be supplied by proof of extrajudicial confessions of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

5. CRIMINAL LAW (§ 680*)—EVIDENCE—ORDER OF PROOF.

The ordinary practice is to establish the corpus delicti before admitting evidence of any statement of accused, but a mere variation in the order of proof may not be prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1610; Dec. Dig. § 680.*]

6. CRIMINAL LAW (§ 517*)—CORPUS DELICTI—EVIDENCE—SUFFICIENCY.

Evidence independent of statements of accused on trial for murder held to establish the corpus delicti, rendering accused's confession admissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 517.*]

7. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY.

Garments found on the person of decedent are admissible in evidence, where the changes which have taken place in them are explained, so that the jury may determine the condition of the clothing at the time the body was found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

8. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY.

The skull of decedent is admissible in evidence where the nature and extent of the alterations therein are shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

9. HOMICIDE (§ 145*)—INTENTION—PRESUMPTIONS.

Where one person assails another with a dangerous weapon likely to kill, and in fact takes the life of the party assailed, the presumption is that the assailant intended death, and, in the absence of evidence to the contrary, the presumption prevails.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 263; Dec. Dig. § 145.*]

10. HOMICIDE (§ 233*)—EVIDENCE—SUFFICIENCY—PROOF OF MOTIVE.

In a prosecution for homicide, proof of motive is not indispensable to a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.*]

11. HOMICIDE (§ 340*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS ON MURDER IN THE FIRST DEGREE.

One convicted of murder in the second degree is not harmed by an erroneous definition of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. § 340.*]

12. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION.

To determine whether or not the law was properly declared for the guidance of the jury, the court must look to the charge as a whole, and cannot look to an isolated excerpt from the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

13. CRIMINAL LAW (§ 762*)—MISLEADING INSTRUCTIONS—ASSUMPTION THAT DEFENDANT DID THE KILLING.

Where the court repeatedly charged that, to justify conviction, the prosecution must establish beyond a reasonable doubt every element of the murder charged, an instruction that, in determining the intention of accused, it is important to consider the means used to accomplish the killing, and that the intention is manifested by the circumstances connected with the offense, given while the court is dealing with the question of intent as affecting the distinction between murder and manslaughter, did not tend to mislead the jury to believe that the court believed that accused had committed the murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1759; Dec. Dig. § 762.*; Homicide, Cent. Dig. § 581.]

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Anton Besold was convicted of murder in the second degree, and, from a judgment of conviction and from an order denying a new trial, he appeals. Affirmed.

A. A. Sturges, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SLOSS, J. The defendant, charged with the murder of Cladie Besold, was found guilty of murder of the second degree. His motion for a new trial was denied and judgment of imprisonment for life followed. He

appeals from the judgment, and from the order denying his motion for a new trial.

He also seeks to appeal from an order denying his motion for a postponement of the trial. The Code does not authorize an appeal from this order. An order denying a motion for a continuance is reviewable on appeal from the judgment, but to obtain a review of such order it is necessary to incorporate the motion, evidence and ruling, in a bill of exceptions. Pen. Code, § 1173, subd. 2, and section 1174; *People v. Buck*, 151 Cal. 667, 91 Pac. 529. The record before us does not include any such bill, and therefore presents no basis for reviewing the action of the trial court in refusing to postpone the trial.

The following statement of the evidence produced at the trial, while not exhaustive, will suffice to illustrate the points raised by the appellant. Some time in August, 1906, one Horton, while walking up Temescal canyon, near Santa Monica Beach, in Los Angeles county, saw a small piece of red silk lying in the path. On looking into the neighboring bushes, he found the corpse of a woman lying some five or six feet from the path. The body was removed to Santa Monica, where an inquest was held. It was evident that death had preceded the discovery of the body by a number of days. The flesh on the head and hands had decayed or dried, and the body was badly decomposed. In the skull were two holes, one on the left side and the other on the right, each being a little above and forward of the ear. They were holes which might have been caused by the entrance and exit of a bullet, and in fact a 38-caliber bullet, fitting the smaller hole, was found in the skull. It had apparently fallen back after piercing the skull and entering the scalp, its force being then spent. A wound of the character indicated by the condition of the remains would cause immediate death. A careful search of the place where the body was discovered disclosed no firearm or other weapon. By means of the clothing found upon the body, and evidence of disease in some of the bones, the body was identified as that of Mrs. Cladie Besold, the wife of the defendant. Dr. N. J. Brown, a physician of Los Angeles, testified that he had attended her professionally on July 9, 1906. He never saw her after that time. Mrs. Besold had an appointment with Dr. Brown for the 11th day of July, 1906, at 10 o'clock in the morning. She did not appear, but at about 1 o'clock in the afternoon of that day the defendant came to Dr. Brown's office in a condition of apparent excitement, and told the doctor that Mrs. Besold could not come that day for treatment, and that she had left Los Angeles for San Francisco, intending to stop at Summerland, near Santa Barbara, on the way.

On the evening of July 11th the defendant came to D. R. Cameron's store in Los Angeles to open a box which he had left there. He brought a trunk containing cloth-

ing which he said belonged to his wife, and stated to Cameron that his wife had gone to "Summerville, or Riverside, or somewhere." On the 13th he told Cameron that he had telegraphed to his wife, and was going to start to join her the next day. On the 19th or 20th of August he returned, and told Cameron that his wife was in West Virginia, and was getting along very nicely.

Mrs. Nobman was a friend of the Besolds, and lived in San Francisco. On July 23d she received from the defendant a letter, in which, under date of July 20th, he said: "I know you was waiting for a letter from Cladie. It is only bad news I can write you. You know she was very sick, and when we go down to Los Angeles, she got worse all the time until July 11th, and I said it was her last, called the doctor to the house, but it was too late, and she was buried last Friday at St. Bernardino." On August 7th Besold visited Mrs. Nobman, and spoke of his wife's death, saying that she had hastened her end by drinking to excess.

Mrs. Ethelin Chaffin had charge of a rooming house in which Besold and his wife lodged in June and July, 1906. On the 11th of July, 1906, as the defendant and Cladie Besold were leaving the house, the latter said to Mrs. Chaffin, in the hearing of Besold, that they were going to the beach for the day. Mrs. Chaffin never saw Cladie Besold again. The defendant returned the same evening, between 5 and 6 o'clock, and said he expected a telegram from his wife; that she had gone to Summerland.

Besold was arrested in Washington, D. C., on the 21st day of September, 1906. In his possession were various articles of jewelry which had belonged to Cladie Besold. He told the arresting officer that his name was Anton Oerter. Subsequently he said that his wife had gone to New Mexico; that she had left him, and he did not know what had become of her.

W. A. White, the sheriff of Los Angeles county, and one of his deputies, went to Washington to bring Besold back for trial. On the return journey they questioned the accused, and he stated that his wife had left him and had gone to Summerland, and that he did not know what had become of her. He said he had never had a gun; that the gun belonged to his wife. The deputy sheriff asked him, "Why did you take your wife up in that lonely canyon and kill her?" to which he replied, "Sheriff, if you have any heart, don't ask me. She makes me trouble when she is alive, and now she makes me trouble when she is dead." It appeared that on August 26, 1906, the defendant was married by a justice of the peace to a Mrs. Pickett.

This recital of the testimony is a complete answer to the claim that the evidence failed to show that the defendant committed the crime of which he was convicted. The finding of the dead body of Cladie Besold, with

a bullet hole through the skull, together with the testimony of experts that a bullet piercing the head of a person in the manner indicated by the condition of the remains would cause death, was certainly persuasive evidence that Mrs. Besold's death had been caused by a gunshot wound. The fact that no pistol or other firearm was discovered in the neighborhood of the corpse clearly tended to show that the wound had not been self-inflicted. Nor was there any lack of testimony tending to prove that the injury resulting in death had been inflicted by the defendant. He had been seen with the deceased on the morning of July 11th. At that time she had declared in his presence that she was going with him to the beach. She was never again seen alive, but her dead body was found near the beach. Within a couple of days of the 9th of July, we find the defendant stating to various persons that she had gone to Summerland. A little later he declares that she had died and been cremated. With her clothing and jewelry in his possession, he departs from the state, and, on being arrested, states that she is alive, and had left him. In the meanwhile he has contracted another marriage. His statements regarding his wife are confused and contradictory, and all are contrary to the established facts. Furthermore, some of his statements to the officers who were bringing him back from Washington were almost tantamount to a confession. All of these circumstances combined to make out a case which the jury was justified in finding to be inconsistent with any rational hypothesis other than that of defendant's guilt.

What has been said covers the point that the court erred in admitting evidence of inculpatory statements of the defendant, because, as is claimed, the corpus delicti had not been established. Before any of the rulings complained of had been made, the people had proved the finding of the dead body of Cladie Besold, in a condition and under circumstances which warranted, if they did not compel, the inference that her death had been caused by the violent act of some person other than herself. Undoubtedly the prosecution is bound to offer evidence which tends to show the commission of a crime, and the want of such evidence cannot be supplied by proof of extrajudicial confessions or admissions of the defendant. *People v. Simonson*, 107 Cal. 345, 40 Pac. 440; *People v. Ward*, 145 Cal. 736, 79 Pac. 448. But here, without considering any statement of the defendant, the evidence referred to fully established the corpus delicti; that is, it tended to show that the person alleged to have been murdered had come to her death, and that her death had been caused by criminal agency. As we have observed, this necessary proof was made before the admission of evidence of any statement of the defendant. Such is ordinarily the proper practice. We are, however, not to be understood as holding

that a mere variation in the order of proof would be prejudicial to the defendant. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Fallon*, 149 Cal. 287, 86 Pac. 689.

There was no error in admitting in evidence, over the objection of the defendant, the garments found on the person of the deceased. It is said that these articles were not shown to be in the same condition in which they had been when taken from the body. Such changes as may have taken place were fully explained. With this evidence of the nature and extent of the alterations, the jury could determine the condition of the clothing at the time the body was found. The ruling attacked was correct. *Ezell v. State*, 103 Ala. 8, 15 South. 818; *Wynne v. State*, 56 Ga. 113; *Boucher v. Roberson Mills*, 182 Mass. 500, 65 N. E. 819; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826. The same considerations apply to the admission in evidence of the skull of the deceased.

Among the instructions to the jury was the following: "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and, in the absence of evidence to the contrary, this presumption must prevail. The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent." We perceive no sound basis for objecting to this instruction. It correctly states the law. *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405. Nor can it be justly said to have no application to the case at bar. If the jury believed that the defendant had assailed Cladie Besold with a dangerous weapon, and that she had died in consequence of his act, the intent with which he acted became a material matter for their consideration.

There was no error in charging the jury that "proof of motive is not indispensable to a conviction." *People v. Durrant*, 116 Cal. 179, 208, 48 Pac. 75. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965, relied on by appellant, merely holds that the court did not err in refusing to charge that "absence of motive is in favor of the defendant." This was held to be an instruction on a matter of fact and properly refused on that ground. The same cannot be said of the instruction given here.

A part of the definition of murder of the first degree is criticised. If the language used by the court was erroneous, the defendant was not harmed thereby, since he was convicted of murder of the second degree only. *People v. Ryan* (Cal.) 92 Pac. 853;

People v. Green, 1 Cal. App. 432, 82 Pac. 544.

The court instructed the jury that, "in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." It is argued that this instruction assumed as a fact that the defendant had in fact done the killing. We think the language is not fairly open to this construction. The court was dealing solely with the question of intent as one of the elements affecting responsibility for a homicide, and was declaring the rule which should govern the jury in determining such intent. Other factors going to make up the crime charged were not under consideration at the moment. It is impossible to declare in each instruction the law governing every phase of the entire case. But even if we assume that the charge quoted, taken by itself, involved an assumption that there had been a killing, and that it had been done by the defendant, it will readily be seen, on an examination of other instructions given, that no such intimation was intended by the court, and that the instruction could not have been so understood by the jury. To determine whether or not the law was properly declared for the guidance of the jury we are to look, not to an isolated excerpt from the instructions, but to the charge as a whole. *People v. Flynn*, 73 Cal. 514, 15 Pac. 102; *People v. Tomlinson*, 66 Cal. 346, 5 Pac. 509; *People v. Fehrenbach*, 102 Cal. 401, 36 Pac. 678; *People v. Brittan*, 118 Cal. 411, 50 Pac. 664; *People v. Ah Jake*, 91 Cal. 99, 27 Pac. 595; *People v. Anderson*, 105 Cal. 34, 38 Pac. 513; *People v. Winters*, 93 Cal. 281, 28 Pac. 946; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *People v. Weber*, 149 Cal. 345, 86 Pac. 671.

In this case the court impressed upon the jury, by instructions repeated in various forms, the propositions that, in order to justify a conviction, the prosecution must establish beyond a reasonable doubt every element of the alleged crime, and that the defendant was entitled to an acquittal unless his guilt of a crime embraced in the charge, and of every essential element thereof, was established beyond a reasonable doubt. Indeed, the instructions covering these phases of the case were so full and numerous that we cannot undertake to quote all of them at length here. One or two extracts will suffice. Thus, among other instructions, the jury was told that, "although the proof * * * may show certain circumstances beyond a reasonable doubt, yet if, in your opinion, it fails to show any one essential or material element or circumstance of the guilt of the accused beyond a reasonable doubt, then it is your duty to acquit the defendant. Every essential and material link in the chain of

evidence, fastening upon the defendant the guilt of the offense charged in the information, must be proved to your satisfaction beyond a reasonable doubt, and if, in your opinion, such proof has not been made, you must acquit the defendant." Again: "You are instructed that, where independent facts and circumstances are relied upon to identify this defendant as the person who committed the crime with which he stands charged, each and every material fact or circumstance which is necessary to complete the chain or series of independent facts tending to establish a presumption of guilt must be established to the same degree of certainty as the main fact." In addition, the jury was instructed specifically that to warrant a conviction it must be proved beyond a reasonable doubt, by evidence exclusive of defendant's statements or admissions, that Cladie Besold had been killed, and that she had come to her death by criminal means. This was, in effect, stated at least three times. That the prosecution was required to prove, beyond a reasonable doubt, every element of the crime charged, was declared no less than five times. Instructions requiring the jury to acquit upon failure of the prosecution to prove beyond a reasonable doubt a single necessary element of the crime appear in two parts of the charge. The presumption of innocence, as applying to every ingredient of the crime, was fully set forth, as was the right of the defendant to have the evidence construed in his favor, so far as reasonably could be done. Two instructions informed the jury that, where circumstantial evidence is relied on, it must be such as to exclude to a moral certainty and beyond a reasonable doubt every reasonable hypothesis but that of the guilt of the defendant. The doctrine of reasonable doubt and the exclusive right of the jury to determine all questions of credibility of witnesses were clearly and amply explained. And, finally, the jury was instructed that, before it could find the defendant guilty, it must "be satisfied and entertain an abiding conviction to a moral certainty that the defendant Besold killed the deceased."

In view of all this, it is impossible to believe that the jury could have understood the instruction complained of as conveying any intimation that the court believed that the defendant had in fact killed the deceased. The instruction, taken together with those referred to, meant no more than that, if the jurors should be satisfied beyond a reasonable doubt that the defendant had killed Cladie Besold, they were, in determining the intent with which he had done the act, to consider the means used and other facts shown. As has been suggested, the court was here dealing with the question of intent as affecting the distinction between murder and manslaughter. No juror of ordinary intelligence could have taken this language as meaning that he was not, before voting

for a conviction, bound to be satisfied beyond a reasonable doubt that the defendant had killed the deceased. That he was so bound had been stated and restated with perhaps unnecessary elaboration. In any view that may be taken of the instruction, it must, in order to have any reasonable meaning, be read in the light of the other instructions as hereinbefore indicated.

No other points are argued by the appellant. We find in the record no error affecting him in any substantial right.

The appeal from the order denying a continuance is dismissed. The judgment and the order denying a new trial are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

154 Cal. 420

BRADLEY v. ROSENTHAL et al.
(Sac. 1,529.)

(Supreme Court of California. Oct. 16, 1908.)

1. JUDGMENT (§ 695*) — CONCLUSIVENESS — PRINCIPAL AND AGENT.

An agent is primarily, and his principal is secondarily, liable for his negligence, and while both may be sued in a single action, exoneration of the agent exonerates the principal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1218; Dec. Dig. § 695.*]

2. INDEMNITY (§ 13*)—AGENT'S NEGLIGENCE—RIGHTS OF PRINCIPAL.

While no right of contribution exists between joint tort-feasors, whether sued jointly or collectively, a principal, who has become liable through his agent's unauthorized negligent act, is entitled to indemnity against him.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 29; Dec. Dig. § 13.*]

3. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE.

In an action against a person and a company for alleged joint negligence, a judgment for the person and a judgment against the company will be reversed and remanded, the company not being entitled to judgment in its favor, and plaintiff not being entitled to an affirmance, where it appears that any negligence was exclusively the person's, where there was an issue as to the person's agency for the company, and where it cannot be determined whether the verdict for the purported agent was based upon correct or incorrect instructions, since, if the verdict was based upon incorrect instructions, the principal is injured, as the judgment exonerates its agent, from whom it is entitled to indemnity, and if upon correct instructions, the principal is injured, since if the agent was not negligent, the principal was entitled to a verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.*]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Personal injury action by M. W. Bradley against F. Rosenthal and the Sunset Telephone & Telegraph Company. From judgments for plaintiff and defendant Rosenthal, and from an order denying a new trial, defendant company appeals. Reversed and remanded for new trial.

Pillsbury, Madison & Sutro and Dixon L. Phillips, for appellant. Maurice E. Power, William H. Alford, and G. W. Zartman, for respondents.

HENSHAW, J. Plaintiff sued to recover damages for personal injuries sustained by him. In his complaint he set forth that he was employed by the defendants to aid in the construction of a telephone line; that his employment consisted in helping to set up and erect poles, and place thereon wires and other necessary appliances; that the defendants agreed to furnish suitable and proper poles; "that said defendants carelessly, negligently and with want of ordinary care on their part furnished certain poles which were very brittle and unfit for said purposes, and the fact of the unfitness of such poles was known to said defendants at the time they furnished the same, but was unknown to plaintiff." He then alleges that, while in the course of his employment he was in the act of ascending one of the poles in a careful and workmanlike manner, the pole "by reason of its brittleness and unfitness for said purpose broke," and he was thrown violently to the ground, sustaining the injuries for which he seeks damages. The defendants answered separately. Defendant Rosenthal admitted his employment of the plaintiff, but alleged that in so employing he acted solely as the agent of the codefendant telephone company. He denies the furnishing of unfit and unsuitable poles, and in this regard alleged that the plaintiff represented to defendant that he was an experienced and skilled lineman, competent to erect and set up poles for telephone lines, and that the plaintiff, at defendant's direction, himself selected the poles which were used. The telephone company in its answer denied all responsibility for, and participation in, the construction of the telephone line, denied that it employed the plaintiff, denied that it furnished or agreed to furnish suitable or any poles, and denied that it had furnished unsuitable poles. Under the issues thus joined trial was had before a jury. It is to be noted that the plaintiff charges that he was employed by "the defendants," and that the negligence which occasioned his accident and injury was the negligence of the defendants. So far as appears from the complaint, therefore, both of the defendants were principals. As between the defendants, radically different issues were joined, the defendant telephone company denying responsibility for, or participation in, the construction of the telephone line, and denying that it had ever employed the plaintiff; the defendant Rosenthal admitting his employment of plaintiff, but pleading that in employing him he was acting as agent of his principal, the telephone company. Evidence was addressed to these issues. On behalf of the telephone company

it was sought to be shown that Rosenthal was building the telephone line upon his own responsibility and not as agent of the telephone company; that his method was to construct such lines in the rural districts at his own risk and cost, and when constructed seek and obtain telephonic connection with the lines of the telephone company. Rosenthal, on the other hand, contended, and introduced evidence to show, that he was building the line for the telephone company, and in managing the work of construction he was acting as its agent. As to the occasion of the accident, it is not disputed that it resulted from the breaking of a telephone pole, the selection of which was not made, nor directly authorized to be made, by the telephone company, and that the selection was made by the defendant Rosenthal. At the request of the defendant Rosenthal the court gave the following instruction: "If you believe from the testimony that F. Rosenthal, acting as agent of the Sunset Telephone & Telegraph Company * * * employed the plaintiff as a lineman to work for said company, and that he was in the employ of said company at the time of the injury complained of, then in no event can said Rosenthal be held liable in this action; but, should you find in favor of plaintiff, your verdict must be against the Sunset Telephone & Telegraph Company only." And again the court charged the jury: "If defendant Rosenthal was the agent of the defendant Sunset Telephone & Telegraph Company, and acting as and in the capacity of agent of said company, employed plaintiff to work on said line and poles, you cannot find or assess any damages against him." The jury returned a verdict in favor of defendant Rosenthal, and against the telephone and telegraph company. Judgment was entered accordingly. The defendant telephone company moved for a new trial, which was denied, and it appeals from the judgments in in favor of plaintiff and in favor of Rosenthal, and also from the order refusing its motion for a new trial, serving notice of appeal both upon plaintiff and upon its codefendant.

Appellant argues that the evidence establishes without conflict that if it be responsible at all, it is responsible solely because of the relationship of principal and agent found to exist between itself and the codefendant Rosenthal; that not one word of evidence tends to establish any direct personal participation, personal knowledge, or personal culpability upon its part, or that its employé was in any way carrying out its express instructions in the particular matter, for the doing of which negligence is charged; that under such circumstances the employer is liable only because of the rule of law which holds him responsible, as well for the undirected, as for the directed, act of the agent within the scope of his employment; that in such kind of cases where there have been no express instructions for the doing of the act complained of in the particular way, the

principal and agent, master and servant, are not joint tort-feasors as the law employs that term. The employé's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent, must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has committed no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort. While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, there exists, in the kind of case here presented, much more than the mere right of contribution. The principal who has been obliged thus to pay for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent. These legal propositions, it will be seen, receive universal recognition. Applying them to the present case, appellant argues that the verdict of the jury in favor of Rosenthal must be construed as their finding that he was not negligent, and as the appellant could be responsible only because Rosenthal was its agent, the judgment against it must be reversed, and, upon the authority of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, this court should order a like judgment in favor of it. Upon the general question here presented as to the correlative rights of master and servant, principal and agent, to indemnity, Cooley thus clearly enunciates the well-settled principle (1 Cooley on Torts [3d Ed.] p. 255): "A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself. On the other hand, suppose the servant be directed by the officers of the company to do a certain act, which it turns out they had no right to do, and for doing which he is made to pay damages. Here, if the act was a plain and manifest wrong, as would be leaving the cars to commit a battery, the servant can have no indemnity, because he must have known the act to be unlawful, but if the act directed was one he had reason to suppose was legal, and he obeyed directions on that supposition, it would ill become the railroad company to demand

that he be treated as a wrongdoer when called upon to indemnify him against the consequences of the act its officers had directed. In such a case the servant is not in morals a wrongdoer at all, and his claim to indemnity would be based upon a faithful obedience to orders, which he had a right to presume were rightful, nothing to the contrary appearing." See, also, 9 Ency. of Law & Prac. p. 807; Storey on Agency (9th Ed.) 271; *Bailey v. Bussing*, 28 Conn. 453; *Old Colony R. R. Co. v. Slavens*, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; *Railway Co. v. Latham*, 63 Me. 177; *Featherstone v. N. & C. Turnpike*, 71 Hun, 109, 24 N. Y. Supp. 603; *N. O. & N. E. R. R. Co. v. Jones*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919; *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

Where recovery is sought, based upon the act or omission of an agent which the principal did not direct, and in which he did not participate, where thus his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent, the effect of the judgment in favor of and exonerating the agent is learnedly considered in *Doremus v. Root*, supra. Generally speaking, it may be said that such a judgment in favor of the agent *ex propria vigore* relieves the principal of responsibility, and may be availed of by the principal for that purpose. Thus in *Lake Shore & Mich. So. Railroad Co. v. Goldberg*, 2 Ill. App. 228, several defendants had been sued in trespass, and one who had joined in the act of trespass and had acted as the agent of appellant had been acquitted. Appellant had acted only through the agent, and in its own defense offered the judgment of acquittal. The court holding the defense good, said: "But where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be. The principal can be no more guilty by reason of the act of his agent than if he had committed the act in person, and the party who was alone charged to have committed the act in person was conclusively adjudged not guilty. We see no way of escape from our conclusion, and for authority refer to *Thomas v. Rumsey*, 6 Johns. (N. Y.) 26, and *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627." In *Doremus v. Root*, supra, the action was brought to recover damages for injury sustained by plaintiff. It was prosecuted against the railroad company, and against Root, the conductor of the company's train. It was charged that the conductor Root did not obey orders, and by his negligence caused a collision. After trial the jury rendered its verdict in favor of Root and against the railroad company. Judgment followed, and the company appealed. The case received elaborate consideration. The judgment in favor of Root was not appealed from. Such being the con-

dition, it was not subject to reversal. The Supreme Court of Washington was compelled to hold that the case was one where the jury had found that the servant, who alone was charged with the culpable act, had committed no wrong, and that of necessity therefore the employer could have committed no wrong. Unable to reverse the judgment in favor of Root, it was constrained to decree the exoneration of the principal. As has been said, the appellant here contends for a like ruling, but in certain vital aspects the case at bar differs from *Doremus v. Root*. Here an appeal has been taken from the judgment in favor of Rosenthal, and there is no such embarrassment as confronted the Supreme Court of Washington. Upon the other hand, while appellant in seeking a judgment in its favor, is asking more than it is entitled to, respondent in turn makes a like request in arguing for an affirmance of the judgments as they stand. Herein he urges that his complaint charged both defendants equally as joint tort-feasors; that in such a case it is well settled that a verdict may pass for one and against another; that this was the result in the case at bar; that the jury must be held to have followed the erroneous instruction of the court in exonerating Rosenthal, or, in other words, must be held to have determined that Rosenthal was acting as the agent of the telephone company, and that this determination by the jury fixes, at any rate, the liability of the company, and that it can matter not that Rosenthal was, under the erroneous instructions, allowed to escape just liability. But there are many and insurmountable objections to this view. While it is true that the complaint charges both of the defendants as having been culpably negligent, the evidence beyond peradventure established that whatever negligence there was, was exclusively the negligence of Rosenthal, and that it was a negligence not directed nor participated in by the telephone company. Again, the issue of agency or nonagency was in controversy between the parties, and was important, because of the right to indemnification which the principal has for such negligent act of his agent. The effect of the verdict in favor of Rosenthal in a matter thus litigated between the parties would be to bar the principal's right of recovery over. And, finally, this appeal can be denied only upon a declaration by this court that the jury's verdict in favor of Rosenthal was based upon the erroneous instructions. But under the circumstances such a declaration cannot judicially be made. The evidence upon the question of the negligence was conflicting. A counter charge of contributory negligence was also made against the plaintiff, and the jury was properly instructed that if the plaintiff was guilty of contributory negligence, he could not recover, and if the defendants were not guilty of negligence, plaintiff could not recover. Under the evidence

presented the jury might have reached the conclusion that the defendant Rosenthal was not negligent at all, in which case it should have rendered a verdict in his favor. If it be said that a jury would stultify itself in holding that an agent was not guilty of negligence, and at the same time holding his principal responsible because of the agent's negligence, and that therefore it must be concluded that the jury followed the erroneous instruction, answer must be made that juries have done precisely this thing, and that the case of *Doremus v. Root* is a typical instance of it. Judicially, therefore, it cannot be declared whether the verdict of the jury in favor of Rosenthal was based upon the correct instructions given by the court or upon the incorrect ones. If upon the incorrect instructions, then appellant is injured, since the judgment exonerates its agent, from whom it is entitled to seek indemnity. If upon the correct instructions, then also is appellant injured, since, if the agent was free from negligence, the principal was also entitled to the jury's verdict.

For these reasons it is held that the judgment in favor of Rosenthal and the judgment against the appellant must both be, and hereby are, reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

(154 Cal. 385)

In re MCPHEE'S ESTATE. (S. F. 5,000.)
(Supreme Court of California. Oct. 13, 1908.)

1. STATUTES (§ 117*)—TITLE—MISLEADING TITLE.

The use of the word "alternative" in the title of St. 1907, p. 753, c. 410, entitled "An act to add new sections to the Code of Civil Procedure, providing a new and alternative method by which appeals may be taken," does not render the title misleading, on the ground that the method provided is exclusive, for the act does provide a new method for taking an appeal, which may be substituted, for the existing method.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 117.*]

2. STATUTES (§ 109*)—TITLE—SUFFICIENCY.

Const. art. 4, § 24, requiring the subject of every act to be expressed in its title, must be liberally construed, and a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed is sufficient, and the title need not embrace an abstract of the contents of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 136; Dec. Dig. § 109.*]

3. STATUTES (§ 117*)—TITLE—SUFFICIENCY.

The provisions of St. 1907, p. 753, c. 410, apply to the subject of providing a method by which appeals may be taken, and are within the title thereof, entitled "An act to add three new sections to the Code of Civil Procedure, * * * providing for a new and alternative method by which appeals may be taken from judgments * * * of the superior court * * * to the

Supreme Court or District Courts of Appeal." and the act is not in conflict with Const. art. 4, § 24, requiring the subject of every act to be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 117.*]

4. STATUTES (§ 60*)—TITLE—SUFFICIENCY—OBJECTION.

The objection to St. 1907, p. 753, c. 410, providing a new alternative method for taking an appeal, that it repeals, by implication, certain existing provisions as to appeals, and hence contains matter not expressed in its title, in violation of Const. art. 4, § 24, does not merely raise the objection made, the objection being based on a construction of the act, which is not admissible in passing on its constitutionality.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 60.*]

5. STATUTES (§ 60*)—TITLE—SUFFICIENCY—OBJECTIONS.

The claim that St. 1907, p. 750, c. 408, providing for a new and alternative method for the preparation of records, is obscure, ambiguous, and uncertain does not go to the validity of the act, on the ground that the act contains legislation not expressed in the title, in violation of Const. art. 4, § 24, requiring the subject of every act to be expressed in its title, this being matter of construction, and not affecting the constitutionality of the act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 60.*]

6. CONSTITUTIONAL LAW (§ 316*)—"DUE PROCESS OF LAW"—APPELLATE PROCEDURE—CHANGE.

Const. art. 1, § 13, providing that no person shall be deprived of life, liberty, or property without "due process of law," has no application as to notices of appeals authorized by statute, for the words "due process of law" mean a course of legal procedure according to the rules established for the protection of private rights; and, when a litigant has had his cause determined under the procedure applied to other similar cases, he cannot complain of want of due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 316.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

7. CONSTITUTIONAL LAW (§ 316*)—DUE PROCESS OF LAW—APPELLATE PROCEDURE—NOTICE OF APPEAL.

What the method and procedure of taking an appeal shall be is a matter for legislative determination, and the Legislature can authorize an appeal without service of notice thereof.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 316.*]

8. CONSTITUTIONAL LAW (§ 316*)—DUE PROCESS OF LAW.

St. 1907, p. 753, c. 410, providing a method for the taking of appeals without requiring service of a notice of appeal, is not in conflict with Const. art. 1, § 13, providing that no one shall be deprived of life, liberty, or property without due process of law, since the court, before any appeal is taken, has acquired jurisdiction over the parties, and the appeal is but a proceeding in the cause after such jurisdiction has attached.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 316.*]

9. CONSTITUTIONAL LAW (§ 316*)—DUE PROCESS OF LAW.

St. 1907, p. 750, c. 408, providing a method for the preparation of records on appeals, without providing for service of notice, is not in conflict with Const. art. 1, § 13, providing that no

person shall be deprived of life, liberty, or property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 316.*]

10. APPEAL AND ERROR (§ 40*)—ORDERS APPEALABLE—STATUTES—CONSTRUCTION.

St. 1907, p. 753, c. 410, providing a new method for the taking of appeals from judgments, orders, or decrees, and providing that appeals from all judgments, orders, or decrees of any of the superior courts, reviewable by the Supreme Court or District Court of Appeals, may be taken in the mode prescribed, provides for an appeal from probate orders.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 40.*]

11. EXECUTORS AND ADMINISTRATORS (§ 510*)—ACCOUNTS—SETTLEMENT—RIGHT TO APPEAL.

The statutory right of an administrator, as such, to appeal from an order settling his accounts is not affected by any order revoking his letters of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

12. APPEAL AND ERROR (§ 395*)—UNDERTAKING—NECESSITY.

An appeal taken under a statute, which does not require the filing of an undertaking for costs on appeal, will not be dismissed for the failure of appellant to file an undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 395.*]

In Bank. Appeal from Superior Court, Mendocino County; Emmet Seawell, Judge.

In the matter of the estate of George S. McPhee, deceased. From a judgment settling the accounts of J. S. Corrigan, administrator, in which Alta McPhee appeared as contestant, the administrator appeals. Motion to dismiss appeal denied.

Thomas, Pemberton & Thomas (Frank P. Deering, of counsel), for appellant. Chas. E. Wilson and J. W. Preston, for respondent.

LORIGAN, J. This is a motion to dismiss an appeal taken by the appellant, as administrator of the above estate, from an order settling his final account. The order of settlement was made January 8, 1908, and the notice of appeal filed March 7, 1908. In taking the appeal and preparing the transcript to be used thereon the appellant proceeded under those certain sections which were added to the Code of Civil Procedure at the last session of the Legislature, and which provided for a new and alternative method by which appeals might be taken, and likewise a new and alternative method of preparing the records to be used on such appeals. The title of the act containing the sections (St. 1907, p. 753, c. 410) providing for such method of appeal is "An act to add three new sections to the Code of Civil Procedure, to be known as sections 941a, 941b and 941c of said Code, respectively, providing a new and alternative method by which appeals may be taken from judgments, orders or decrees of the superior court of the state of California to the Supreme Court or District Courts of

Appeal thereof." The title of the act as to the method of preparing the records on such appeals (St. 1907, p. 750, c. 408) is "An act to add three new sections to the Code of Civil Procedure of the state of California to be known as numbers 953a, 953b, 953c, relating to a new and alternative method for the preparation of records to be used on appeals from judgments, orders or decrees of the superior court to the Supreme Court or District Court of Appeal." Section 941a, referred to in the title of the act first quoted, provides that "appeals from all judgments, orders or decrees of any of the superior courts of this state reviewable by the Supreme Court or District Court of Appeals may in addition to other modes prescribed by law be taken pursuant to the provisions of the next section." This next section (941b) provides that any person having a right of appeal from any judgment, order, or decree of the superior court may appeal therefrom by filing with the clerk of the court in which the judgment, order, or decree is entered a notice of appeal, which notice may be filed at any time after the rendition of said judgment, order, or decree, but must be filed within 60 days after a notice of the entry thereof has been served on the attorney of record appearing in the case or proceeding. It further provides that "this notice need not be served on any of the parties to the action or the proceeding or their representatives or attorneys, but when filed * * * shall without further action on the part of the appellant transfer the cause for decision and determination to the higher court." The sections referred to in the title of the other act quoted provide for a detailed new and alternative method of preparing records for use on appeal. We do not refer to them at length, because we do not deem their consideration particularly necessary. In taking his appeal appellant proceeded under the new and alternative methods provided for by the sections of the acts referred to. He filed his notice of appeal, but did not serve it on the contestant or her attorney. He likewise had his transcript prepared under the new method provided for doing so, and in due time filed it in this court. The motion of respondent to dismiss the appeal is based principally on the claim that the particular act of the Legislature, providing for a new and alternative method by which appeals may be taken, is void.

It was also set forth in the notice of motion, as one of the grounds upon which a dismissal would be urged, that the transcript on appeal was not properly perfected under the new method providing for its preparation, but on the hearing this claim was, as we recall it, practically abandoned. If not, the point is without merit, as an inspection of the record shows that the transcript properly conforms to all the requirements of the new

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

procedure respecting its preparation. Some criticism is indulged in as to the meaning and construction of the provisions of the act authorizing its preparation, but these matters will be considered in disposing of the principal attack of respondent, which is upon the act providing for the method of appeal as distinguished from the act providing for the method of preparing the record on appeal.

As to the attack upon the act providing for the method of appeal. The particular claim of respondent is that this act is invalid, as violative of article 4, § 24, of the Constitution, which provides that "Every act shall embrace but one subject, which subject shall be expressed in its title." He insists that the title to the act violates this provision because it is misleading, and that the act embraces more subjects than is expressed in its title. It is further insisted that by the provisions of the act respondent is deprived of her property without due process of law. As to the title to the act being misleading. It is the position of counsel that this follows from the use of the word "alternative" in the act, considered in relation to the provisions of the act itself; that the matter of appeal there provided for is not an "alternative" one, but it is intended to be, and is, exclusive. There is nothing in this claim. There was an existing method of taking an appeal when the act was passed, for which the new method might be substituted, if an appellant should elect to do so, as an alternative, and the term was sufficiently clear as indicating the character of legislation intended. Nor is the objection that the act embraces subjects not embraced in its title well taken. It is now well settled that the constitutional provision requiring the subject of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed. It is not necessary that it should "embrace an abstract or catalogue of its contents." *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73. Considered under this rule, there is nothing in the act itself foreign to the subject of the legislation expressed in its title. All its provisions apply to the subject of providing a method by which appeals may be taken from all judgments, orders, or decrees of the superior court. In fact, when the objection of counsel that the act contains subjects not embraced in its title is considered in the light of the particular matters relied on by him as showing this, it is apparent that the real claim is more as to the effect or construction which is to be given to the provisions than their relation to the title of the act as distinct subjects of legislation. The claim really is that these provisions of the act, in effect, repeal by implication other provisions

of the Code of Civil Procedure relative to the time when appeals may be taken, and conflict with still other provisions in several respects. But these are matters which have no relevancy to the question of the validity of the act itself. Whether the act in question repealed by implication other portions of the Code or conflicts with them can only be determined when presented in a proper case. The construction of the act can have no bearing on the question whether article 4, § 24, of the Constitution has been violated or not. We look at the title of the act and its provisions to determine whether, under the liberal rule above stated, the latter conform to the subject expressed in the title. If they do, then the constitutional provisions have been followed. As far as the objections urged by counsel are concerned, they only affect the construction to be given to provisions which are all addressed to the subject-matter of the title, namely, the method of taking an appeal. When the provisions are thus pertinent to the title of the act, the constitutional mandate is complied with, and the construction of its provisions, which is a matter entirely aside from the constitutionality of the act itself, must be left until occasion calls for its consideration. In this view respondent's objection to the constitutionality of the act as violating the particular provision of the Constitution relied on is untenable. The same may be said of the objections of respondent to the other act providing a method of preparing the record on appeal. These objections do not go to the validity of the act, upon the score of legislation not expressed in its title. The claim is that the act is obscure, ambiguous, and uncertain; that it is indefinite as to the meaning of certain terms, and as to what is required to be done on the part of counsel, the clerk, and the court in various particulars with respect to the transcript. But these are all matters applying to the construction of the act, with which on this motion we are not concerned.

It is next insisted that the act violates article 1, § 13, relating to "due process of law," because it does not require that the notice of appeal shall be served on him so that he may have his day in court. But this constitutional provision has no application as to notices of appeal. "Due process of law" is law in its regular administration, through courts of justice (2 Kent's Commentaries, 10), and as said by Judge Field, in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, of the words "due process of law" when applied to judicial proceedings, "they then mean a course of legal procedure according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights." It is the right of any litigant to have his cause tried and determined under rules of procedure the same as are applied to other similar cases, and when this is af-

forded him, he has no ground to complain that "due process of law" is not being observed. Before any appeal is taken the court has already acquired jurisdiction in the action over the parties by original process, and the appeal is but a proceeding in the cause after that jurisdiction has attached. What the method and procedure in taking an appeal shall be is a matter for determination by the Legislature, and that it can prescribe, in the exercise of its plenary power over the subject, for taking an appeal without any service of the notice thereof is so clear as to admit of no doubt. Counsel for respondent has cited us to no authority which, even by analogy, supports his claim that failure to provide for service of the notice of appeal is not "due process of law." The only cases referred to by him are those of this court, where it is held that the service of notice of appeal was necessary in order to confer jurisdiction upon this court on appeal. But these cases have no bearing on the question here, because heretofore our statute has always required service of the notice, and, of course, when the Legislature prescribes service, it is essential that it be made. None of these cases cited even intimate (and naturally would not, because the question could not be involved) that the Legislature might not, as it has in this act, dispense with service without violating the constitutional provision. Whether service of the notice shall or shall not be made is its province to determine, and no constitutional right of respondent is invaded because it is declared that such service need not be made. The purpose of service could only be to give the respondent actual notice that an appeal had been taken. But as he is constructively in court during the pendency of the action, it was no violation of the constitutional provision to require him to take notice of any such appeal as part of the proceedings in the case. The statute fixed the time in which the notice of appeal might be filed and the respondent could readily ascertain, by examining the records and files of the case in the clerk's office, whether it had been in fact filed. Having notice in law that it might be filed within a specified time, he was bound in law to take notice of its actual filing within that time. What is here said as to the objection of want of service of notice of appeal applies equally to the claim of respondent that the act relative to the method of preparing the transcript is objectionable constitutionally, because it does not provide for service of the notice filed with the clerk that the appellant intends to appeal and requiring that a transcript be made up. His right to the service of notice is no better in the one case than in the other, and he has no constitutional right to have service of it in either.

It is further claimed that the act in question does not provide for an appeal from probate orders. But this claim is answered by the terms of section 941a heretofore quoted, which provides an appeal "from all judgments, orders or decrees of any of the superior courts of this state," etc.

It appears that subsequent to the order settling his accounts the superior court revoked the letters of administration of appellant. Thereafter he appealed from the order of settlement. Respondent insists that appellant had no right to appeal as administrator after the revocation of his letters. This point has no force. The statute confers on the administrator, as such, the right of appeal from an order settling his accounts, and the right to do so cannot be affected by any order revoking his letters. The cases of *Kerns v. Dean*, 77 Cal. 555, 19 Pac. 817, *Ex parte McDermott*, 127 Cal. 450, 59 Pac. 783, and *Estate of Danielson*, 88 Cal. 480, 26 Pac. 505, cited to sustain the position of respondent, are entirely inapplicable. This is so apparent that it would be time ill spent to particularly point it out. Aside from this, the order revoking the letters was itself appealed from.

Nor is there any merit in the point that the appeal should be dismissed for failure of appellant to file an undertaking on appeal for costs. The act under which this appeal is taken does not require the filing of any such bond. It was a matter solely for the Legislature to determine whether it would require such a bond to be given, and it has dispensed with it.

The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

154 Cal. 402
STOCKTON AUTOMOBILE CO. v. CONFER
et al. (Sac. No. 1,601.)

(Supreme Court of California. Oct. 16, 1908.)

1. HIGHWAYS (§ 200*)—OBSTRUCTION—INJURIES—LIABILITY.

One who unlawfully obstructs the free use of a highway is charged as an insurer against accident to one properly traveling the highway and injured by such obstruction; but, where the highway is obstructed under license, the person responsible therefor is chargeable only with ordinary care to see that the obstruction does not cause injury to persons lawfully using the highway.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 509; Dec. Dig. § 200.*]

2. MUNICIPAL CORPORATIONS (§ 809*)—STREETS—OBSTRUCTION—INJURIES—LIABILITY.

Under General Street Law (Vrooman Act, St. 1885, pp. 160, 161, §§ 22, 23), providing that, where a defect in a street exists for a day after notice to the superintendent of streets, persons bound by law to repair it, and the officers through whose neglect the defect remains,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be liable to one injured thereby, the exercise of due care to prevent injury by such obstruction, thus imposed upon a contractor and the superintendent, requires the erection of guards, and the placing of lights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1688-1689; Dec. Dig. § 809.*]

3. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—OBSTRUCTIONS—WARNINGS—SUFFICIENCY—QUESTION OF FACT.

Whether warnings to travelers in a street, placed upon an obstruction therein, are sufficient, is a question of fact.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1749; Dec. Dig. § 821.*]

4. MUNICIPAL CORPORATIONS (§ 809*)—STREETS—OBSTRUCTIONS—WARNINGS—REMOVAL—INJURIES—LIABILITY.

Where one, bound to guard obstructions lawfully placed in a street, places proper guards to prevent injury to travelers, and they are removed without his fault, he is not liable for injury occurring before he could have discovered and remedied the situation by the exercise of ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1688; Dec. Dig. § 809.*]

5. MUNICIPAL CORPORATIONS (§ 798*)—STREETS—OBSTRUCTIONS—GUARDS—DUTY TO PROVIDE.

Where in obstructing a street a contractor erects suitable warning to travelers, the city need not take like precaution, and the city or a responsible person may avail himself, in his defense, of such warnings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1657; Dec. Dig. § 798.*]

6. MUNICIPAL CORPORATIONS (§ 819*)—STREETS—OBSTRUCTIONS—GUARDS—EVIDENCE—SUFFICIENCY.

Evidence, in an action for injury from an obstruction in a street, held to sustain a finding that the obstruction was not guarded in a suitable manner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1739; Dec. Dig. § 819.*]

7. MUNICIPAL CORPORATIONS (§ 744*)—STREETS—OBSTRUCTIONS—GUARDS—FAILURE TO ERECT—LIABILITY.

Under General Street Law (Vrooman Act, St. 1885, pp. 160, 161, c. 153, §§ 22, 23), providing that where a defect in a street exists for a day after notice to the superintendent of streets the persons, bound by law to repair it, and the officers through whose neglect the defect remains, shall be liable to one injured thereby, where sufficient notice is given, the superintendent is liable for a contractor's failure to erect suitable warnings on an obstruction in a street; the duty to do so being equally binding upon each, and both being liable for the failure of either.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

8. NOTICE (§ 9*)—CHARACTER REQUIRED.

Generally, where a statute or contract requires notice, and there is nothing to show that any other form of notice was intended, personal notice will be required; the law countenancing substituted and constructive notice only as a matter of necessity or extreme expediency.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 16; Dec. Dig. § 9.*]

9. MUNICIPAL CORPORATIONS (§ 788*)—STREETS—OBSTRUCTIONS—NOTICE—SUFFICIENCY.

Notice given at the superintendent of streets' office, in his absence, to his deputy, of an obstruction in a street, was sufficient, under General Street Law (Vrooman Act, St. 1885, pp. 160, 161, c. 153, §§ 22, 23), fixing the liability for injuries caused by defects in streets existing for a day after notice to the superintendent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1645; Dec. Dig. § 788.*]

10. MUNICIPAL CORPORATIONS (§ 744*)—STREETS—OBSTRUCTION—INJURY—LIABILITY OF SUPERINTENDENT.

Under General Street Law (Vrooman Act, St. 1885, pp. 160, 161, c. 153, §§ 22, 23), providing that, where a defect in a street exists for a day after notice to the superintendent of streets, persons bound by law to repair it, and the officers through whose neglect the defect remains, shall be liable to one injured thereby, that an obstruction placed in a street by a contractor was not a necessary consequence of the contract work does not relieve the superintendent of liability for injury caused thereby, where, after knowing of the obstruction, he failed to take proper precautions to abate it, or to warn the public of the danger of its presence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the Stockton Automobile Company against Eli Confer and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Budd & Thompson (Buck & Middlecoff, of counsel), for appellants. C. H. Fairall and A. C. White, for respondents.

HENSHAW, J. This action was brought to recover damages for injury occasioned to an automobile belonging to plaintiff. While driven upon the streets of Stockton at night the machine struck a pile of bitumen upon the highway, and was damaged. The board of public works having employed a contractor, John Craven, to build cross-walks of bitumen at the intersection of two of its streets, in the performance of this authorized work he had placed the pile struck by the automobile. The pile was about 2 feet 8 inches in height, sloping toward its sides, and extending from the curb of the street a distance of about 16 feet toward the center, and about the same distance lengthwise of the street. The street was about 60 feet wide. The defendant Confer was a member of the board of public works which awarded the contract, knew of the contract, and was at the same time superintendent of streets. The bitumen had remained in the street for several days before the accident. The accident happened about 2 o'clock a. m. of January 10th. The court found that defendant Eli Confer and John Craven had notice of this obstruction for more than 24 hours before the happening of the accident, and that, notwithstanding the notice and knowledge of the existence of the

obstruction, "the deceased John Craven and said Eli Confer failed to make any sufficient provision or take any suitable precaution to protect the public from injury therefrom." Judgment upon these findings passed for the plaintiff, and from that judgment, and from the court's order denying defendants' motion for a new trial, this appeal is prosecuted. The appeal is addressed to two principal propositions: First, that the evidence does not support the finding that the defendants failed to make any sufficient provision, or to take any suitable precaution, to guard or protect by lights or signals, or in any other suitable or sufficient manner, the obstruction of which they had notice; and, second, that as to the defendant Eli Confer the evidence does not support the finding that he had received notice of the existence of the obstruction.

Touching the first proposition, the law of the matter is simple and well settled. An individual who erects an unlawful obstruction to the free use of a highway, in its nature a nuisance, by reason of his wrongful act, is charged in law as an insurer against accident to a person properly traveling the highway and meeting injury by reason of such unlawful obstruction. *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220; 15 Am. & Eng. Ency. of Law, pp. 433, 434. But where the highway is obstructed under license and by authority, the person responsible for such obstruction is chargeable only with ordinary care to see that such obstruction does not become a cause of injury to any person lawfully traveling the highway. If the work upon the highway is of a private nature, usually the person doing the work and the owner of the property are liable. In some cases, not necessary here to consider, an equal liability may be cast upon the municipality or municipal authorities. In the case at bar the work was public work, done by a private contractor, under contract with the municipal authorities. The responsibility of the contractor for any negligence is unquestioned. The responsibility of the street superintendent (and not the municipality) is, in this case, fixed by the provisions of the general street law. *Vrooman Act*, St. 1885, pp. 160, 161, §§ 22, 23. That act provides as follows: "If, in consequence of any graded street or public highway improved under the provisions of this act, being out of repair and in condition to endanger persons or property passing thereon, any person while carefully using said street or public highway, and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice

thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city."

In the exercise of the due care to prevent injury by such obstruction, which the law thus imposes upon the contractor and the superintendent of streets, an obligation arises to erect guards and place lights. When erected, the sufficiency of these barriers or lights or other warning signals is a question of fact for the jury's determination. The authorities are so numerous upon these propositions that a mere citation of a few of them is sufficient: 15 Am. & Eng. Ency. of Law, supra; 5 *Thompson on Neg.* § 5996 et seq.; *Raymond v. Keseburg*, 91 Wis. 194, 64 N. W. 861; *Weirs v. Jones*, 80 Iowa, 351, 45 N. W. 883; *Campbell v. Fair Haven*, 54 Vt. 336; *Walker v. Ann Arbor*, 111 Mich. 5, 69 N. W. 87; *Welsh v. Lansing*, 111 Mich. 589, 70 N. W. 129; *Klatt v. Milwaukee*, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 757; *Mills v. City of Philadelphia*, 187 Pa. 287, 40 Atl. 821; *Canfield v. City of Newport (Ky.)* 73 S. W. 788; *Parker v. City of Cohoes*, 10 Hun, 531, affirmed 74 N. Y. 610. It being the duty of the responsible person to see that suitable warnings are erected to guard the public against an obstruction, the next question which naturally arises is that of the duty imposed by law touching the maintenance of such warnings when erected. Upon this subject, too, the authorities are uniform. The rule is stated in *Raymond v. Keseburg*, supra, as follows: "The true rule is that if a person, whose duty it is to so guard all obstructions lawfully placed in a public street as to prevent danger to persons using such street for travel in the exercise of ordinary care, performs his duty in that regard, by the use of a proper light or otherwise, and the guard, after being properly placed, is removed without fault on such person's part, and a traveler is thereby injured before sufficient time has elapsed for such person, in the exercise of ordinary care, to discover such removal and remedy it, then he is not liable." To the same effect are *Canfield v. City of Newport*, supra; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; *Doherty v. Inhabitants of Waltham*, 4 Gray (Mass.) 596; *Welsh v. Lansing*, supra; *Weirs v. Jones*, supra; *Klatt v. Milwaukee*, supra; *Parker v. City of Cohoes*, supra. Of course, if a suitable warning or barrier has been erected by the contractor in the performance of the work, it relieves the city or other authority from the necessity of taking like precaution, and the city or other responsible

person may avail itself, in its defense of the barriers or lights suitable in themselves and properly placed by the author of the danger. *Walker v. Ann Arbor*, 111 Mich. 1, 69 N. W. 87.

Under these well-settled principles, we come to the consideration of the evidence in support of the finding of the court that the obstruction was not guarded or protected by lights or signals or in any other suitable or sufficient manner. It appears from the evidence that the contractor Craven had been notified to place lights upon the pile. Upon the night of the accident witnesses testified that they saw a light, evidently a lantern, upon the pile. The light was seen between half past 5 and 6 o'clock. It was a single light, located about the middle of the pile of bitumen. It was visible for nearly a block. The light was seen burning by one of the witnesses as late as half past 9 or 10 o'clock, though another of the witnesses testifies that there was no light as late as 8 o'clock, and at the time of the accident it is in evidence, without conflict, that no light was burning upon the pile. It appears, further, that there was an electric light tower with three electric lights upon it situated in the street about 293 feet north of the pile of bitumen, and this light burned through the night. One of plaintiff's witnesses testified that he was at the scene of the accident a few minutes after it happened, and that he could see the pile of bitumen from across the street, a distance of about 60 feet. There was no light upon the pile, and no evidence that a light had been there. He looked for a light. No traces of glass or evidences of a lantern, broken or unbroken, were discovered.

Upon this evidence we are asked to hold that the finding of the court that no suitable or sufficient light or warning had been erected is unsustained by the evidence. But this we may not do. It is not apparent, as appellant argues, that the court held the defendants to the duty of maintaining, as well as providing, suitable lights and warnings. As appellants would construe the finding, it is to the effect that the court declared that suitable lights and warnings were provided and placed, but that they were not maintained, and that defendants were responsible for the failure to maintain them. But such is not the finding. The finding is that suitable lights and warnings were not placed, and to hold that this finding is unsupported would necessitate a declaration, as matter of law, that the single light burning upon an obstruction 16 feet square, upon a street 60 feet in width, was sufficient as a warning light. Generally, as has been said, the question of sufficiency is one of fact, to be left to the jury or judge as the trier of fact, and it would require a clear case to justify a court in holding that a finding as to the insufficiency of a barricade, light, or warning was not supported by the evidence.

It is next contended that the only notice

sufficient in law to cast liability upon the superintendent of streets is an actual personal notice, and that such notice was not given. The fact is that the superintendent of streets was not notified personally, but it was proved beyond controversy that notice of the obstruction and of the lack of lights was given by a police officer of the city and by other persons, at the office of the superintendent of streets, to T. C. Poole, his deputy. This deputy made a note in the records of his office of the fact, and instructed an employé to carry word to Craven, the contractor, to provide lights. Craven was notified upon that day by an employé of the office. There was thus established a personal notice, delivered at the office of the superintendent of streets to his deputy in charge, and this notice was acted upon. Of course, if the notice thus given was sufficient, the superintendent of streets was responsible for the failure of Craven to erect suitable warnings, for the duty to do so was equally imperative upon each, and for the failure of either both were responsible. It may be broadly stated that, where a statute or contract requires the giving of notice, and there is nothing in the context or in the circumstances of the case to show that any other form of notice was intended, personal notice will be required. 21 Am. & Eng. Ency. of Law, p. 53, and cases. This is true because the law always favors a personal notice, and countenances substituted and constructive notices as matters of necessity or extreme expediency. But the principle is not that personal notice must always be given, but that it must be given where, from the nature of the statute or contract—from the nature of the case, in short—it appears that no other notice is contemplated. Thus in *Williams v. Bergin*, 108 Cal. 171, 41 Pac. 287, this court had under consideration the provisions of a street law requiring assessments, and it was declared that, upon an appeal by the contractor to the supervisors for an increase of the amount of the lien upon the owner's property, the notice to the owner was in the nature of process by which the board of supervisors acquired jurisdiction to act upon the appeal and change the assessment, and that the notice given must be the notice required by the statute, and it was held that a publication requiring "all appellants" to appear, without specifying the owners of the property, or the defendants against whom the appeal was taken, was insufficient. It is there said that, in the absence of any provision in the statute for the mode of giving notice, it would be necessary that every person who might be affected by the appeal should receive personal notice of the matter appealed from. And this, as to the statute in question, would be a perfectly legitimate construction within the rule as above announced. The notice in that case being in its nature a summons for the determination of a matter affecting private property rights,

in all such cases the law is zealous that the notice conveyed by the summons should be personally served, and permits substituted service by publication and deposit in the mail only as a matter of necessity. But here everything that could be done to notify the superintendent was done. He was sought at his place of business during business hours, and, in his absence, his deputy and representative was notified. If such notification, to meet the circumstances of cases such as this, be held insufficient, it would be necessary merely for the superintendent of streets to immerse himself in his private office during business hours, and forever escape the liability with which the law seeks to charge him for the careless or negligent performance of his duties. Such is an unreasonable construction of the law, and we hold that this notice, timely made, at the place of business of the public official, and in his absence to his deputy there representing him, is a notice sufficient under the provisions of the street law.

The court found "that said bitumen was placed and piled upon said street for the purpose of making said cross-walks, but it was not necessary to place or pile the same in the manner or place where the same was piled, and that the placing of said bitumen in said way constituted a defect and an unnecessary obstruction in said street." Upon this finding appellant argues that the case is one where the employer (here the superintendent of streets) is not liable, when the obstruction or defect in the street causing injury is wholly collateral to the contract work, not a necessary consequence of it, but entirely the result of the negligent or wrongful act of the contractor, subcontractor, or his servants; that in such a case the immediate author of the injury alone is liable. 2 Dillon, Mun. Corp. § 1029; Robbins v. Chicago City, 71 U. S. 679, 18 L. Ed. 427. But notwithstanding the finding of the court, the case does not fall within the principle to which it is referred. If no notice had been conveyed to the superintendent of streets, an argument might be based upon the proposition that the character of the work done was not inherently such as to cause an obstruction or nuisance in the street, and that he would not be chargeable therefor because such an obstruction was created by the negligence of the contractor as an incident to, and not as a necessary part of, the task to be performed. But the foundation of the action in this case is that the superintendent of streets, after knowledge that the contractor was thus obstructing the street (whether rightfully or wrongfully, necessarily or incidentally, it matters not), failed to see that proper precautions were taken to abate the obstruction, or to warn the public of the danger of its presence.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

154 Cal. 372

CARR v. HOWELL. (L. A. 2,058.)

(Supreme Court of California. Oct. 10, 1908.

Rehearing Denied Nov. 9, 1908.)

1. SPECIFIC PERFORMANCE (§ 29*)—CONTRACTS FOR SALE OF REAL ESTATE—DESCRIPTION—SUFFICIENCY.

An agreement for the sale of real estate described the same as "56x155 feet to an alley, on the east side of Broadway between Sixth and Seventh streets" in a city named, "and * * * being a part of lot 7 in block 17, Ord's survey." Parol evidence showed that the vendor intended to sell, and the purchaser intended to buy, a certain lot, which was the only property that could answer the description. *Held*, that the agreement and the parol evidence sufficiently identified the property to authorize specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 73-74; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS—CERTAINTY.

A contract for the sale of real estate stipulated for a cash payment, and for the delivery of a purchase-money mortgage to secure the payment of notes for the balance of the price. The contract definitely fixed the amount of the notes, the rate of interest they were to bear, the time they were to run, and the rebate to be allowed for payment of mortgage taxes by the mortgagor. *Held*, that the agreement sufficiently stated the terms of the mortgage to authorize specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

3. VENDOR AND PURCHASER (§ 25*)—CONTRACT—EXECUTION—DELIVERY—"DELIVERED."

A broker, empowered to negotiate a sale of real estate, but not to execute a contract of sale, procured a purchaser, prepared a contract in duplicate, which the purchaser signed, and sent the duplicates to the owner, with the request to sign both contracts and return one for the purchaser. The owner signed both contracts, kept one, retained the money accompanying it, and returned the other contract to the broker. *Held*, that the contract was executed and delivered within the principle established as to a grant, by Civ. Code, § 1059, declaring that a grant shall be deemed constructively delivered, where the instrument is delivered for the benefit of the grantee, etc.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

4. VENDOR AND PURCHASER (§ 32*)—VALIDITY—FRAUD—EVIDENCE.

Evidence held to warrant a finding that a contract for the sale of real estate was not procured by the fraud of the purchaser or the broker procuring him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38-60; Dec. Dig. § 32.*]

5. SPECIFIC PERFORMANCE (§ 92*)—PERFORMANCE—DELAY—TIME OF ESSENCE OF CONTRACT.

Where time was not of the essence of a contract for the sale of real estate, a delay by the purchaser, caused by a desire to ascertain whether the owner of adjoining premises, who had taken possession of a strip of the lot purchased, intended to claim the strip, or would yield possession on demand, did not put the purchaser in default, and he could obtain specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 242; Dec. Dig. § 92.*]

6. JUDGMENT (§ 570*)—RES JUDICATA—JUDGMENT OF DISMISSAL—EFFECT.

A judgment of the federal court, dismissing an action removed to it, rendered on plaintiff voluntarily asking for the dismissal, while a demurrer to the complaint was pending and undecided, is not a bar to a subsequent suit in any court on the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1030; Dec. Dig. § 570.*]

7. SPECIFIC PERFORMANCE (§ 120*)—EVIDENCE—ADMISSIBILITY.

Where, in an action for the specific performance of a contract for the sale of real estate, defendant claimed that the contract had been procured by the fraud of her agent and the purchaser, and it was not disputed that the agent had not actually delivered the contract to the purchaser, evidence of the prices offered to the agent by others offering to buy the premises after the duplicate contracts of sale, signed by the purchaser, had been forwarded by the agent to the owner for her signature, was immaterial on the issue of the delivery of the contract to the purchaser.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 120.*]

8. SPECIFIC PERFORMANCE (§ 120*)—EVIDENCE—ADMISSIBILITY.

Where, in an action for the specific performance of a contract for the sale of real estate, executed by a purchaser procured by a broker employed by the owner, the owner claimed that the contract was obtained by the fraud of the purchaser and broker, evidence whether others, offering to buy the premises after the duplicate contracts signed by the purchaser had been forwarded to the owner for her signature, were authorized by proposed purchasers, able and willing to buy, was irrelevant, the broker not having been informed as to the proposed purchasers.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 120.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by J. E. Carr against R. H. Howell, administrator with will annexed of Lelia Bonner Dwyer, deceased. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. J. Leowy, Hunsaker & Britt, and Valentine & Newby, for appellant. Barker & Bowen, Gray, Barker & Bowen, and J. S. Chipman, for respondent.

SHAW, J. This is an action to enforce specific performance of an agreement for the sale of real estate, alleged to have been executed to the plaintiff by Lelia Bonner Dwyer in her lifetime. The defendant appeals

from the judgment in favor of plaintiff, and from an order denying her motion for a new trial.

The first point argued is that the agreement in question is so uncertain, both in the description of the property agreed to be conveyed, and in regard to the terms of the mortgage to be given for the unpaid purchase money, that it is not susceptible of specific performance. The agreement is as follows: "Los Angeles, Cal., March 4, 1905. Received of J. E. Carr the sum of one thousand dollars (\$1,000) as a deposit and part payment on 56x155 feet to an alley, on the east side of Broadway between Sixth and Seventh streets, in the city of Los Angeles, Cal., and being a part of lot seven (7) in block 17, Ord's survey, which I this day agree to sell and the said Carr agrees to buy, at the purchase price of one hundred thousand dollars, subject to a three year lease containing a cancellation clause in case of sale of said property by me. On or before May 13, 1905, I agree to furnish said Carr a certificate of title by the Title Insurance & Trust Co., of Los Angeles, and upon the delivery of said certificate of title and my deed conveying to said Carr said property free and clear of all incumbrances, the said Carr on or before said date of May 13, 1905, simultaneously with the delivery of said deed and certificate of title, is to make me a further cash payment of nine thousand dollars (\$9,000) and is to execute and deliver to me a purchase-money mortgage back on said property securing the payment of six notes in the sum of fifteen thousand dollars (\$15,000) each, due on or before one, two, three, four, five and six years, with interest at the rate of nine per cent. per annum, payable annually, with an agreement back from me to rebate three per cent. per annum of said interest if held harmless on all mortgage taxes. Upon the consummation of this contract said Carr hereby agrees to pay Wesley Clark and W. I. Hollingsworth a commission of twenty-five hundred dollars (\$2,500). [Signed] Lelia Bonner Dwyer. J. E. Carr." This agreement, reasonably interpreted, describes a lot 56 feet wide and 155 feet long, with side and end lines parallel, and abutting on Broadway street, but it does not clearly show whether it is the side or end lines that abut on the street, nor does it show in what part of lot 7, block 17, it is situated. It is conceded that, without aid from extrinsic facts, the contract is too uncertain in these particulars to be capable of specific performance. The appellant relies upon the rule stated in *Marriner v. Dennison*, 78 Cal. 207, 20 Pac. 389, that "parol evidence cannot be heard to furnish a description. The only purposes for which such evidence can be heard is to apply the description to the subject-matter"—and in *Van Slyke v. Broadway Co.*, 115 Cal. 646, 47 Pac. 690, 928, that "parol evidence is inad-

missible for the purpose of altering the legal operation of an instrument by evidence of an intention to an effect which is not expressed in the instrument." The case of *Marriner v. Dennison*, supra, however, also declares that "the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency." The plaintiff in the case endeavored to make the description in the contract sufficient by setting forth at length a correct and complete description of the lot, which it is alleged the parties intended should be described in the contract, and alleged that Lelia Bonner Dwyer at that time owned the particular tract of land described, and that the said parcel was the only parcel of land she then owned situated in said lot 7 of block 17 of Ord's survey, or on the east side of Broadway between Sixth and Seventh streets in the city of Los Angeles. With the aid of these extrinsic facts, which were fully proven by the evidence, and found by the court to exist, the plaintiff claims that the contract was sufficiently certain.

The authorities fully sustain this view. In *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671, the agreement declared that the vendor agreed to sell "a house and lot of land situated on Amity street, Lynn, Mass." It was contended that this description was too uncertain to admit of specific performance. Regarding this, the court said: "The presumption is strong that a description, which actually corresponds with an estate owned by the contracting party, is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own. * * * If the party who enters into the agreement in fact owns a parcel answering the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption the words 'a house and lot,' on a street where the party who uses the language owns only one estate, are as definite and precise as 'my house and lot' would be—a description the sufficiency of which has been placed beyond doubt by very numerous authorities." In this case it was further stated that the fact that the vendor could lawfully make an agreement to sell land which he did not own did not prevent the application of the rule. This case was followed in the case of *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110, where a similar description was employed under similar circumstances. It may be conceded that the decisions are not entirely harmonious with respect to contracts of this vague character, but in our own state we have followed the rule of *Hurley v. Brown*, supra. In *Preble v. Abrahams*, 88 Cal. 246, 26 Pac. 99, 22 Am. St. Rep. 301, *Preble and Young* agreed to sell to *Abrahams* "forty acres of the eighty-acre tract at *Biggs*." There was nothing else in the agreement which served to identify the property

intended to be sold. It was shown by the evidence, however, that *Preble and Young* owned a certain specifically described 80-acre tract at *Biggs*; that they simultaneously contracted to convey the western half thereof to another party, and the eastern half thereof to the defendant, the two contracts being made with knowledge of all the parties concerned. In respect of this evidence as applied to the contract, the court said: "The evidence clearly shows that the parties perfectly understood that the sale and purchase was not of an undivided interest of 40 acres in a tract of 80 acres, but of 40 acres in severalty. * * * Nothing is made more clear by the evidence than that *Mrs. Biggs* [the other party], with the full knowledge of all the parties, purchased the 40 acres of said 80-acre tract upon which the improvements were located. This is clearly specified in the written agreement between her and the plaintiffs. They agreed to sell her 40 acres, including the buildings and orchards on the 40 acres, to be taken by her where the houses and barns and orchards were at that time, and the same place on which *Mr. Biggs, Jr.*, and his family were residing. This and the agreement to sell to the defendant were contemporaneous. The defendant, if he agreed to purchase anything, agreed to purchase the 40 acres remaining after the 40 acres purchased by *Mrs. Biggs* had been segregated from said 80-acre tract." This case has been cited and approved in *Towle v. Carmelo, etc., Co.*, 99 Cal. 398, 33 Pac. 1126, *Higgins v. Manson*, 126 Cal. 469, 58 Pac. 907, 77 Am. St. Rep. 192, and *Brewer v. Horst, etc., Co.*, 127 Cal. 647, 60 Pac. 418, 50 L. R. A. 240. The case of *Towle v. Carmelo, etc., Company* also approves the case of *Mead v. Parker*, supra. *Bacon v. Leslie*, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134, is a similar case. There the description of the land was as follows: "½ of sec. 7-23-7, and all of sec. 13-23-7, in Sycamore township, Butler county, Kansas." To aid this description, it was alleged and proven that the defendant at the time actually owned the south half of section 7, and that at that date he did not own any other land in that section. Following *Hurley v. Brown* and *Mead v. Parker*, the court held that this description, aided by the extrinsic circumstances mentioned, sufficiently identified the property intended to be sold and enforced specific performance accordingly.

The case at bar falls within these rules. *Mrs. Dwyer* owned no other property which could have answered the description given in the contract. The property which she did own fully answered that description, and it would not be presumed that she intended to sell and convey property which she did not then own. Therefore, for the purposes of specific performance, as that remedy is applied in this state, the description is sufficient. It may be further suggested that the agreement further identifies the property in-

tended to be conveyed by stating that it was subject to a three-year lease, containing a cancellation clause in case of a sale of the property by Mrs. Dwyer, the vendor. There was some indirect proof that the property described in the complaint was covered by such a lease, but the fact was not alleged in the complaint as a matter to be referred to in aid of the description.

In regard to the terms of the mortgage to be given by the purchaser, it is claimed that the agreement does not state what covenants it was to contain. The contract definitely fixed the amount of the respective notes, the rate of interest they were to bear, the time they were to run, and the rebate to be allowed for payment of mortgage taxes by the mortgagor. The notes and mortgage were required to be executed simultaneously with the delivery of the deed, and thus their proper dates were fixed. The fact that mortgages sometimes, or even usually, contain other terms and covenants than those here prescribed does not render the contract uncertain. It merely relieves the mortgagor from the necessity of inserting any covenants which the contract did not specify. There was no uncertainty in the terms and covenants specified in the contract, and the subsequent proceedings showed that the parties had no substantial difficulty in complying with the agreement in this respect.

It is next contended that the evidence fails to show that the contract which the plaintiff seeks to have specifically performed, was ever executed, and the particular in which it is claimed there was a failure of proof is that there was no evidence of an actual delivery to the vendee. The evidence shows the following circumstances with relation to a delivery: Mrs. Dwyer, the vendor, resided in the city of New Orleans. Carr, the vendee, resided in Los Angeles, where the property was situated. Mr. Wesley Clark, a real estate broker in Los Angeles, was the local agent of Mrs. Dwyer, empowered to negotiate for the sale of her real estate in her behalf, but not authorized to execute a contract of sale. One Hollingsworth, who was acting as the agent for Carr, wrote to Mrs. Dwyer in New Orleans, asking her terms for the sale of the property in question. She answered that Mr. Clark was her agent in Los Angeles, and referred Mr. Hollingsworth to Clark for further negotiations. Thereupon, after some talk between them as to price, the agents agreed that Carr would give \$100,000 for the property upon the terms mentioned in the written contract sued on. The contract was thereupon drawn in duplicate by Mr. Clark and given to Hollingsworth to procure the signatures of Carr to each copy thereof. This Hollingsworth did, and returned the same to Clark, to be transmitted to New Orleans for the signatures of Mrs. Dwyer. Thereupon Clark sent a letter to Mrs. Dwyer, inclosing the two duplicate contracts, and containing the following

statements: "I herewith inclose you contracts of sale with a check of one thousand dollars (\$1,000) as a deposit on said contract. Sign both contracts, and let me have one back for Mr. Carr, and also send me the certificate of title which you have by the Title Insurance & Trust Co. on this property, which I will have continued to date, and be ready to close the deal so soon as Mr. Carr is ready. Mr. Carr is putting up a block, and for that reason he is a little shy on ready cash, but he says that he thinks he will have some money within a very short time, and so soon as he does, he will notify me and close the deal up at once, without waiting to the time limit stated in the contract." These papers were received by Mrs. Dwyer at New Orleans, and, after consulting with her attorney there, she signed each copy, retained one of them, and also the check for \$1,000, and delivered the other to her attorney, Hill, who by her direction thereupon sent it to Mr. Clark with the following letter from Hill to Clark in Los Angeles: "Your letter and agreement, signed by Mr. J. E. Carr, of date March 4th, came duly to hand. Mrs. Dwyer signed this morning, and requests me to forward the agreement to you, also the certificate of title, which you require. What is the meaning of the 9 per cent. and the clause about mortgage taxes? We do not understand it, but sign, nevertheless, as you seem to approve it. Is there any custom, in sales with notes secured by mortgages, for the purchaser to transfer insurance policies to cover the deferred payments? If so, we should like to get such security in this case." Immediately upon receipt of this signed contract Clark informed Carr that he had the contract, and was ready to close the deal as soon as Carr could perform his part of the contract. Hollingsworth appeared, and asked Clark for the contract, as did also Mr. Barker, the attorney who was acting for Carr in the matter. Clark declined to give them the contract, but did give them a copy thereof, and informed them that he wanted to close up the transaction immediately. Carr notified Clark that he was ready to close the deal, and Clark thereupon prepared a deed to be executed by Mrs. Dwyer, and the form of notes and mortgage to be executed by Carr, and forwarded the deed to Mrs. Dwyer for execution, and the notes and mortgage for the approval of her attorney. Mrs. Dwyer executed the deed as requested, and in about two weeks from the date of the contract sent the deed with the notes and mortgage to a bank in Los Angeles, to be delivered when directed by Mr. Clark. Some negotiations ensued, owing, it appears, to the fact that Clark suspected that Hollingsworth was interested in the purchase, and was unwilling to close the deal unless he had a larger share of the commission than that specified in the contract. It was not contended, however, at any time by

Clark, nor by Mrs. Dwyer, that the agreement was not fully executed. Clark finally became satisfied that his suspicion that Hollingsworth had an interest was groundless, and demanded the immediate carrying out of the contract, notifying Carr that unless this was done by 2 o'clock of April 26th, he would direct that the papers be returned by the bank to New Orleans. It will be observed that time was not of the essence of the contract, and that by its terms the parties could offer to perform on or before May 13, 1905. A few minutes after the time specified by Clark in his notice, Carr expressly waived all the objections he had previously made to the title, and offered to perform the contract, tendering the money and the duly executed notes and mortgage, but the offer was refused.

Upon these facts the court found that the contract sued on was duly executed. It is contended that this could not have been so unless there had been an actual delivery of the paper to the vendee, Mr. Carr. This, however, is not necessary in all cases. Civ. Code, § 1059, provides that "though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: (1) Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or (2) where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." While this section relates by its terms to a grant, we think the principles therein laid down are equally applicable to any contract. The force and effect of the evidence, and the inferences to be reasonably drawn therefrom were for the consideration of the court below. The letter which Clark wrote to Mrs. Dwyer, inclosing the duplicate copy of the contract signed by Carr, contained a request that she should sign both contracts and let Clark have one back "for Mr. Carr." Evidently the court below construed this to mean that the contract was to be returned to Mr. Clark to be held by him, not as her agent, but as the agent of Mr. Carr, the vendee. Under the circumstances of the case it cannot be contended that it would not reasonably bear this construction. In pursuance of this request Mrs. Dwyer signed the two agreements, kept one, retained the money accompanying the same, and returned the other agreement to Clark. The natural inference would be that she returned it to Mr. Clark for Mr. Carr, as the letter requested. Nothing in her conduct, until after the final tender by Mr. Carr, evinced any belief or contention on her part that the contract was not executed. On the contrary, it is all consistent with the theory that she considered the matter of the contract a completed transaction, and was desirous only of a full performance of its terms. Although Clark was

Mrs. Dwyer's own agent, she could, nevertheless, make him the custodian of the contract for the benefit of Carr; and, if she did so, and delivered the contract to Clark for Carr, as the evidence tended to show, and as the court manifestly believed she did, it was a sufficient delivery to complete its execution as a subsisting contract. There was reason to believe from the evidence that Clark chose to retain possession of the agreement because of his suspicions that Hollingsworth was to have an interest in the purchase, and as a means of obtaining for himself a larger share of the commission, and not because of any notion that the agreement would not be fully executed unless he should deliver it to Carr or to Carr's agent. The evidence sustains the finding that the contract was delivered.

The next contention is that the contract was obtained by fraud, and that the price agreed on for the property was inadequate, and that for these reasons performance should have been refused. From what has been said it will be seen that the negotiations on behalf of Mrs. Dwyer were conducted by Clark as her agent. He was a real estate broker who had been doing an extensive business as such in Los Angeles for many years prior to this transaction. It would be presumed that he acted in good faith, was true to his trust, and that the vendee was not aware of any evil design on his part toward his principal, unless such design or circumstances indicating it were made apparent to the vendee. The court below, after what appears to have been a very fair and patient hearing on the subject, found in favor of the plaintiff. The evidence is voluminous, and it is useless to discuss it at length. It may be said that, while there were some circumstances which might raise a suspicion that there was collusion between Clark and Hollingsworth, with the intent to induce Mrs. Dwyer to sell for the sake of the commissions to be divided between them, they were by no means of such controlling significance as to require a finding to that effect, much less to justify this court in overturning the decision of the trial court on the subject. Nor was there sufficient evidence of false representations by Hollingsworth, either to Clark or to Mrs. Dwyer, to require a finding that the contract was fraudulently obtained by him for Carr. There is some evidence that the property was worth more than the price named, and there was also evidence that it was worth less. The fact appears to be that prices of land in that vicinity were rising at that time, and that it was difficult, at the time of the trial, to ascertain the precise time at which they reached the values at which this sale was made. It is also shown that the market value of this lot, in common with real estate generally in Los Angeles, subsequently increased rapidly and materially, and it is evident that, at the time the contract was

made, no person could foresee how long this upward movement of prices would continue, or how far it would go. The evidence shows that this sale was for a higher price per foot than any sale of property in that vicinity previously made. Under these circumstances, the claim that the sale was necessarily unfair because of inadequacy of consideration cannot be sustained. Possibly the evidence would have been sufficient to have sustained a finding of fraud and unfairness, if such finding had been made, but it is clearly insufficient to justify us in setting aside a finding that there was no fraud or unfairness.

The plaintiff was not in default by reason of his refusal to comply with the contract at the exact time of the demand, on the 26th of April, 1905. Time was not of the essence of the contract. His delay was caused by a desire to ascertain positively whether or not Forester, the owner of the lot adjoining the lot in question, and who had taken possession of a two-foot strip along the northern line of the lot, intended to claim title to said strip, or whether he would yield possession on demand. The delay thus excused was not unreasonable, and not sufficient to put the buyer in default.

On the 27th of April, the day after this tender, the plaintiff began an action in the superior court to enforce performance of this contract. That action was removed to the United States Circuit Court, upon the ground that Mrs. Dwyer was a citizen of the state of Louisiana. She died on June 22, 1905, and on August 8, 1905, Wesley Clark, a citizen of California, was appointed administrator of her estate in California, by the superior court of Los Angeles county. On August 28, 1905, while a demurrer to the complaint therein was pending and undecided, the plaintiff voluntarily asked that the suit in the United States court be dismissed, and judgment of dismissal thereof was thereupon given. The defendant claims that the judgment of dismissal is a bar to the maintenance of the present action. His theory is that, by the removal of the first action to the United States Circuit Court, the superior court of the county of Los Angeles was forever divested of all power and jurisdiction over the subject-matter of this particular cause of action. Some remarks in the opinions in *Friedman v. Israel* (C. C.) 26 Fed. 801, *Railway Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520, and *Cox v. T. V. & G., etc., Co.*, 68 Ga. 446, are cited in support of this rather startling proposition. But the cases merely decide that after the dismissal in the federal court the plaintiff cannot go back to the state court and continue or renew the original action in that court. And so far as they appear to uphold the doctrine contended for, they have been directly overruled by the later cases of *Gassman v. Jar-*

vis (C. C.) 100 Fed. 146; *Texas C. C. Co. v. Starnes* (C. C.) 128 Fed. 183; *McIver v. Florida, etc., Co.*, 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437, and other cases that might be cited. The rule has long been established that a judgment of dismissal, given upon motion of the plaintiff, before the hearing or trial of any issue of law or fact, and without any determination of the merits of the cause, is no bar to a subsequent suit in any court upon the same cause of action. 2 *Black on Judgments*, § 720, at page 1082; *Merritt v. Campbell*, 47 Cal. 542; *Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595; *Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916; *Pyle v. Piercy*, 122 Cal. 385, 55 Pac. 141; *Westbay v. Gray*, 116 Cal. 667, 48 Pac. 800; 23 *Cyc.* 1139, 1140. The court below correctly held that this judgment was no bar to the present action.

A number of errors of law are urged to have been made by the trial court in its rulings upon evidence. As before said, the trial appears to have been very fair and thorough. It would extend this opinion to an unnecessary length to treat of all these alleged errors in detail. None of them was of any substantial importance, and none appears to have had any material bearing upon the decision in the case. For the most part the rulings are correct. Those that may have been technically erroneous are insubstantial and immaterial. One instance deserves larger mention. Clark testified that between March 4, 1905, and March 17th after the duplicate contracts had been forwarded to Mrs. Dwyer, and before they were returned, certain other real estate agents made to him offers to buy this property. On cross-examination by defendant the court refused to allow him to tell the prices offered. This ruling was put upon the ground that the offered evidence was not pertinent to the issue as to the delivery to Carr of the duplicate subsequently returned to Clark. It was clearly immaterial on that point. Moreover, it was not disputed that Clark never did actually deliver that paper into Carr's custody. Afterwards, in the progress of the trial, these agents were permitted to testify as to what they said to Clark in making these offers, but were not allowed to say whether or not they were authorized, by any proposed buyer, to pay the prices offered, or whether the buyers were able and willing to buy. The only point to which this evidence could relate was the alleged fraudulent conduct of Clark, and as it was not claimed that Clark was informed in whose behalf the offers were made, nor as to their wealth and ability, the rejected evidence was clearly irrelevant upon that subject.

The judgment and order are affirmed.

We concur: ANGELLOTTI J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(154 Cal. 355)

Ex parte HORNEF. (Cr. 1,454.)

(Supreme Court of California. Oct. 9, 1908.)

1. STATUTES (§ 114*)—TITLE—DENTISTRY.

St. 1901, p. 564, c. 175, entitled "An act to insure the better education of practitioners of dental surgery to regulate the practice of dentistry, providing penalties for violation thereof, and to repeal an act to insure better education of dentistry practitioners, etc., approved March 12, 1885," is not defective.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 145; Dec. Dig. § 114.*]

2. CRIMINAL LAW (§ 993*) — JUDGMENT — AMENDMENT.

Where defendant was convicted of illegally practicing dentistry without a license, but the judgment first rendered recited that he was convicted of practicing "medicine" without a license, an amendment by substituting the word "dentistry" for "medicine" is not a second judgment by the court in excess of its jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 996.*]

3. CRIMINAL LAW (§ 1218*)—PLACE OF IMPRISONMENT.

Under the act relating to the city of Oakland, providing that those convicted of any offense within the jurisdiction of the police court should be confined in the city jail, a person convicted of practicing dentistry without a license, in violation of St. 1901, p. 564, c. 175, making such offense a misdemeanor, and declaring that persons violating it should be punished by a fine or imprisonment in the county jail, was properly imprisoned in the city jail until payment of the fine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3320; Dec. Dig. § 1218.*]

4. INDICTMENT AND INFORMATION (§ 111*)—STATUTES—PROVISO.

St. 1901, p. 564, c. 175, makes it unlawful for any person to practice dentistry without a license from the board of examiners appointed thereunder, provided that the act does not affect the right of dentists to practice who had a right to do so when the act was passed, and section 19 declares that any person shall be guilty of a misdemeanor who is practicing dentistry without a license, or whose license has been revoked or suspended. *Held*, that as the proviso is matter of excuse only, and neither prescribes nor defines the offense, a complaint for violation of the act need not negative such proviso.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-297; Dec. Dig. § 111.*]

5. PHYSICIANS AND SURGEONS (§ 5*) — DENTISTS—RIGHT TO PRACTICE—STATUTES—CONSTRUCTION.

St. 1901, p. 564, c. 175, § 1, makes it unlawful for any person to practice dentistry without a license granted as prescribed, and section 19, subd. 10, added thereto by St. 1903, p. 326, c. 244, § 6, makes any person guilty of a misdemeanor who is practicing dentistry in the state without a license, or whose license has been revoked or suspended. *Held*, that the act is not limited to those who commenced to practice in the state after its passage, but includes those practicing illegally under the former law.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 5.*]

6. HABEAS CORPUS (§ 92*) — DEFENSES — REVIEW OF FACTS.

Where a petitioner was convicted of practicing dentistry without a license, it was no ground for release on habeas corpus that the

petitioner showed that he had a legal right to practice under the laws existing at the time of the passage of St. 1901, p. 564, c. 175, and was therefore exempted from the license requirement by section 19, subd. 10, added thereto by St. 1903, p. 326, c. 244, § 6; the decision of the trial court on the facts not being reviewable on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87, 89, 91, 92, 95; Dec. Dig. § 92; * Contempt, Cent. Dig. § 219.]

In Bank. Application for a writ of habeas corpus by S. C. Hornef against the chief of police of the city of Oakland. Writ discharged. Petitioner remanded.

Austin Lewis, for petitioner. Everett J. Brown, W. J. Burpee, and John W. Stetson, for respondent.

ANGELLOTTI, J. The petitioner seeks his discharge from the custody of the chief of police of the city of Oakland, by whom he is imprisoned, under a judgment of the police court of the city of Oakland, pronounced upon a conviction of the offense of practicing dentistry without having a license so to do from the board of dental examiners of the state.

The act of the Legislature, upon which the prosecution against petitioner was founded, is an act entitled "An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of California, providing penalties for the violation hereof, and to repeal an act now in force relating to the same and known as 'An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of California, approved March 12, 1885,'" approved March 23, 1901 (St. 1901, p. 564, c. 175). This act was held constitutional by this court in *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, by an opinion which practically disposes of all the points made by petitioner in support of the claim that it is unconstitutional, except the objection that its title is defective. Wherein the title is defective counsel for petitioner does not indicate, and we perceive no basis for the objection. The claim is made that the judgment under which petitioner is imprisoned is void, for the reason that it is a judgment attempted to be given after the police court had exhausted its authority by rendering a previous judgment. The records and papers show clearly enough that the so-called second judgment was merely an order correcting the entry of the judgment on the records of the court to make it conform to the facts, a trifling clerical mistake having been made in the first entry in the recital of the offense of which petitioner had been convicted. He had been informed against for practicing dentistry without a license, and had been convicted of that offense, and the judgment rendered on conviction was that he pay a fine of \$50, and, in default of such payment,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he be imprisoned in the city jail of the city of Oakland until the fine was satisfied, in the proportion of one day's imprisonment for every \$2 fine. In the entry of the judgment the recital as to the offense of which petitioner had been convicted was to the effect that he had been convicted of practicing medicine without a license. The entry was amended by the court to make it conform to what was obviously the fact, and to the judgment as actually rendered, by substituting the word "dentistry" for the word "medicine." There was no second judgment.

It is further suggested that petitioner cannot be legally imprisoned in the city jail, the offense of which he was convicted being a misdemeanor under a state law, and that law prescribing that persons violating its provisions shall be punishable by a fine or imprisoned in the county jail. This objection appears to be answered by the provisions of the act of the Legislature relative to the city of Oakland, which are similar to those in regard to the police courts of other cities, to the effect that the place of imprisonment of those convicted of any offense within the jurisdiction of the court shall be the city jail.

As was indicated to counsel on the oral argument, the only reason we issued the writ in this matter was that we desired to hear argument upon the question of the sufficiency, in one respect, of the complaint against petitioner, upon which he was arrested, tried, and convicted. The law provides: "It shall be unlawful for any person to engage in the practice of dentistry in the state of California, unless said person shall have obtained a license from a board of dental examiners, duly authorized and appointed under the provisions of this act to issue licenses; provided that this act shall not affect the right under the laws of the state of California, of dentists to practice dentistry who have lawful right to practice dentistry at the time of the passage of this act." Section 1, Act 1901 (St. 1901, p. 564, c. 175). It further provides in section 19 of the act, as added in 1903 (St. 1903, p. 326, c. 244, § 6): "Any person, * * * shall be guilty of a misdemeanor, * * * who * * * (10) is practicing dentistry in the state without a license, or whose license has been revoked or suspended." The proviso in section 1 is not very artistically expressed from a legal standpoint, but the meaning is probably clear enough, viz., that all those having, at the time of the passage of the act, the lawful right under the laws of the state, to practice dentistry shall be excepted from the operation of the remaining portion of such section, requiring the obtaining of a license from the board appointed under said act. The complaint in the case at bar charged simply that petitioner on August 31, 1907, "did then and there practice dentistry without having a license so to do from the board of dental examiners of California, by displaying a

sign advertising himself as a dentist," which constitutes "practicing" dentistry under an express provision of the act, and did not allege, in line with the proviso or exception in section 1, that he did not have the lawful right to practice at the time the act was passed, or any fact or facts tantamount thereto. As is apparent, it did allege facts constituting a public offense under subdivision 10, § 19, of the act. Assuming that this subdivision must be read in connection with the proviso in section 1, the question is whether or not it was necessary to further allege facts showing that the accused was not within the proviso of section 1, in order to state a public offense. It should be stated, for a better understanding of the meaning of the proviso, that at the time of the passage of this act there was in force a former act relative to the same subject, approved on March 12, 1885 (St. 1885, p. 110, c. 127), which made it unlawful for any person, not engaged in the practice of dentistry at the time of the passage thereof, to commence such practice without obtaining a license from a board of dental commissioners, and required every person then engaged in such practice to make proper proof thereof to such board within six months, and to thereupon obtain from the board a certificate thereon, upon which he might continue to practice. The proviso in the act of 1901 referred, of course, to those who were then lawfully entitled to practice under the act of 1885. At the time of the passage of the act of 1901 it thus necessarily included all dentists then engaged in practice, except those who were then practicing in violation of the act of 1885, but we do not consider that this weighs materially in the determination of the question under consideration.

There is practically no conflict in the authorities as to what the general rule is in regard to the necessity of alleging, in a complaint, indictment, or information, facts showing that an accused does not come within exceptions or provisos contained in the statute upon which the prosecution is based. The accepted rule is expressed very clearly in *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754. It was there said: "The question is whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case the only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is

so incorporated, it shall be negatived, otherwise it is a matter of defense." The court further said that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense. See, also, *U. S. v. Cook*, 17 Wall. 168, 173, 21 L. Ed. 538; *Territory v. Scott*, 2 Dak. 212, 6 N. W. 435; *State v. Flanagan*, 25 R. I. 371, 55 Atl. 876, and cases there cited. Whatever conflict in the authorities on this matter is to be found is not in regard to the rule above stated, but rather in the application thereof to particular circumstances. In *State v. Abbey*, supra, the indictment was for the offense of bigamy, alleging simply a second marriage by defendant while his former wife was still alive. The statute contained a proviso that the act should not extend to any person whose husband or wife had been out of the state for seven years together, the party marrying not knowing the other party to be living within that time, or to persons divorced, or when the marriage had been declared null and void by decree of court, or when the former marriage was within the age of consent, and was not afterward assented to. It was held that these things all constituted matters of defense, and need not be negatived in the indictment. The situation was practically the same in *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655, and the same rule was applied. In *Billigheimer v. State*, 32 Ohio St. 435, the statute made an act of common labor on Sunday an offense, provided that nothing therein contained should be construed to extend to those who conscientiously observed the seventh day of the week as the Sabbath, and it was held that the matter stated in the proviso was a matter of defense, and need not be negatived in the complaint. In *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488, the statute made it unlawful to sell, etc., opium, except for druggists and apothecaries, who might sell it on prescriptions of physicians, and the indictment simply alleged a sale, without negativing the exception. It was held that the exception did not define or qualify the offense created by the statute, and that the indictment was sufficient. In both *State v. Flanagan*, 25 R. I. 371, 55 Atl. 876, and *State v. Heffernan* (R. I.) 68 Atl. 364, the indictments were for practicing medicine without a license. The statute provided that it should not be construed to prohibit gratuitous services in case of emergency, and that it should not apply to commissioned surgeons of the United States army or navy, or marine hospital service, or to legally qualified physicians of another state called to see a particular case, etc. The indictments simply alleged the practice of medicine without a license, without negativing the exceptions, and were held sufficient. See, also, *State v. Fuller*, 33 N. H. 259. On the

other hand, in *State v. Mahony*, 24 R. I. 338, 53 Atl. 124, the statute provided that "no person, unless a registered pharmacist," etc., shall retail medicines or poisons, and it was held that the limitation had been made a substantial part of the statutory definition of the offense, and must be negatived. This illustrates the distinction very clearly. There is apparently no decision of this state which is directly in point. See, however, *People v. Nugent*, 4 Cal. 341; *People v. Collins*, 105 Cal. 504, 39 Pac. 16. The case at bar is practically the same as *State v. Flanagan*, supra, and *State v. Heffernan*, supra, and is clearly a case where it was not necessary to allege in the complaint facts showing that the accused did not come within the terms of the proviso or exception. The offense of which petitioner was convicted, as defined by the statute, was "practicing dentistry in the state without a license." Subdivision 10, § 19, Act 1901, as added in 1903. The matters stated in the proviso to section 1 constitute no part of the definition or description of this offense. At most the proviso is a statement of an exception which in no degree qualifies the offense created by the statute, but simply exempts certain persons from the operation of such statute. As such, it was available to the petitioner in defense of the charge made against him in the police court if he came within its provisions, but it was not necessary that the complaint should allege that he was not within its terms.

Counsel for petitioner, relying on the language of section 1 of the act of 1901, "It shall be unlawful for any person to engage in the practice of dentistry," etc., contends that the act is applicable only to those who first commenced practice in the state after its passage, and that the complaint should allege such a commencement of practice after the passage of the act in order to state a public offense. We have already set forth subdivision 10 of section 19 of the act, which is a sufficient answer to this claim.

It is further alleged that the petition in this habeas corpus proceeding showed that petitioner had the legal right to practice dentistry under the laws of this state at the time of the passage of the act of 1901, and therefore was not required to have a license, as provided by subdivision 10, § 19, of the act. It should be unnecessary to say that this cannot avail petitioner in this proceeding. If he had any such defense on the facts to the charge against him, the time to make it was on his trial in the police court. The decision of that court as to the facts cannot be reviewed on habeas corpus.

The writ heretofore issued must be discharged, and the petitioner remanded to the custody of the chief of police of the city of Oakland, and it is so ordered.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

154 Cal. 411

NORTON et al. v. BASSETT et al.

(L. A. 1,972.)

(Supreme Court of California. Oct. 16, 1908.

Rehearing Denied Nov. 14, 1908.)

1. LIMITATION OF ACTIONS (§ 103*)—CONSTRUCTIVE TRUST—ENFORCEMENT.

Plaintiffs and O. agreed to jointly buy land, with interests in a certain proportion; O., in addition to paying his own share of the purchase money, to advance part of that of plaintiffs, the legal title to be taken in O.'s name, and held by him in trust to secure his advances, and for the benefit of the joint owners, the land to be subdivided and sold, the proceeds to be applied first to reimbursing O., and after that to be divided among the parties in the proportion of their shares. Held that, while O. was a voluntary trustee, holding under a resulting trust of a continuing nature, so that, he having continued to discharge his duties and not repudiated the trust, no cause of action against him could arise, yet defendant, on the title devolving on him by inheritance on the death of O., became an involuntary or constructive trustee, with the duty merely to preserve and protect the property, to account to the beneficiaries for it, and to turn over to them their shares of it; so that, immediately on the death of O., without any repudiation of the trust, plaintiffs' cause of action against defendants arose, and the statute commenced to run.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 103.*]

2. TRUSTS (§ 244*)—CHANGE FROM INVOLUNTARY TO VOLUNTARY TRUST.

Defendant's relation to property of an involuntary trustee thereof is not changed to that of a voluntary trustee, with the incidents thereof, by recognition of the trust by decedent's administrator, and by defendant's guardian, neither having authority to make any recognition having that effect.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 244.*]

3. TRUSTS (§§ 17, 18*)—CHANGE FROM CONSTRUCTIVE TO EXPRESS TRUST.

One's relation to land cannot be changed from that of a constructive trustee to an express trustee by his verbal promise to account at a future time; Civ. Code, § 852, providing that no trust in relation to real estate is valid unless created by instrument in writing or operation of law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 18; Dec. Dig. §§ 17, 18.*]

4. LIMITATION OF ACTIONS (§ 146*)—NEW PROMISE—WRITING.

By express provision of Code Civ. Proc. § 360, an acknowledgment or new promise to take a case out of the bar of limitations must be in writing.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by C. E. Norton and another, partners, against Charles N. Bassett and another. Judgment for plaintiffs. Defendant Bassett appeals. Reversed and remanded, with directions.

Flint & Barker, Barker & Bowen, and Gray, Barker & Bowen, for appellant. Tanner, Taft & Odell and W. R. Bacon, for respondents.

LORIGAN, J. This cause was originally decided on appeal by the District Court of Appeals for the Second Appellate District. The judgment of the superior court was there affirmed, and on petition of appellant the cause was ordered to this court to be reheard. The action was brought to have a trust declared, and for an accounting of the rents, issues, and profits, and the proceeds of sale of a portion of the trust property. Plaintiffs obtained judgment, and the defendant Bassett appealed from it, and from an order denying his motion for a new trial.

It was alleged in the complaint that in February, 1895, the plaintiffs and one O. T. Bassett, who was the father of the defendant Charles N. Bassett, and the defendant Roll agreed to jointly purchase the Workmen Ranch, consisting of 814 acres of land in Los Angeles county, for the price of \$44,812.34, and that they should purchase and own the said lands in the following proportions, to wit, O. T. Bassett ten-sixteenths thereof, the plaintiffs five-sixteenths, and the said Roll one-sixteenth; that O. T. Bassett, in addition to paying his own proportion of the purchase price, would advance and loan to plaintiffs and Roll such amounts of money above what they were able to advance themselves as were necessary to pay their proportionate shares of the purchase price; that the legal title to the property was to be taken in the name of O. T. Bassett, and held by him in trust to secure the advances to be made by him for plaintiffs and Roll, and for the benefit of said joint owners; that the land was to be subdivided and sold, and the proceeds and profits devoted to the payment of the purchase price and expenses of the venture until O. T. Bassett was repaid the advances to be made by him, and the residue was to be divided among the parties, in proportion to their interest in the land as above specified; that pursuant to this agreement plaintiffs paid toward the purchase price of their five-sixteenths interest the sum of \$1,214, and the said O. T. Bassett advanced and loaned to plaintiffs and Roll, and paid for them to the owners of the property, the balance of their proportionate share of the purchase price of their respective interests; that upon such payment to the owners the title to the entire property was conveyed to said O. T. Bassett in trust pursuant to the agreement of all the parties; that the land was subdivided and portions thereof sold, and the proceeds, together with the rents and profits of the residue, paid to the said O. T. Bassett until his death on January 1, 1898. It is then alleged that, on the death of said O. T. Bassett, the title to the residue of said land vested in the defendant Charles N. Bassett, his son and only heir at law; that the estate of O. T. Bassett was duly administered on, and by a decree of distribution said lands were distributed to said Charles N. Bassett,

who was at the date thereof a minor, and whose estate was duly represented by a guardian, appointed by the court, until he reached his majority; that the administrator and guardian, while they acted as such, and Charles N. Bassett at all times since his father's death, had actual notice of the ownership of plaintiffs of said five-sixteenths interest in said land and the proceeds thereof; that plaintiffs demanded of the administrator and the guardian and Charles N. Bassett an accounting; that the administrator and guardian promised that said C. N. Bassett would fully account for the moneys received for said lands, and the lands remaining unsold, when he attained his majority, and the said Charles N. Bassett, during his minority, also promised to do so when he became of age, but upon attaining his majority repudiated his promise, and refused to account; that the administrator and guardian while they acted as such collected all the rents and profits of said land, and upon attaining his majority the said C. N. Bassett did so, and the latter had also sold certain portions of the property; that by reason of the promises of the administrator, the guardian, and the said Charles N. Bassett himself that the latter would make an accounting when he became of age, the plaintiffs had not heretofore brought an action to establish their rights in said property. The prayer was for an accounting and decree declaring a trust in favor of plaintiffs for five-sixteenths interest in the land remaining unsold, and for a conveyance thereof from said defendant C. N. Bassett to plaintiffs. The complaint was filed February 6, 1903. It was subsequently amended, but there was no material change as to the facts alleged in the original complaint—at least none that affect the question to be particularly considered on this appeal. A demurrer was interposed by the defendant C. N. Bassett, both to the original complaint and the amendment thereto, under which it was insisted, among other objections to the sufficiency of these pleadings, that the cause of action alleged by plaintiffs was barred by laches on their part, and also by certain provisions of the statute of limitations. The demurrer was overruled, as was also the demurrer of the defendant Roll, who, however, made no subsequent appearance in the action. The defendant Bassett filed an answer, setting up various defenses, and after trial findings were made in harmony with the allegations of the complaint and amendment thereto. In addition the court found against the claim of laches asserted by defendant and the bar of the statute of limitations. A decree was entered accordingly, declaring a trust in favor of plaintiffs as to the property in question; that they were the owners of an undivided five-sixteenths interest in certain portions of it, which remained undisposed of, and directed a conveyance from defendant Bassett to them of such interest; there was also awarded

plaintiffs, on the accounting taken in the action, a judgment for the sum of \$9,328.95.

Various grounds for a reversal are urged on this appeal, it being particularly insisted that as matter of law, the court should have sustained the demurrer interposed to the complaint on the ground of laches and the bar of the statute of limitations, and that it should have found in favor of defendant in these particulars as matters of fact. Without considering the question of laches, we are satisfied that the cause of action asserted by plaintiffs was barred by the statute of limitations, and that the demurrer on that ground should have been sustained. The theory of plaintiffs, accepted by the trial court and by the District Court of Appeals, was that the same rule as to the time when the statute of limitations would commence to run against plaintiffs as beneficiaries applied in the case of the trust relation which the defendant C. N. Bassett held to the property by devolution upon him of the title to it through the death of his father, as applied to the trust relationship in which the latter held the property during his lifetime—that the statute would only commence to run in either case upon notice being brought home to plaintiffs of a repudiation of the trust. This, however, is not the rule as laid down by the decisions in this state. The trust relations of O. T. Bassett and the defendant C. N. Bassett to the trust property were entirely distinct, and the rule as to when the statute of limitations commences to run is essentially different as applied to such distinct relations. The relation which O. T. Bassett bore to the trust property was that of a voluntary trustee, that of the defendant C. N. Bassett as to it that of an involuntary trustee. As far as the elder Bassett was concerned, he was a voluntary trustee, holding title to the property under a resulting trust, a trust which, under the agreement of the parties and as accepted by him, was to be of a continuing character, and he was acting under it and making sales of the property in conformity with his voluntarily assumed trusteeship up to the time of his death. Under such circumstances, while the elder Bassett was trustee and as long as he was discharging the duties of such trustee in pursuance of the terms of his trust, the beneficiaries would have no right of action against him, and could have none until he repudiated or disavowed the trust relationship. This, of course, is a familiar rule. But the relation which the defendant Charles N. Bassett held towards this trust property upon the death of his father was not that of a voluntary trustee, but solely an involuntary one, one which was cast upon him by operation of law—a constructive and implied trust—springing from the devolution on him of the title to the trust property by the death of his ancestor. As to him the trust was neither a voluntary nor a continuing one. He owed no duty at all to the beneficiaries to do

anything in furtherance of the purposes or objects for which the trust was created. As between him and the plaintiffs there was no contractual relation with reference to it. Upon the death of his father and the vesting of the legal title in him as heir, while the property descended to him impressed with the trust, he took it simply as a "dry, involuntary, legal trustee," upon whom was imposed no duty except to preserve and protect the trust property, and to account to the beneficiaries for it, and to turn over to them their share of it. As this was the only duty cast upon the defendant Bassett as an involuntary trustee, the plaintiffs' right of action to establish and enforce their claims in the trust property accrued immediately on the death of the voluntary trustee, O. T. Bassett. They were not required to make any demand upon the administrator or the guardian, or upon the defendant Bassett as a prerequisite to maintaining an action for that purpose. Nor was any denial or repudiation of the trust by any of these persons necessary in order to set the statute of limitations in motion. As plaintiffs' right of action accrued on the death of the voluntary trustee, the elder Bassett, and the vesting of the title to the trust property in the defendant Bassett as an involuntary or constructive trustee, the statute then commenced to run, and, unless an action was brought by the plaintiffs within four years thereafter, their right to maintain it was barred.

It is the settled rule of the authorities in this state that no repudiation of an implied or constructive trust—as an involuntary trust always is—is necessary to set the statute of limitations in operation. A cause of action in favor of the beneficiaries arises immediately that the law creates such a trust. In *Hecht v. Slaney*, 72 Cal. 363, 366, 14 Pac. 88, 89, where an implied or constructive trust was involved, the rule was declared and applied. It is there said: "Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust." The same rule was equally applied in the case of *Nougues v. Newlands*, 118 Cal. 102, 106, 50 Pac. 386. There it appeared that Nougues, Williams, and Ralston associated together for the purpose of purchasing and improving lands; the agreement being that Maurice Dore should take title to the lands in his own name, as trustee for those parties. While holding the title to the lands conveyed to him for the other agreeing parties under this express voluntary trust, Dore conveyed it all to William Sharon, who had notice of the interest of the other parties, and written notice from Nougues of the terms on which Dore held the property. The court held that Sharon, on taking the deed from Dore with full knowledge of the trust, became an in-

voluntary trustee of a trust, cast upon him by operation of law, that Ralston's deed to Sharon did not create Nougues and Williams beneficiaries thereunder, and that on the conveyance from Dore to Sharon the statute of limitations commenced to run in favor of the latter, who was grantor of defendant Newlands, and the decision to the effect that the statute of limitations commenced to operate on the acceptance of the deed from Dore by Sharon was expressly based on the proposition that thereby Sharon became an involuntary trustee of the property. *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699, is to the same effect. Without particularly referring to the facts in that case, it appears that an assignee in insolvency, a voluntary trustee, transferred the property of the insolvent's estate to the defendant, against whom the creditors of the insolvent debtor brought an action to have it decreed that the defendant, who was the attorney of the assignee at the time of the purchase, held the property in trust for them, upon both an express and constructive trust. It is there said (quoting from the syllabus, which correctly states the conclusion of the court) that "the statute of limitations does not begin to run against an express trust until a repudiation thereof is brought to the knowledge of the beneficiary, and it begins to run against the enforcement of a constructive trust from the date of its inception, and, it appearing that the constructive trust established by the conveyance was created upon the purchase of the property of the insolvent debtor by the attorney for the assignee, some seven years prior to the commencement of the action, its enforcement by the creditors is barred by the statute of limitations." It is subsequently as clearly reiterated in *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480, that, "where a trust, if it exists at all, is not created by agreement of the parties, but is only implied, or such as is by operation of law fixed upon the conscience of a person, the statute begins to run from the inception of the trust." In the case at bar, so far as this defendant was concerned, if the trust exists at all as to him, it is not by reason of any agreement on his part, but because it is thrust upon him by operation of law.

Under the principle of these decisions, as the defendant Bassett was but an involuntary trustee, the trustee of a constructive trust, the statute of limitations commenced to run as soon as that trust relationship was created by devolution of the title of the trust property on him. No disaffirmance of the trust on his part was necessary to set the statute in motion. Nor did the recognition of the trust, which it is alleged was made by the administrator of the estate of O. T. Bassett, the deceased voluntary trustee, or by the guardian of the defendant Bassett, or by Bassett himself, operate to change the relation of the latter to the property from that of an involuntary to that of a volun-

tary trustee. Neither the administrator nor guardian is vested with any authority in law to make any recognition which would have that effect. Neither did the alleged promise of the defendant, while a minor, to make an accounting when he attained his majority, accomplish it. It is not averred that any written recognition of the trust was made by the defendant Bassett, and no oral recognition of it would operate to change his relation from a constructive to an express trustee. As said in *Nougues v. Newlands*, page 107 of 118 Cal., page 387 of 50 Pac., to which we have heretofore called attention, "the recognition of Sharon of the rights of Nougues and Williams, which is pleaded in a paragraph of the bill above quoted, could not operate in law to change the position of Sharon from that of an involuntary to that of an express trustee. To accomplish this Sharon must have declared the trust by a signed instrument in writing. Civ. Code, § 852. It is not averred that he ever did this, and to the contrary the matters pleaded distinctly negative the idea that such was the fact." Neither is there any allegation of any written acknowledgment or promise made by defendant Bassett with reference to the trust, or an accounting thereof, such as was necessary to take the case out of the operation of the statute of limitations. Section 360, Code Civ. Proc. In support of their contention that the statute had not run in favor of the defendant Bassett because there had been no repudiation of the trust, respondents rely on the cases of *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384, *Roach v. Carrafa*, 85 Cal. 446, 25 Pac. 22, *Watson v. Sutro*, 86 Cal. 529, 24 Pac. 172, 25 Pac. 64, *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108, *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077, *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482, and *White v. Costigan*, 138 Cal. 564, 72 Pac. 178. But in all these cases, save in *Butler v. Hyland* and *Hovey v. Bradbury*, the trusts with which the court was dealing were voluntary trusts, such as was the trust as it existed while the elder Bassett was alive and held the property as trustee for the benefit of plaintiffs. The rule, as we have seen, is uniform in such cases that, before the statute of limitations will commence to run, there must be a repudiation of the trust. These cases, of course, can have no application here, because, as we have seen, the position of the defendant Bassett was not that of a trustee of a voluntary trust, but that of an involuntary trustee—the trustee of a trust obligation cast upon him by the law, and to which the rule in the cases cited, as we have seen, has no application. The only cases cited which could have any possible application are the cases of *Butler v. Hyland* and *Hovey v. Bradbury* above referred to. It is true that in those cases the trusts sought to be enforced were involuntary trusts, but in each of those cases only

two years had elapsed from the death of one of the parties to the voluntary trust, which had been changed into the involuntary one which was sought to be enforced. Clearly there the four-year statute of limitations had not run in favor of the involuntary trustees. In the case at bar the trust cast on the defendant Bassett was an involuntary one. The plaintiffs had a right to proceed to enforce their claim to the trust property immediately that the title to the trust property vested in the defendant Bassett as an involuntary or constructive trustee. The statute commenced to run from that date, and this action, not having been commenced until over five years thereafter, was barred by the provisions of the statute requiring such actions to be commenced within four years from the time the right of action accrues.

The trial court should have sustained the demurrer to the complaint on this ground. The judgment and order are reversed, and the cause remanded, with directions to the trial court to set aside the judgment entered, and to enter an order sustaining the demurrer of the defendant Bassett to the complaint and the amendment thereto.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; SLOSS, J.

8 Cal. App. 747
LITCH et al. v. KERNS et al. (Civ. 444.)
(Court of Appeal, Third District, California.
Sept. 9, 1908.)

1. JUDGMENT (§ 195*)—ISSUES ON DEMURRER.

Where plaintiff chooses to rely on the complaint after the court has sustained a demurrer thereto, a judgment of dismissal, or for defendant, is the proper judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 195.*]

2. APPEAL AND ERROR (§ 870*) — JUDGMENT APPEALABLE—REVIEW.

An appeal from a judgment of dismissal, or for defendant after sustaining a demurrer to the complaint, on the ground that it fails to state facts sufficient to constitute a cause of action, brings under review the rulings on the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3507; Dec. Dig. § 870.*]

3. APPEAL AND ERROR (§ 102*)—ORDERS APPEALABLE—RULINGS ON DEMURRER.

Under Code Civ. Proc. § 939, defining appealable orders, an order overruling or sustaining a demurrer is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. § 102.*]

4. JUDGMENT (§ 195*)—ISSUES ON DEMURRER.

Where the court sustains a demurrer to the complaint, and refuses to allow plaintiff to amend, a judgment in favor of defendant should be entered, though the refusal to allow an amendment might be equivalent to a final judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 195.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Butte County; K. S. Mahon, Judge.

Action by A. G. Litch and others against B. S. Kerns and others. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Dismissed.

L. F. Eggers, for appellants. Park Henshaw, for respondents.

BURNETT, J. The record shows that: "The demurrer to the second amended complaint was duly argued by respective counsel; and, after due consideration by the court, it is ordered that said demurrer be, and the same is hereby, sustained, to which ruling counsel for plaintiff then and there duly excepted." The notice of appeal specifies that: "The plaintiffs hereby appeal * * * from the order of the aforesaid superior court * * * in sustaining the demurrer of defendants to the said plaintiffs' complaint." It does not appear that plaintiffs ever applied to the court for permission to file another amended complaint, nor that there would have been a denial of said application if it had been made. However, we must presume that plaintiffs chose to rely upon the complaint in question, and in orderly sequence a judgment should have been rendered dismissing the action, or for defendants for their costs. An appeal from the judgment would have brought under review the question of law whether the court erred in holding that the second amended complaint fails to state facts sufficient to constitute a cause of action. But, as shown by the certificate of the clerk, "no judgment upon said order, or any judgment of any kind, has ever been rendered or entered."

Respondents have moved to dismiss the appeal, upon the ground: "First, that said appeal was prematurely taken; and, second, that the order appealed from is not an appealable order." The position is clearly well taken. An order sustaining or overruling a demurrer is not appealable. Code Civ. Proc. § 939; *Moulton v. Ellmaker*, 30 Cal. 528; *Hibberd v. Smith*, 39 Cal. 147; *Ashley v. Olmstead*, 54 Cal. 618. In the last cited case it is said: "From an order sustaining a demurrer * * * no appeal can be taken directly to this court. The only method of review of such proceedings here is through an appeal from the final judgment entered in the action itself, if such judgment be unfavorable." In the *Hibberd* Case, supra, it is said: "The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from an order sustaining the demurrer, that the plaintiff could appeal. We have repeatedly held that an order sustaining or overruling a demurrer is not an appealable order." There is nothing to the contrary in the cases cited by appellants. In *Gallardo v. Reed*, 49 Cal. 346, there was an application to the Supreme Court for a

writ of mandate to compel the trial judge to pronounce judgment. The court said: "The demurrer to the complaint was sustained, and the plaintiff's application to amend was refused. This amounts to a final disposition of the cause, and it therefore became the duty of the clerk, in the absence of special directions from the judge, to enter appropriate judgment in the records of the court." So here, if the court had refused to allow the plaintiffs to amend, it might be considered equivalent to a final judgment, but still it would be the duty of the clerk to enter a judgment in favor of defendants, and from this the appeal would properly be taken. The case of *Goldtree v. Spreckels*, 135 Cal. 672, 67 Pac. 1091, cited by appellants, has no direct bearing upon the question before us. It does, however, in the following quotation, recognize the necessity of a judgment in addition to the order sustaining the demurrer to the complaint: "When a general demurrer to a petition is sustained, and the plaintiff declines to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action. Therefore, in such a case, nothing remains to be done except to render judgment for the defendant." In the foregoing view there is nothing technical or arbitrary, nor does this course impose upon an appellant any hardship; but, on the contrary, it harmonizes with the requirement of the statute, the decisions of the courts, and the uniform practice of the profession. No doubt if plaintiffs had announced that they declined to amend, or if the court had refused them permission so to do, the clerk would have entered the appropriate judgment, and the appeal could have been properly taken, but appellants chose rather to pursue a course for which we can find no reason nor legal support. It may be added that, notwithstanding the conclusion we have reached on the motion to dismiss, we have examined the whole record, and we are entirely satisfied that the trial court properly sustained the demurrer.

The appeal is dismissed.

We concur: **CHIPMAN, P. J.; HART, J.**

8 Cal. App. 762

PACIFIC WINDOW GLASS CO. et al. v. SMITH, Judge. (Civ. 506.)

(Court of Appeal, Third District, California. Sept. 9, 1908.)

1. JUSTICES OF THE PEACE (§ 159*)—APPEAL—SECURITY—DEPOSIT—PURPOSE.

Code Civ. Proc. § 978, requires, on appeal from a justice's court, an undertaking in the sum of \$100 for costs on appeal, and also provides for an undertaking to stay proceedings, but makes a deposit of the amount of the judgment appealed from, including costs, equivalent to the undertaking for a stay, and requires the justice to transmit the deposit to the clerk of

the superior court. Section 926 permits a money deposit in lieu of an undertaking for costs on appeal, and requires the sum so deposited to be equal to the amount required by the undertaking. Judgment having been rendered against petitioners in a justice's court for \$177, including attorney's fees and costs, they appealed, and on the following day deposited the amount of the judgment appealed from without stating its purpose, and the proceedings and the deposit were transferred to the superior court. *Held*, that the deposit would be construed as being security for costs on appeal, and not to stay proceedings, so that the appeal was improperly dismissed for want of such security.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

2. JUSTICES OF THE PEACE (§ 159*)—APPEAL—REQUISITES FOR TRANSFER—SECURITY—DEPOSIT—AMOUNT.

Under Code Civ. Proc. § 978, requiring on appeal from a justice's court an undertaking in the sum of \$100 for payment of costs on appeal, and section 926 permitting a money deposit in an equal sum in lieu thereof, the sum deposited as security cannot be less than the amount required by statute, but the fact that it exceeds that amount will not invalidate the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

3. ESTOPPEL (§ 68*)—PARTY ENTITLED TO ALLEGE—ASSENT TO PROCEEDINGS.

Where, on appeal from a justice's court, a deposit was made without stating whether it was for security on appeal or to stay proceedings, but upon motion to dismiss the appeal in the superior court appellant stated that it was made to perfect the appeal, he would be estopped from thereafter asserting that it was for a different purpose.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 165-169; Dec. Dig. § 68.*]

4. TRIAL (§ 18*)—DECISIONS—DECISIONS ON MERITS.

Causes should be allowed to be heard on their merits, wherever possible, without doing positive violence to rules of procedure and practice.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 18.*]

Certiorari to Superior Court, San Joaquin County; Frank H. Smith, Judge.

Certiorari by the Pacific Window Glass Company and others against Frank H. Smith, as judge of the superior court in and for San Joaquin county, and the superior court, to set aside an order dismissing an appeal by petitioners. Order annulled and vacated.

Ashley & Neumiller, for petitioners. Webster & Webster, for respondents.

HART, J. Certiorari. The petitioners charge that the respondents acted in excess of their jurisdiction in the dismissal of an appeal from the justice's court of O'Neal township, county of San Joaquin, in a certain action wherein one W. J. Herson was plaintiff and the petitioners were defendants, and in which judgment was rendered and entered in favor of the plaintiff in said action against the petitioners.

The ground upon which the appeal was

dismissed in said action was that "no undertaking on appeal for the sum of \$100 for the payment of the costs on the appeal" had been filed by the defendants in said action (petitioners here), as required by the provisions of section 978 of the Code of Civil Procedure. According to the uncontroverted averments of the petition, a judgment was rendered by the justice's court of O'Neal township on the 2d day of April, 1908, in favor of said W. J. Herson and against the petitioners for the sum of \$177.30, of which the sum of \$25.16 was for attorneys' fees and \$26.34 for costs. On April 7, 1908, the petitioners as defendants in said action filed with said justice's court a notice of appeal from said judgment on questions of both law and fact, and served a copy thereof on the adverse party, and on the following day—April 8th—"made a deposit of the amount of said judgment, including all costs, appealed from, with said justice," in the sum of \$177.30. Thereupon said justice transmitted to the clerk of the respondent, said superior court, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, and the notice of appeal, and also transmitted and turned over to the clerk of said superior court the sum of \$177.30 deposited with said justice as aforesaid, the same to be subject to any order of said superior court in the premises. Thereupon the petitioners caused said appeal to be placed on the May 4, 1908, trial calendar of said superior court; no objection thereto having been interposed by the plaintiff in said action. On May 15, 1908, the said plaintiff filed and served notice on petitioners that he would on Monday, May 25, 1908, move to dismiss the appeal upon the ground already stated. Said motion was heard, with the result as stated. The respondents demur to the petition on general grounds. The question which is assumed by counsel on both sides to be the pivotal one upon which it must be determined whether the superior court obtained jurisdiction of the appeal is as to the intent and purpose with which the deposit was made by the petitioners with the justice of the peace.

There is nothing in the record before us affirmatively indicating the particular purpose which was in the minds of the petitioners for which the deposit was made when the money was delivered to the justice. The money was deposited the day following the filing of the notice of the appeal, but counsel for petitioners so depositing said money made no statement to the justice as to the purpose which it was intended the deposit was to subserve. It is therefore claimed by the respondents that the deposit being exactly the same in amount as the judgment and costs and attorneys' fees awarded to the plaintiff, as required by the statute in

cases where a deposit of money is made in lieu of a stay bond, and in excess of the amount required in lieu of an undertaking conditioned for the payment of the costs on the appeal, it must be assumed that the deposit was made for the purpose of staying execution, and not for the indemnification of the plaintiff against the costs on appeal. The position of respondents would be impregnable if the assumption essential to its soundness were tenable. But we know of no principle and can conceive of no reason justifying that assumption. We think it would be more conformable to reason, and that we are authorized to assume, there being nothing to the contrary shown by the record certified to this court of all the proceedings in the action before the justice of the peace, that the purpose of the deposit was intended by the petitioners to perfect the appeal, or, in other words, intended as a step in the matter of the appeal without which the appeal would manifestly be ineffectual. Section 978 of the Code of Civil Procedure provides that "an appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal." The same section provides for an undertaking the purpose of which is to stay the proceedings, and further provides as to the latter undertaking that "a deposit of the amount of the judgment, including all costs, appealed from or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the superior court to be by him paid out on the order of the court." There is no provision in that section authorizing the substitution of a money deposit for the undertaking required for the payment of the costs on the appeal; but the right to deposit money in lieu of an undertaking for that purpose is given by section 926 of the Code of Civil Procedure, which provides that the sum so deposited must be equal to the amount required "by the said undertaking," and an appeal so perfected will give the superior court jurisdiction of the case. *Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401. Section 978 provides, as will be observed, that the money deposited in the place of the undertaking to stay proceedings shall be transmitted by the justice to the clerk of the superior court. There is no provision in either of the sections to which we have referred requiring the same course to be pursued as to the money deposited in lieu of the undertaking for the payment of the costs on the appeal. It is thus to be noticed that it was perhaps the duty of the justice, assuming that the money deposited with him by the petitioners was for the payment of the costs on the appeal, to

have retained said money pending the disposition of the appeal by the superior court. But this circumstance does not necessarily become a factor in the determination of the question before us. The right of the petitioners to maintain their appeal should not be made to hinge on an unauthorized act of the justice of the peace. Besides, if this were the only objection grounded against the right to maintain the appeal, it would promptly and properly be repudiated as a mere shadow without any semblance of substance. But we do not understand respondents to undertake to maintain that the circumstance possesses further significance than as evidencing the understanding the justice conceived of the purpose for which the deposit was made.

We think the deposit, under all the circumstances, is to be and should be construed as having been made for the purpose of the payment of the costs on the appeal. The petitioners intended to and did take the appeal. They filed and served their notice to that effect, and doubtless their counsel well knew that, in order to perfect the appeal, an undertaking or a deposit of some amount of money to guarantee the payment of the costs on appeal was indispensably essential. For aught that we can determine from the record before us, the petitioners might have believed and assumed that the depositing with the justice of a sum equal in amount to the judgment and costs, etc., would have the effect of both staying proceedings and perfecting the appeal. But as the Supreme Court of Nevada, in *Nevada v. Cal. M. Co.*, 13 Nev. 212, says: "Whether they unwittingly or intentionally executed the undertaking for the purpose of perfecting the appeal as well as staying execution, the result is that they accomplished the first, whether they did the last or not. An appeal is taken by filing and serving notice. It is made effectual as an appeal simply by executing an undertaking in accordance with section 1402, Comp. Laws." The fact that the amount deposited exceeds that required by the statute to make the appeal effectual cannot, of course, vitiate the appeal. The sum deposited to render the appeal effectual cannot be less than that required (*Swem v. Monroe*, 148 Cal. 743, 83 Pac. 1074), but the appeal cannot be invalidated because the amount deposited for that purpose exceeds, however much, the sum prescribed. *M. H. C. & M. Co. v. Woodbury*, 10 Cal. 186; *Ward v. Superior Court*, 58 Cal. 519. In some of the early cases it is said that an appeal will not be dismissed on the ground of insufficiency in the justification of the sureties, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 374; *Zoller v. McDonald*, 23 Cal. 136. The deposit was sufficient to meet the costs on appeal, and we can see no reason why it should not,

under the circumstances, be held to have been made for that purpose. It is, of course, impossible to say, except by presumption, what the particular idea of petitioners was in making the deposit, but we may suggest that we can hardly understand why the petitioners should have intended the deposit to operate as a stay only, since they could have gained no substantial advantage by depositing the money for the purpose of effecting a stay of proceedings if, as the respondents contend, they failed to take the necessary step to make the appeal effectual.

Counsel for respondents suggest that, if the plaintiff had sought to secure execution of the judgment, the petitioners, under the circumstances, could and probably would have claimed that the deposit was intended as a stay. If so, their appeal would have been without the requisite support and consequently ineffectual. The suggestion also occurs to us that the plaintiff in the appealed action could have suffered no injury from a refusal of the court to dismiss the appeal, for, having declared, in resisting the motion, the purpose of the deposit to be to perfect the appeal, the petitioners would certainly have been estopped from thereafter denying it, or from asserting a contrary or different purpose of said deposit.

The conclusion we have reached responds to the spirit and corresponds with the trend of modern decisions on points of practice in general, which is that causes should be permitted to be heard on their merits where, in so ruling, positive violence is not done some rule or rules of procedure and practice. *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 483, 82 Pac. 53.

In accordance with the foregoing views, the order of the respondents dismissing the appeal in said action of *Herson v. Pacific Window Glass Co. (a Corporation) et al.*, is hereby annulled, set aside, and vacated.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

8 Cal. App. 733

HARTWELL v. C. GANAHL LUMBER CO.
et al. (Civ. 512.)

(Court of Appeal, Second District, California.
Sept. 8, 1908.)

1. CONTRACTS (§ 34*)—BUILDING CONTRACTS—EXECUTION—SUFFICIENCY.

A building contract purported to consist of three parts, all attached. The first part was a builder's contract signed by the parties, and called for the construction of a building on a designated lot "conformable to the drawings and specifications of even date herewith" made by a designated architect, "and signed by the parties." The second part consisted of specifications made by the architect and named "specifications of the material and labor to be used in the erection of * * * building * * * on" designated lot. The third part consisted of general specifications for the materials and work

for the erection of the building furnished by the architect. The second and third portions were each signed by the contractor. *Held*, that the contract was sufficiently executed within Code Civ. Proc. § 1183, providing that building contracts shall be in writing subscribed by the parties thereto, etc.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 34.*]

2. EVIDENCE (§ 399*) — PAROL EVIDENCE — BUILDING CONTRACTS — IDENTIFICATION OF PART OF CONTRACT.

Parol evidence cannot be received to show what plans and specifications were intended by the parties to form a part of their contract for the construction of a building.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 399.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by George H. Hartwell against the C. Ganahl Lumber Company and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, certain of the defendants appeal. *Affirmed*.

G. C. De Garmo and Charles L. Batcheller, for appellants. R. L. Horton, for respondents.

ALLEN, P. J. Appeal from a judgment and an order denying the motion of appellants for a new trial.

The case presented is one where plaintiff brought an action against a large number of defendants, each of whom had filed a certain claim of lien against the property of plaintiff, requiring them to litigate as to their respective claims to a balance in plaintiff's hands subject to such liens. It was stipulated that the claims of lien were correct as to the amounts.

The only question presented upon this appeal relates to the validity of a certain building contract entered into between plaintiff and one Parlier for the construction of a certain house. There is appended to the respondent's brief an opinion filed by Hon. Walter Bordwell, trial judge, in support of his judgment determining that the contract entered into was a valid one. This opinion reflects our views upon the question involved, and is adopted as the opinion of this court:

"The plaintiff is the owner of real property upon which the defendant Parlier, as contractor, constructed a dwelling. The other defendants are lien claimants for labor performed, materials furnished, or subcontract work. The plaintiff by this action seeks to have the defendants interplead, and desires that the court by its decree divide the amount of money conceded to be due under the contract and which he has deposited in court. The plaintiff has offered an instrument from the recorder's office, purporting to be a contract under which the building was constructed, as evidence of the provisions of section 1183, Code Civ. Proc., requiring building contracts over \$1,000 to be in writing, have been complied with. The de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

endants object to the offer on the ground that the contract has not been duly executed, in that the plans and specifications, although attached to the contract, have not been signed by the parties, as required by the express provisions of the contract. The objections will be overruled, for which I give the following reasons:

"The instrument offered consists of three parts all attached, the first part being a builder's contract in the form commonly used in this vicinity; the second, specifications; and, the third, plans. The first part, usually called the 'contract,' is signed by both parties. Among other things it contains the statement that the contract is to construct 'a two-story frame residence with basement and attic, said building to be built on lot 176 of Clark & Bryan's Westmoreland tract'; also that the building is to be constructed 'conformable to the drawings and specifications of even date herewith, made by A. L. Haley, architect, and signed by the parties.' Turning to the specifications attached to this contract, we find them to be named as 'Specifications of the material and labor to be used in the erection of a two-story frame residence building for George H. Hartwell, Esq., on lot 176 Westmoreland tract. * * * A. L. Haley, architect,' and underneath the cover we find again 'general specifications for the materials and works necessary in the erection and completion of the two-story frame residence building for George H. Hartwell, to be located on lot 176 Westmoreland tract, on the west side of Menlo avenue, according to the accompanying plans and specifications as furnished by A. L. Haley, architect, 204-5 Henne Building, Los Angeles, Cal.' The plans are attached to the specifications, and are marked as indicated in the specifications as prepared on the scale of one inch to one foot and by 'A. L. Haley, architect, 204-5 Henne building, Los Angeles, Cal.' The second and third portions of the instrument—that is, the plans and specifications—are each signed by the contractor. I think it proper to hold as a presumption that the contract was signed by the owner and contractor in the condition it now is, to wit, with the plans and specifications attached thereto; and, furthermore, the oral evidence in the case shows it was so signed. No oral evidence can be received to show what plans and specifications were intended by the parties to form a part of their contract. The sole question here is whether the plans and specifications attached to the contract can, as a proposition of law, without the aid of any oral testimony, be held to be the plans and specifications intended by the parties to be those constituting a part of their contract.

"Sufficiency of execution of contracts resembling the one here has been at different times before the Supreme Court. In *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916, the contract refers to specifications as being sign-

ed and kept in the office of the architect. No specifications are in fact signed. The contract was held to be inchoate and void because of the misreference. In *West Coast Lumber Co. v. Knapp*, 122 Cal. 80, 54 Pac. 533, the contract recited that the plans and specifications were 'identified by the signatures of the parties thereto.' No such signatures being found, the contract was held invalid, although after the contract was signed the plans and specifications were attached and the whole filed as one document. In *Worden v. Hammond*, 37 Cal. 62, the plans and specifications were referred to as annexed, but were not in fact; the contract held void. In *Willamette S. M. L. & Mfg. Co. v. Los Angeles College*, 94 Cal. 229, 29 Pac. 629, held that a failure to annex drawings referred to in the contract as 'hereunto annexed' renders the contract invalid; and holds that it is necessary that the 'entire terms [of contract] can be ascertained by mere inspection and without oral testimony.' There have been a number of other cases decided by the Supreme Court all holding that, where the plans and specifications were not filed with the recorder, the contract 'is rendered void.' It is all a question of identification. If, from an inspection of the instrument offered, the court can determine that it is the contract agreed upon by the parties in its entirety, it will be sufficient; but, if any oral testimony is required to enable the court to determine whether or not this is the complete contract intended by the parties, then the execution is insufficient, for, according to all authorities, no such oral testimony can be received. None of the cases referred to as having been before the Supreme Court was precisely like the one at bar. If they were, then the determination of the Supreme Court would, of course, settle the matter; or, if this case come entirely within the principles laid down by the Supreme Court, then those decisions would be conclusive here. Some of these cases so strongly resemble the one on trial that at first impulse they seem to determine the matter; but there is a difference, and the most important is that in none of these cases does it appear that there was any method or reference other than the signing or attaching of the plans and specifications by which it could be determined that the plans and specifications attached were the ones relied on by the parties for their guide as to details of construction. Here the contract signed by both parties referred to plans and specifications to be prepared by Mr. Haley, the architect, and, turning to the plans and specifications attached to the contract, we find that they go together and contain on their face the information that they were prepared for the construction of the house of the plaintiff and on property particularly described, to wit, precisely the same property described in the contract. In the second place, the

plans and specifications contain the signature of one of the parties to the contract, to wit, the contractor, and is indorsed by the county recorder, as 'filed at the request of the owner.' The plaintiff's counsel argues (and not without force) that this is a sufficient signing to meet the requirements of the contract, as it indicates an intention on the part of both parties to regard this as their contract and binding upon them. I might find more difficulty in satisfying my mind on the sufficiency of the execution if the argument as to the sufficient signing was the only answer to the attack made upon the contract; but an inspection of the plans and specifications shows clearly, irrespective of any signing of the contract, that they were made as contemplated by the parties; and these plans and specifications are the ones referred to in the contract which is signed by the parties. 'That is certain which can be made certain' is applicable here, because from an inspection of the instruments as a whole it can be determined with certainty that the plans and specifications attached are those referred to in the contract.

"The rule by which we are bound is that we must determine from an inspection of the writing, without resort to parol testimony, what the parties intended to rely upon as their guide in the performance of the things to be done; and all the Supreme Court cases cited by counsel for the defendants were considered as coming within this rule. If the instrument, as a whole, makes certain what that intention was, it will suffice, and no omission which does not cause uncertainty, or tend to mislead, will be allowed to stand in the way of upholding the contract, and to my mind, in this case, it can determine without resorting to parol testimony that the plans and specifications attached are the ones which the parties intended; hence, in my judgment, this case does not come within the rule."

The validity of the contract, then, being determined, the court by its order distributed the fund among the various claimants. While the court erred under decisions of our Supreme Court announced since the trial of this cause in awarding preference to labor lienors and in allowing them attorney's fees, as well as attorney's fees to the materialmen, appellants did not serve notice of appeal upon any of the lien claimants to whom such rights had been given, and make no point, if in fact any could be made, that the allowance of an attorney's fee, as between the appellants, materially prejudiced either in his rights. The judgment, in so far as it affects the defendants other than appellants, has become final, and we see no prejudicial error in the record open to correction.

The judgment and order are affirmed.

We concur: TAGGART, J.; SHAW, J.

8 Cal. App. 750

LARUE v. DAVIES. (Civ. 478.)

(Court of Appeal, Third District, California.
Sept. 9, 1908. Rehearing Denied by
Supreme Court Nov. 5, 1908.)

1. SHERIFFS AND CONSTABLES (§ 13*)—REMOVAL FOR NEGLECT OF DUTY—SUMMARY PROCEEDINGS—ACCUSATION—SUFFICIENCY.

Pen. Code, § 772, provides for the removal by summary proceedings of public officers accused of neglecting their duties. Section 415 provides that every person who maliciously and willfully disturbs the peace by fighting, etc., is guilty of a misdemeanor. Pol. Code, § 4176, subdvs. 1, 2, 3, make it the duty of the sheriff to preserve the peace and to prevent all breaches of the peace, etc., which come to his knowledge. Section 4315 makes these subdivisions applicable to constables. *Held* that, in a proceeding to remove a constable for neglect of duty, an accusation alleging that a number of persons "willfully and unlawfully" disturbed the peace by fighting in the streets, and that defendant refused to prevent them, etc., was sufficient, though it did not allege that such persons "maliciously" disturbed the peace, since fighting is in itself unlawful, and under Pen. Code, § 7, subd. 4, providing that the word "maliciously" imports an intent to do a wrongful act, the allegation that such persons willfully and unlawfully disturbed the peace sufficiently indicated the intent.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 13.*]

2. SHERIFFS AND CONSTABLES (§ 13*)—CONSTABLES—REMOVAL FOR NEGLECT OF DUTY—SUFFICIENCY OF EVIDENCE.

In summary proceedings to remove a constable for neglect of duty in failing to prevent a disturbance of the peace, evidence *held* sufficient to support findings against defendant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 13.*]

Appeal from Superior Court, Colusa County; H. M. Alberry, Judge.

Summary proceedings on the accusation of D. H. Larue against T. E. Davies for the removal of defendant from the office of constable for neglect of duty. From a judgment of removal, defendant appeals. Affirmed.

C. L. Donohoe and Frank Freeman, for appellant. Seth Millington, for respondent.

BURNETT, J. This is an appeal from a judgment removing defendant from the office of constable of Princeton township in Colusa county. The proceedings were taken under section 772 of the Penal Code providing for the "removal of public officers by summary proceedings," and were based upon a written accusation signed and verified by plaintiff charging defendant with refusal and neglect to perform the official duties pertaining to his office in that "on the 27th day of March, 1907, at and in the town of Princeton in Colusa county, state of California, and in said township, a large number of persons on the streets of said town, did then and there willfully and unlawfully disturb the peace of said neighborhood and of said plaintiff by threatening, traducing, quarreling, and fighting with one another; and did then and there use vulgar, profane, and indecent language that was heard by all passersby on said streets;

that said defendant was present and a witness to all and each of said acts * * * and did willfully, knowingly, and unlawfully refuse and neglect to preserve the peace, or to make any effort to prevent the same; that said defendant had full power, authority, and ability to do and perform all and each of the things herein alleged to have been refused and neglected to be done by him."

Appellant contends: (1) that the written accusation does not state facts sufficient to constitute a cause of action; (2) the judgment is not justified by the findings of fact; and (3) the findings of fact are not justified by the evidence.

The first two grounds may be considered together, as it is admitted that the findings follow the averments of the accusation. Hence, if the objections to the latter be not well founded, it must be conceded that the findings support the judgment. The contention is made that the duties of the constable are defined by statute, and that the facts alleged in the accusation fall short of bringing the case within the scope and purview of said statutory definition. The particular objection made by appellant is that it does not appear that an offense was being committed by any one at the time and place alleged in the accusation. Therefore it is insisted no duty was cast upon the constable to take any affirmative action. If we are to look to the statute for a specific justification of the charge, it will be found in subdivisions 1, 2, or 3 of section 4176 of the Political Code. By section 4315 of the same Code these subdivisions are made applicable to a constable, and they provide that he must: "(1) Preserve the peace. (2) Arrest and take before the nearest magistrate for examination, all persons who attempt to commit or who have committed a public offense. (3) Prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to his knowledge." From the averments of the accusation it appears clear enough that certain persons were perpetrating a breach of the peace and that the constable was present. Therefore it was plainly his duty to prevent or suppress the disturbance. His inaction under the circumstances alleged amounted to a willful neglect of duty, and rendered him liable to removal from office if effect is to be given to said section 772 of the Penal Code.

However, it is argued by appellant that the facts charged do not amount to a disturbance of the peace, for the reason that a material element of the offense as defined in section 415 of the Penal Code is omitted from the accusation. That section provides that "every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting * * * or uses any vulgar, profane or indecent language within the

presence or hearing of women or children in a loud and boisterous manner is guilty of a misdemeanor." The latter clause must be eliminated, as claimed by appellant, since there is no allegation that the language was used in the presence of women or children or in "a loud and boisterous manner." And it is urged that the accusation is not brought within the terms of the first clause, since there is no allegation that the parties who were engaged in fighting "maliciously" disturbed the peace. But it is alleged that they "willfully and unlawfully" disturbed the peace, and we consider this sufficient to meet the requirement of the statute. The word "maliciously" imports "an intent to do a wrongful act." Pen. Code, § 7, subd. 4. This intent is sufficiently indicated by the allegation that the parties willfully and unlawfully disturbed the peace by fighting in the streets. "Fighting" has a well-defined meaning, and is itself unlawful, and it is hard to conceive how persons could willfully and unlawfully disturb the peace by fighting without having "the intent to do a wrongful act." It is manifest, of course, that the accusation is concerned with the commonplace fistcuffs involving assault and battery, and it does not contemplate the more respectable if none the less cruel exhibitions of skill and endurance conducted according to Marquis of Queensbury rules under the auspices of some domestic incorporated club sanctioned by the Legislature. Pen. Code, § 412. We conclude without hesitation that, where two or more persons on the streets of Princeton willfully and unlawfully disturb the peace of the neighborhood by fighting, they are certainly committing a public offense, and we are unable to resist the conviction that, if a peace officer is present, he cannot be a passive spectator and discharge the duties of his office. We may admit that the accusation is somewhat uncertain in the respects indicated by appellant, but, conceding for the purpose of the argument that the requirements for an indictment or information are applicable to an "accusation," we find a ready answer in the suggestion that no objection whatever to its sufficiency was made in the court below, and it is clear that the facts alleged and the corresponding findings, if defectively stated, furnish ample support for the judgment.

In considering the sufficiency of the evidence there is no reason for any departure from the general rule that the testimony must be taken most strongly against the appellant, and, if we can see any substantial support for the findings, we can go no further. The record shows that several witnesses for the plaintiff testified to facts tending to support the material averments of the accusation. For instance, one said that there were from 20 to 40 men close together on the street. The men were wrangling, quarreling, cursing, and swearing. These men were engaged in that sort of thing for at least 15 or 20 minutes, when a fight took

place. "Defendant was near where the men were all of the time, and I did not see him do anything to stop the noise or fight, until it was all over. After it was all over he took hold of one of them, and told him to quit. He did not make any arrest. After the trouble was over the defendant said: 'Hell, if they want to fight, let them fight it out.'" We must accept the testimony as credible and hold that it justified the findings.

Another question of vital importance, not suggested by counsel, but involved in the record, relates to the finality of the judgment. It is not clear that the Supreme Court or this court has jurisdiction to entertain the appeal. In the Matter of Curtis, 108 Cal. 662, 41 Pac. 793, it is said: "By section 772 of the Penal Code the Legislature has provided a manner for the trial of certain misdemeanors in office. * * * These proceedings are intended to be summary, and, as the Legislature has made no provision for a review of the action of the superior court, its judgment is final." There is now a statute authorizing an appeal—section 770 of the Penal Code as amended in 1905—but, as said in the Curtis Case, supra: "By article 6, § 4, Const., the Supreme Court is given appellate jurisdiction in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone. Section 682 of the Penal Code declares that 'every public offense must be prosecuted by indictment or information, except where proceedings are had for the removal of civil officers of the state.' The 'information' here authorized is that named in the Constitution (article 1, § 8) as the equivalent of an indictment and which is to be prepared by the district attorney under the provisions of section 809 of the Penal Code. * * * As the appellate jurisdiction of the court in criminal cases given by the constitution extends only to such as are prosecuted by indictment or information, we have no jurisdiction to entertain the present appeal." In Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1, it is held that "a proceeding by accusation for alleged misdemeanors in office, under section 772 of the Penal Code, is a criminal proceeding not prosecuted by information or indictment, and is not within the appellate jurisdiction of the Supreme Court."

The District Court of Appeal is given jurisdiction "in questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered." Article 6, § 4, Const. Cal. As this is a criminal proceeding not prosecuted by indictment or information, unless we are prepared to hold that the Legislature can enlarge the appellate jurisdiction of the courts beyond what the constitution provides, the conclusion would seem to follow that the appeal should be dismissed.

But the judgment, for reasons stated, should be upheld, and, as the question of jurisdiction has not been discussed by counsel, we do not decide it.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

8 Cal. App. 777

HOUGHTON CO. v. KENNEDY et al.
(Civ. 459.)

(Court of Appeal, First District, California.
Sept. 10, 1908. Rehearing Denied
Oct. 8, 1908.)

1. APPEAL AND ERROR (§ 356*)—TIME TO APPEAL—STATUTES.

Under Code Civ. Proc. § 939, providing that an appeal may be taken from a final judgment within six months after the entry thereof, an appeal from a judgment not taken within that time cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926–1927; Dec. Dig. § 356.*]

2. SALES (§ 69*)—BILL OF SALE—CONSTRUCTION—PROPERTY TRANSFERRED.

A debtor, in satisfaction of his debt, conveyed to a creditor real estate, together with the appurtenances and improvements thereon and connected therewith. On the same date, he executed a bill of sale, conveying to the creditor all the fences and buildings, and all engines, pumps, appurtenances, and pipe lines, scales, watering troughs, and other property of like character situated on or connected with the real estate, together with all of the appurtenances used in connection with the property situated on the real estate or in the vicinity thereof. At the time of the execution of the conveyance and bill of sale, a dairy and a slaughtering and butcher business were conducted on the premises. The debtor vacated the premises, and the creditor took possession of all the property. Held, that the bill of sale included all strictly personal property situated on the premises, and in the immediate vicinity thereof, and used in connection with the premises.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 184; Dec. Dig. § 69.*]

3. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS.

Where there is a conflict in the evidence, or where different conclusions as to the facts may fairly be drawn, the court on appeal cannot interfere with the determination of the trial court as to the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Houghton Company against J. W. Kennedy and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

P. Bernard and Francis C. Huebner, for appellants. Frank H. Short and F. E. Cook, for respondent.

HALL, J. This is an action in claim and delivery, to recover possession of certain property taken from the possession of plaintiff by defendants. The property sued for

consists of an engine and boiler, a bunkhouse, shafts and piping, fencing, sheds, a Howe scales, and a centrifugal pump. Plaintiff recovered judgment for the possession of all of said property, and defendants have appealed to this court from the judgment and the order denying defendants' motion for a new trial.

The only point relied on for a reversal of either the judgment or the order is the insufficiency of the evidence to sustain the findings of fact that, at the time of the bringing of the suit, plaintiff was the owner and entitled to the possession of the property sued for. Inasmuch as the appeal was not taken from the judgment until more than six months after the entry thereof, it cannot be considered. Code Civ. Proc. § 939. This is of no practical importance, however, as the point relied on is fully presented by the appeal from the order denying the motion for a new trial, the reversal of which would have the effect of vacating the judgment. All of the property at one time belonged to defendant J. W. Kennedy. Plaintiff claims to have received title to the property in dispute from said J. W. Kennedy in April, 1905. It is insisted by defendants that the property in dispute was never transferred or sold to plaintiff by defendant J. W. Kennedy, and it is also claimed that prior to the alleged transfer and sale to plaintiff by J. W. Kennedy, all of the property sued for was sold by J. W. Kennedy to defendant W. S. Kennedy, and that he, by virtue of such sale, was the owner thereof, and entitled to the possession thereof when this action was brought.

We shall first take up the contention that the property sued for was never transferred or sold by defendant J. W. Kennedy to plaintiff. On the 1st day of October, 1901, J. F. Houghton (the predecessor in interest of the Houghton Company) leased to defendant J. W. Kennedy certain real and personal property. Said defendant became greatly indebted to plaintiff, for which plaintiff held notes of said defendant, and in April, 1905, said defendant had a settlement with plaintiff, whereby plaintiff released said defendant from his obligations under said lease, and delivered up and canceled the notes of said defendant held by plaintiff. In consideration thereof, and of said settlement, defendant J. W. Kennedy and his wife executed to plaintiff a deed dated April 18, 1905, conveying, with other lands, all of block 8 in the town site of Rolinda, Fresno county, together with the appurtenances and improvements thereon and connected therewith. They also executed and delivered to plaintiff a bill of sale, of the same date, in the words following, to wit: "This is to certify, that for value received, the undersigned, J. W. Kennedy and Margaret Kennedy, his wife, have assigned, transferred and delivered unto the Houghton Company, a corporation, all of their right, title, estate, claim or interest in or to all of the following described personal property, and appurtenan-

ces to real estate, to wit: All of the fences and buildings of every description, and all engines, pumps, appurtenances and pipe lines, scales, watering troughs and other property and appurtenances of like character and description, all situated upon or connected with the lands and property described in a certain lease between J. F. Houghton and J. W. Kennedy dated October 1, 1901, and the lands and property described in a certain trust deed from said J. W. Kennedy and wife to W. B. Houghton and H. F. Gordon, trustees for J. F. Houghton, dated the 15th of December, 1898, and recorded in volume 220 of deeds, page 430 et seq., Fresno County Records; together with and including all of the connections and appurtenances used in connection with said property situated upon said lands, or in the vicinity thereof, including any such property situated upon or extending through or under the town site of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof.

* * * Said Kennedy and his wife, by the terms of the bill of sale, warranted the property transferred to be free and clear of all liens or incumbrances made or permitted by them or either of them. The trust deed mentioned described said block 8 of the town site of Rolinda. At the time of the execution of the bill of sale, and for some time prior thereto, a dairy and a slaughtering and butcher business were conducted on the premises described. Both defendants vacated the premises at or shortly after the settlement effected between plaintiff and J. W. Kennedy, and the same, and all the property now in dispute, seems to have been taken possession of by plaintiff, and so remained, without any claim being made thereto by either defendant, until the latter part of the following August, when defendants forcibly took possession of the property now in dispute.

Appellants first take up the ownership of the Howe scales and certain fencing, making a chute through which to run cattle, from the scales to the slaughterhouse. It is not contended that these scales and fencing were not situated upon block 8. They are therefore clearly within the terms of the bill of sale, which assigns "all of the fences, * * * scales, * * * upon or connected with" said block 8. The bill of sale was not intended to convey only such property as was appurtenant to the real estate. Such property passed under the deed of block 8, executed at the same time. The bill of sale in terms clearly passed all strictly personal property situated upon block 8. Appellants, however, point to certain testimony, given by defendant J. W. Kennedy, to the effect that he had, by oral agreement with Chittenden, the representative of plaintiff, reserved the scales, and insist that this evidence was not contradicted. Passing the objection to this argument that such evidence was clearly an attempt to modify and contradict the unambiguous terms of a written agreement, we

think the evidence of Mr. Chittenden does, in effect, contradict such evidence. He had given evidence for plaintiff as to what took place between himself and J. W. Kennedy at the time referred to by said Kennedy, and as to what personal property he had agreed might be reserved and removed by J. W. Kennedy. It did not include any scales or fencing. Kennedy's own practical construction of the verbal agreement seems to accord with this, for, while he executed a writing at the time of the settlement, agreeing to remove his effects within three days, he never under such agreement attempted to remove the scales or fencing. We think it equally clear, that all of the other property in dispute is covered by the terms of the bill of sale. While some of it, probably, was not actually upon block 8, it was all in the immediate vicinity thereof, and all was upon the town site of Rolinda, and all was used in connection with block 8, and the property situate thereon, and comes within the clause, "Together with and including all of the connections and appurtenances used in connection with said property situated upon said lands, or in the vicinity thereof, including any such property situated upon or extending through or under the town site of Rolinda, or through or under the streets, roads or highways thereon or in the vicinity thereof." For instance, the boiler was in a shed or building situate on block 8. This boiler supplied steam to the engine, which operated the pump. The engine and pump were in a tankhouse, which, though probably not on block 8, was in the street bordering block 8, and was connected with the shed containing the boiler—one wall serving for the two structures. The engine and pump forced water to a tank, from which water was conveyed through pipes to the dwelling house on the premises, and various watering troughs on the premises used to supply stock with water. There was no other engine on or about the premises. It is the only engine that could possibly have been designated by the words of the bill of sale "all engines." The language of the bill of sale is very broad and comprehensive, and we think the court was justified in concluding that all the property in dispute came within its terms.

Appellants' second general contention is that the evidence shows without conflict that, before the assignment relied on by plaintiff, J. W. Kennedy had, for a valuable consideration, sold all the property in dispute to W. S. Kennedy. Respondent makes answer to this contention that the evidence is sufficient to support the conclusion that no sale in fact took place, that the assignment relied on was never intended, as between J. W. Kennedy and W. S. Kennedy, to pass title at all, but that the transfer was a sham and merely colorable, and also that whatever sale or transfer did take place was not accompa-

nied by an immediate delivery, nor followed by an actual and continual change of possession, and was therefore void, under section 3440 of the Civil Code, as against plaintiff, which it is claimed was a subsequent purchaser in good faith. While the evidence is such that the court might have found in favor of defendants' contention, we think there is sufficient in the record to justify the court in finding in favor of plaintiff as to either of the contentions of plaintiff. Where there is a conflict in the evidence, or where different conclusions as to the facts may fairly be drawn from the evidence and circumstances proved, this court cannot interfere with the determination of the trial court as to the facts. The transfer relied on by defendant took place on or about May 4, 1904. W. S. Kennedy is the son of J. W. Kennedy, and on said date, and for some time prior thereto, had been working for him on the premises. Both continued thereafter to work on the premises in carrying on the operations and business of the ranch. At the time of the alleged sale to W. S. Kennedy the father was much indebted, some of the claims against him seeming to be considered by him as unjust. He continued actively to assist in the operations and business carried on at the ranch, until the settlement with plaintiff, without any compensation, or any agreement for any compensation other than as stated by W. S. Kennedy: "We were to pay off these debts, * * * to pay off all of his debts." The bill of sale between J. W. Kennedy and W. S. Kennedy, although specifying many items, does not, in terms, mention any of the property now in dispute, save "one engine and boiler." As is usual in cases of this character, the evidence and circumstances are such that different conclusions as to the facts might well be drawn by different minds. What the actual facts were was peculiarly a matter to be determined by the trial court. *Claudius v. Aguirre*, 89 Cal. 501, 26 Pac. 1077. No good purpose can be served by a detailed discussion of the evidence. It is sufficient to say that we think the court was justified in finding for plaintiff upon all the questions arising out of the alleged sale of the property in dispute to defendant W. S. Kennedy.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

8 Cal. App. 720

PEOPLE v. COREY. (Cr. 89.)

(Court of Appeal, Second District, California. Sept. 8, 1908.)

1. WITNESSES (§ 287*)—EXAMINATION—REDIRECT EXAMINATION—NEW MATTER ON CROSS-EXAMINATION.

Where the evidence on cross-examination tended to show that the condition of prosecu-

trix's organs, indicating sexual intercourse, might have resulted from her conduct after the alleged rape, the evidence showing that she was found wandering about the street at night some two weeks thereafter, the prosecution could, on redirect examination, show that her presence on the street was not for purposes of sexual intercourse.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

2. CRIMINAL LAW (§ 448*)—EVIDENCE—COMPETENCY—INTENT.

Where a question on redirect examination, as to why prosecutrix was on the street late at night several weeks after the rape, was competent to explain the evidence on cross-examination, which tended to show that she might have had the intercourse which injured her sexual organs after the alleged rape, to which she answered that she went out because she was worried, her answer that she was worried, because she was afraid she was pregnant was incompetent as a mere opinion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—PREJUDICIAL EFFECT.

Where testimony, as to complaint made by prosecutrix three weeks after the alleged rape, was elicited by defendant on cross-examination, its repetition on redirect examination was not prejudicial, even though it was inadmissible for the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

4. RAPE (§ 48*)—EVIDENCE—DELAY IN MAKING COMPLAINT.

Testimony, as to complaint made by prosecutrix three weeks after the alleged rape, was inadmissible for the prosecution.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 67; Dec. Dig. § 48.*]

5. WITNESSES (§ 287*)—REDIRECT EXAMINATION—EXPLANATION OF TESTIMONY ON CROSS-EXAMINATION.

On redirect examination, a state's witness may state circumstances tending to correct wrong impressions from matters elicited on cross-examination, though such facts may be prejudicial to defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

6. CRIMINAL LAW (§ 342*)—EVIDENCE—COMPETENCY—MOTIVE.

The reasons of a witness for doing a particular act are not admissible, unless intent is the gist of the crime, and the witness is the one whose intent is the subject of inquiry.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 342.*]

7. RAPE (§ 38*)—EVIDENCE—ADMISSIBILITY—MOTIVE.

In a rape prosecution, the evidence tending to show that prosecutrix and another woman were in bed with two men when the alleged rape occurred, a question to the other woman as to why she got in bed with the man was properly excluded.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 38.*]

8. WITNESSES (§ 357*)—IMPEACHMENT—BELIEF UNDER OATH—COMPETENCY OF QUESTION.

A witness, called to impeach another by showing the latter's reputation to be bad, may be asked whether he would believe such other under oath, from what he knows of his gen-

eral reputation; the adoption of the Code not having changed the rule.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1158; Dec. Dig. § 357.*]

9. WITNESSES (§ 357*)—IMPEACHMENT—MODE OF IMPEACHMENT.

That a witness may be impeached by proof of his general reputation would not prevent his further impeachment by showing his lack of credibility under oath.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1158; Dec. Dig. § 357.*]

10. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction not applicable to the case was properly refused in a criminal prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1980-1985; Dec. Dig. § 814.*]

11. CRIMINAL LAW (§ 809*)—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTION.

An instruction that, if the evidence points to two conclusions, one consistent with guilt and the other with innocence, the jury must reject the former and adopt the latter and acquit, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 809.*]

12. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—INNOCENCE OF ACCUSED.

An instruction was proper that, if two opposing conclusions could with equal propriety be drawn from the evidence, the one favoring innocence should be adopted, where the jury were also instructed that a conclusion favoring guilt could only be adopted when convincing beyond a reasonable doubt, as the entire charge should be considered together.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990-1995; Dec. Dig. § 822.*]

13. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT—NECESSITY OF INSTRUCTION.

All instructions, which direct the jury to convict, properly include the element of accused's guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1904-1922; Dec. Dig. § 789.*]

14. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES—REJECTION OF TESTIMONY FALSE IN PART.

An instruction that, if the jury believe from the evidence that any witness has willfully testified falsely to any material fact, "either at the preliminary examination of this case or at this trial," it might reject "her" or "his" (the) entire testimony (of such witness) was modified by eliminating the words quoted, and adding those in parentheses. *Held* that, if the instruction as given in the language of the Code was improper, as invading the province of the jury, the refusal to give as requested was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

15. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—HARMLESS ERROR.

Instructions, given pursuant to Code Civ. Proc. § 2061, providing that on proper occasions the jury should be instructed that a witness, false in one part of his testimony, is to be distrusted in others, whether or not violative of the Constitution as invading the province of the jury, contained only commonplace matters which the jury would be presumed to know without

instruction, and, if not in fact prejudicial, are not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3154; Dec. Dig. § 1172.*]

16. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—IMPEACHMENT.

Code Civ. Proc. § 2052, permits a witness to be impeached by showing that he has made at other times statements inconsistent with his present testimony. The trial court instructed that a witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth is bad, but refused to add that he could be impeached by the fact that he had given testimony at other times inconsistent with his present testimony; there being testimony to which the requested instruction was applicable, and which would have been seriously affected by it. *Held*, that the additional instruction should have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1889-1894; Dec. Dig. § 785.*]

17. CRIMINAL LAW (§ 757*)—INSTRUCTIONS—PROVINCE OF JURY—EFFECT OF EVIDENCE.

An instruction, pursuant to Code Civ. Proc. § 2052, permitting a witness to be impeached by showing that he had made statements at other times inconsistent with his present testimony, would not be objectionable as invading the province of the jury; the statute not relating to the effect of evidence, but to its admission and application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772-1785; Dec. Dig. § 757.*]

18. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—NECESSITY—PURPOSE OF EVIDENCE.

When the evidence is admissible only for a particular purpose, the court should instruct the jury to consider it only for that purpose; and, where impeaching evidence is attempted to be used to sustain the case in chief, the court should instruct that the statements introduced by way of impeachment should not be considered as proving the facts stated, but only to contradict the impeached witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1889-1894; Dec. Dig. § 785.*]

19. RAPE (§ 54*)—PROSECUTION—EVIDENCE—SUFFICIENCY—CORROBORATION OF PROSECUTRIX.

In rape, a conviction will be sustained which rests upon the testimony of prosecutrix alone.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

20. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—FAVORABLE TO COMPLAINING PARTY.

In a rape prosecution, an instruction that the jury should scan the testimony of the prosecutrix with great care, and act upon it with caution, except where it was corroborated by other credible evidence, if error, was favorable to accused, and not prejudicial; since a conviction might be had on prosecutrix's testimony alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Edwin Corey was convicted of rape, and from the judgment, and an order denying a motion for a new trial, he appealed. Reversed.

F. H. Thompson and Goldberg & Meily, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. The record shows notices of appeal: From a judgment of conviction of the defendant of the crime of rape, committed by having intercourse with a female child under the age of 16 years, from an order denying a motion for a new trial, and from the verdict of the jury in the cause. Our Code does not provide for the appeal last named, and the record presents nothing for consideration under the appeal attempted by that name.

The offense is alleged to have been committed June 22, 1907, and, as testified to by the prosecutrix, was committed at the house of a woman named Jacoby, while the prosecutrix with defendant, and the Jacoby woman with another man, occupied the same bed for a period of about half an hour, all in a more or less intoxicated condition from drinking beer. And, according to the testimony of prosecutrix, each woman had intercourse with her male companion, although a 16 year old brother of the Jacoby woman, who had not been drinking, was present all the time. The Jacoby woman denied having intercourse with the man with whom she was lying, and all knowledge of defendant having had sexual intercourse with the prosecutrix, although she (the witness) was awake, and talking all the time the party were in the bed together. She, however, testified that when she "got up and went to the bathroom," she was followed by the prosecutrix, and "she [prosecutrix] made complaint to me." What the complaint was is not stated. This woman corroborated the testimony of the prosecutrix that the two men and two women, partly undressed, and more or less intoxicated, occupied the bed together, she fixing the time which the party stayed in bed at from 10 to 15 minutes. A physician, who examined prosecutrix in the early part of the September following, testified that he found prosecutrix's vagina in such a condition as to give presumptive evidence that she had had sexual intercourse some time before. The laceration of the hymen had completely healed, and the conditions were such as he would have expected any time after two weeks from the injury, or perhaps in less time. Neither the 16 year old brother nor the male companion of the Jacoby woman appear to have been witnesses at the trial. On cross-examination of the prosecutrix she was asked: "Who was the first person that you told about being ravished there that night after the occurrence?" To which she answered: "University Station Sergeant Butler." It was then developed that she was arrested about half past 1 o'clock in the morning, wandering about the streets alone,

some time in July, about three weeks after the occurrence of June 22d, and again, about two weeks later, arrested about 2 o'clock in the morning under similar circumstances. On redirect examination by the district attorney she was asked, in relation to the arrest: "What was the occasion of your being there, and what made you run away from home." To this defendant objected as incompetent, irrelevant, and immaterial, and the court overruled his objection. The witness answered: "Well, because I was worried. I was going to drown myself; that is why." And the district attorney continued the examination: "Q. Worried about what? A. I was afraid I was in a family way, so I run away. (Defendant thereupon moved to strike out the answer, on the general grounds stated in objection to the first-mentioned question, which motion was denied.) Q. And the second time you were arrested out there, about two weeks later, why did you run away that time? (Same objection, ruling, and exception.) A. Worried about the same thing."

The cross-examination tended to show that the condition found by the physician might have been the result of conduct of the prosecutrix after the date of the alleged rape, and the prosecution was entitled, on redirect examination, to show that the presence of the prosecutrix on the street at the times mentioned was not for purposes which might have produced the conditions mentioned by the physician. This would have justified the asking of the first question, but the second question, "Worried about what?" was somewhat ambiguous. It might have elicited an answer which was proper evidence in the case, and did not necessarily call for incompetent testimony. The answer, although responsive, was clearly incompetent, and we think the motion to strike it out should have been granted. *People v. Long* (Cal. App.) 93 Pac. 387. It is apparent that the district attorney and the trial court both regarded the evidence as competent, since an objection to another question, intended to call for a repetition of the answer, was overruled. The testimony as to the delayed complaint, made to the arresting officer three weeks after the alleged occurrence, was elicited by defendant himself on cross-examination, and its repetition in the redirect examination could not have prejudiced him, even though the evidence itself was not admissible as a part of the case for the prosecution, under the decision in *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013, and cases therein cited. The opinion of the prosecutrix that she was afraid she was in a family way was a corroborating circumstance which might have had great weight with the jury, the evidence for the prosecution, disclosed by the record, being inherently weak in character. Upon redirect examination it is proper to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from the

matter drawn out on cross-examination, notwithstanding such facts and circumstances may prejudice the case for the defendant. *State v. McGahey*, 3 N. D. 293, 55 N. W. 753. The cross-examination by the defendant of witnesses for the prosecution may open the door for the admission, on redirect examination, of matters tending to support the case for the prosecution, which would not have been admissible on the case in chief, and such matters will be received, on the ground that they are necessary to explain the testimony elicited upon the cross-examination (*Williams v. State*, 61 Wis. 281, 21 N. W. 56), or are a part of the transaction which has been inquired into upon the cross-examination (*People v. Smallman*, 55 Cal. 185); but, on the other hand, the reason of a witness for doing a particular act is not evidence, unless intent be the gist of the crime, and the question be directed to the person whose intent is the subject of the inquiry. In a case of this character, even the reasons of the prosecutrix for her acts in connection with the crime charged, where detailed some time after, were held inadmissible when sought to be introduced in the same manner here attempted, to wit, by redirect examination. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73. A question calling for her state of mind and her reasons for acts done three weeks after the time of the alleged rape, which on its face shows it was asked for the purpose of introducing in evidence a mere opinion or belief of the prosecutrix in support of her case, is clearly improper. The evidence sought to be introduced could have been intended for no other purpose than that the jury might connect it with the occurrence of June 22d, and thereby strengthen the case for the people. There was no error in sustaining an objection to the question addressed to the Jacoby woman as to the intent with which she got into bed with Sullivan.

The practice is not uniform in all the states in respect to the right to ask a witness, called to impeach another by showing the latter's general reputation to be bad, the question, "From what you know of her general reputation for truth and veracity, would you believe her under oath?" but in this state the right has been sustained, and it was long ago said to be too well established to be questioned. *Stevens v. Irwin*, 12 Cal. 306. The adoption of the Code has not changed the rule. *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310. The Attorney General contends that the refusal to allow the question to be asked has never been held to be reversible error by the appellate courts of this state, and we are asked to so consider the refusal of the court to permit the defendant to ask the question of the witness Herrin, in relation to the witness Jacoby. This is urged on the ground that the opinion of Mrs. Herrin in this respect could not have influenced the jury in reaching a verdict, and therefore the rejection of the evidence was

not prejudicial. Other states which permit the question to be asked have taken a contrary view (*Douglass v. State* [Tex. Cr. App.] 98 S. W. 840; *State v. Johnson*, 40 Kan. 266, 19 Pac. 749), and we do not see how an appellate court can well say that the opinion of a witness, made competent evidence by the statute and the rules of evidence, can have no effect upon the verdict. The effect must be determined entirely by the person giving the opinion, and this in turn would depend upon the manner of the witness, his credibility, and so forth, which are matters exclusively within the province of the jury. We have considered the effect of the decision in the case of *People v. Tyler*, 35 Cal. 553, that the witness may be said to be impeached by the proof that his general reputation for truth and veracity is bad in the community in which he resides, without the impeaching witness being himself prepared to say he would not believe the witness under oath. But the adoption of one method of impeachment does not exclude the party adopting it from availing himself of any of the other methods provided by law, however conclusive his first effort may have been. A witness may be willing to testify to the bad general reputation of a witness whom he could not conscientiously say he would not believe under oath. If he adds his individual opinion to the general reputation, we cannot say that such opinion will have no weight with the jury.

The trial court modified certain instructions requested by defendant, and refused to give certain others. The instruction, "The jury are instructed that, if the evidence points (equally) to two conclusions, one consistent with the defendant's guilt, the other consistent with the defendant's innocence, the jury are bound to reject the one of guilt and adopt the one of innocence, and acquit the defendant," was modified by inserting the word "equally," as indicated; and the instruction, "The court instructs you that, if there be two chains of circumstances, one chain of circumstances pointing toward the innocence of this defendant, and the other chain of circumstances pointing toward his guilt, and you are unable to say, beyond a reasonable doubt, which of the chains of circumstances is correct, it will be your duty to follow the chain of circumstances which points toward the defendant's innocence, and acquit him," was refused by the court. It is contended by appellant that under the authority of *People v. Dolan*, 96 Cal. 315, 31 Pac. 107, it was error for the trial court to modify the one instruction and to refuse to give the other. The instruction refused is neither within the rule laid down by the case cited, nor within the facts of the case at bar, and no error was committed by refusing to give it. By the modification of the other instruction the court no doubt intended to say that, where the evidence justified equally or alike a conclusion of guilt or innocence, the

jury must adopt the latter. The words "points to two conclusions" were not happily chosen in the instruction as requested by defendant, but the ambiguity created by their use was not increased or rendered any more prejudicial to defendant by the interpolation of the word "equally." It was proper for the court to instruct the jury that, if two opposing conclusions could with equal propriety be drawn from the evidence, the one favoring innocence should be adopted, although it is also true that the one favoring the guilt of the accused could only be adopted when convincing beyond a reasonable doubt. The entire charge must be considered together. All instructions given to the jury, which directed them to convict, properly included the element of the guilt of the defendant beyond a reasonable doubt.

The defendant requested the instruction: "If you believe from the evidence that any witness has willfully testified falsely to any material fact, *either at the preliminary examination of this case, or at this trial*, you are at liberty to reject *her or his* (the) entire testimony (of such witness)." It was modified by the court by striking out the words in italics and adding those in parentheses, and, as so modified, was given to the jury. The importation into this instruction of the element of a false statement made at a place other than the trial cannot strengthen the right of the defendant to have it given. If he was not entitled to have the instruction given in the language of the Code as it was given by the court, the refusal to give it with the added matter was not reversible error. Section 2061 of the Code of Civil Procedure provides that, on all proper occasions the jury are to be instructed by the court: "* * * (3) That a witness, false in one part of his testimony, is to be distrusted in others." Instructions of this character, required by the section of the Code mentioned, and held proper, in other jurisdictions, have been frequently criticised as unconstitutional in this state, because invading the province of the jury, and the inferences which the jurors are thereby instructed to draw are declared to be inferences of fact, and not conclusions of law, which the court is justified in making for the jury. *Kauffman v. Maier*, 94 Cal. 283, 29 Pac. 481, 18 L. R. A. 124. After much consideration of the question the Supreme Court has classified these instructions among those said to contain only mere commonplace matters that jurors would be presumed to know about and act upon in the absence of instructions, and whether violative of the constitutional prohibition against judges charging juries with respect to matters of fact, or not, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground of reversal. *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744; *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Moran*, 144 Cal. 63, 77 Pac. 777; *Goss v. Steiger*, 148 Cal. 155, 82

Pac. 681; *People v. Grill*, 151 Cal. 597, 91 Pac. 515; *People v. Hower*, 151 Cal. 646, 91 Pac. 507.

The trial court also instructed the jury that, "A witness may be impeached, by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad." Defendant tendered an instruction to this effect, which also contained the words, "or that he has given testimony at other times inconsistent with his present testimony," which additional words the court refused to give. Section 2052 of the Code of Civil Procedure expressly declares that a witness may be impeached by showing that "he has made, at other times, statements inconsistent with his present testimony." The Attorney General invokes the rule declared in connection with the instruction last considered, and contends that to so instruct the jury would be to tell them something they already knew. This can hardly be said of a rule provided, not as an instruction upon the effect of the evidence, but as a rule relating to its admission and application. The criticisms of some of the subdivisions of section 2061, referred to above, are not directed against a rule declaring the purpose for which evidence is admitted. There appears to be a peculiar propriety in the court advising the jury as to the application which the law permits to be made of a particular kind of evidence, while instructions as to the effect which should be given the evidence present a different question. Evidence which is intended to be considered only for a limited purpose is often admitted, and it is the duty of the court, upon request of the party affected thereby, to instruct the jury that they shall consider such evidence only for the purpose for which admitted. This rule is applicable to impeaching evidence, and has been so declared in cases in which parties have attempted to use impeaching evidence for the purpose of sustaining the case in chief. In such a case it is proper for the court to instruct the jury that the statements introduced for the purpose of impeaching the witness cannot be considered as establishing the facts stated, but for the sole purpose of contradicting the witness sought to be impeached. *Thiele v. Newman*, 116 Cal. 571, 48 Pac. 713. There is testimony in the record here to which such an instruction was applicable, and the defendant was entitled to have it given. The testimony of the witness Jacoby was seriously affected by such impeaching testimony, and it was important to the defendant that the jury should have been instructed in this regard.

The instruction requested by the defendant that it was the duty of the jury to scan and scrutinize the testimony of the prosecutrix with great care, and act upon it with caution, was modified by the court by adding the

words, "except where it is corroborated by other credible evidence, if you find there is any such in the case." There is no special statutory requirement for such a cautionary instruction in rape cases; neither is there any statutory rule requiring evidence in corroboration of the story of the prosecutrix to be given in order to justify a conviction. On the contrary, it has been held by the Supreme Court of this state that a conviction will be sustained which rests upon the testimony of the prosecutrix alone. *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Benc*, 130 Cal. 168, 62 Pac. 404. It has also been held that to refuse to give an instruction cautioning the jury as to the danger of convicting on the unsupported testimony of the prosecutrix was proper, in a case where there was some corroborating evidence, because the jury might construe such giving to be an intimation from the court that the corroboration was insufficient. *People v. Rangod*, 112 Cal. 672, 44 Pac. 1071. If there was error in giving the instruction as modified, it is apparent that the error was to the benefit, and not the prejudice, of the defendant.

Judgment reversed.

We concur: ALLEN, P. J.; SHAW, J.

8 Cal. App. 738

PEOPLE v. GREGORY. (Cr. 69.)

(Court of Appeal, Third District, California.
Sept. 9, 1908. Rehearing Denied by Supreme Court Nov. 2, 1908.)

1. INDICTMENT AND INFORMATION (§ 137*) — MOTION TO SET ASIDE—INSUFFICIENT COMPLAINT.

Though the complaint on which the warrant for defendant's arrest issued was insufficient, under Pen. Code, § 1322, because made by his wife, so that it would have been the magistrate's duty, if shown such fact, to dismiss the complaint, yet on a motion to set aside the information the sufficiency of the complaint is immaterial; the information being based on the commitment, and it being enough that this, on its face, was regular and charged an offense within the court's jurisdiction.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 137.*]

2. CRIMINAL LAW (§ 1144*) — APPEAL — PRESUMPTIONS.

It will be presumed that the evidence on which a commitment was founded was in all respects legally sufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3016; Dec. Dig. § 1144.*]

3. CRIMINAL LAW (§ 259*) — COMMITMENT — DESIGNATING OFFENSE.

The commitment, reciting, "it appearing to me that the offense of committing a lewd and lascivious act on the body of a child under the age of 14 years has been committed," designates generally the offense denounced by Pen. Code § 288, which is all that, under section 872, is necessary.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 562; Dec. Dig. § 259.*]

4. CRIMINAL LAW (§ 1114*) — APPEAL — REVIEW—BILL OF EXCEPTIONS.

To authorize review of the denial of an alleged motion to discharge defendant because

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not brought to trial within 60 days after the filing of the information, the motion and its grounds, the ruling and any exception thereto, must be authenticated in a bill of exceptions, as required by Court of Appeal Rule 29 (64 Pac. xii).

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1114.*]

5. CRIMINAL LAW (§ 635*)—TRIAL—PUBLICITY.

Defendant was not deprived of his constitutional right to a public trial by the remark of the judge, on refusing to clear the courtroom because he had no power to do so, that, in his judgment, there would be nothing testified to in the case that any right-minded person would desire to hear, though thereupon the entire audience left the room.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452; Dec. Dig. § 635.*]

6. CRIMINAL LAW (§ 1153*)—DETERMINATION AS TO COMPETENCY.

Under Code Civ. Proc. § 1880, providing that children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, cannot be witnesses, the ruling of the trial court, after an examination of a witness, more than 10 years old at the time of the trial, but less than that at the time of the matters in question, that she is competent is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3062; Dec. Dig. § 1153.*]

7. WITNESSES (§ 240*)—LEADING QUESTIONS.

Allowing leading questions to a witness, who is a mere child testifying to revolting circumstances, is a matter in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 847; Dec. Dig. § 240.*]

8. CRIMINAL LAW (§ 995*)—JUDGMENT—DESCRIBING OFFENSE.

Though the judgment does not declare the intent with which the act was done, it sufficiently describes the offense to enable one, from it and Pen. Code, § 288, to determine the nature of the offense of which defendant was convicted, and that the punishment imposed was within the prescribed penalty; it reciting that defendant was convicted of the "crime of committing a lewd and lascivious act on and with the body of a child under the age of 14 years."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2538; Dec. Dig. § 995.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Orrin C. Gregory appeals from a conviction. Affirmed.

M. J. Cheatham and N. A. Gernon, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

HART, J. The defendant was convicted of the crime of "committing a lewd and lascivious act upon and with the body of a child under the age of 14 years" and was thereupon sentenced by the court to serve a term of 10 years in the State Penitentiary. The testimony discloses that the person upon whom the offense is charged to have been committed is the minor daughter of the accused. The evidence also shows that the alleged crime was perpetrated a trifle over a year prior to the making of the order by the

magistrate holding the defendant to trial, and that at that time the child with whom the alleged act was committed was 9 years of age.

1. The defendant moved to set aside the information filed against him in the superior court by the district attorney, on the ground that, before the filing of the same, he "had not been legally committed by a magistrate." The bill of exceptions shows that said motion was made on the complaint filed before the magistrate, and upon which the warrant for the arrest of the accused was issued, the order of commitment and two affidavits made by the defendant. One of these affidavits alleges that Orra Gregory, who swore to the complaint before the magistrate charging the defendant with the crime for which he was committed, and of which he was informed against by the district attorney, was, at the time said complaint was so sworn to, the wife of the accused. The other, presumably offered as a basis for a motion for a continuance of the preliminary hearing, set forth that the accused was too ill to intelligently and understandingly proceed with said examination at the time the same was called and heard. It is obvious that, if the magistrate, before making the order committing the accused, and before taking any testimony in support of the charge, had been informed in a proper manner of the alleged fact that the party swearing to the complaint was, when said complaint was sworn to, the wife of the defendant, his plain duty under the law would have been to dismiss said complaint, it not appearing that the depositions of any other witnesses were taken by the magistrate before the issuance of the warrant. Section 1322, Pen. Code. But we think the question presented is not reviewable on a motion to set aside the information. The information is not based on the deposition or complaint upon which the warrant was issued, but upon the commitment. In the case of *People v. Lee Look*, 143 Cal. 219, 76 Pac. 1028, it is said: " * * * But in the case at bar, two years before the motion to dismiss now under consideration was made, the preliminary examination had been held, at which a large amount of testimony had been taken which showed, or strongly tended to show, that appellant had been guilty of murder, and the magistrate had committed him for the crime of murder, and the commitment was in due and sufficient form. The information in this case is based, not on the said deposition, or 'complaint' if that word be preferred, but on the commitment; and under these circumstances the question of the sufficiency of the said deposition to justify the original warrant of arrest is of no consequence"—citing *People v. Smith*, 1 Cal. 9; *People v. Velarde*, 59 Cal. 458; *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892; *People v. Staples*, 91 Cal. 23, 27 Pac. 523; *People v. Dolan*, 96 Cal. 315, 31

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 107; *People v. Schorn*, 116 Cal. 507, 48 Pac. 495; *People v. Cole*, 127 Cal. 545, 59 Pac. 984. The case of *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619, was where the petitioner had been arrested on a warrant issued by the magistrate, upon a deposition or "complaint" which had been sworn to on information and belief, and the crime therein charged against the accused was unsupported by any other depositions containing competent evidence bearing upon said crime or connecting the petitioner with the commission thereof. The petitioner was discharged upon habeas corpus, because his arrest was under a void warrant, but his discharge was ordered before any hearing had been had or commitment made or information filed. In the case at bar, as we have seen, the defendant was committed after a preliminary hearing; and, while the character and the extent of the testimony upon which the commitment was founded do not appear, the presumption is that it was in all respects legally sufficient. In any event the commitment alone is the basis of the information; and, if upon its face it was regular, and charged an offense of which the superior court has triable jurisdiction, the fact, if it be a fact, that the accused might have been taken into custody and before the magistrate for preliminary hearing without authority of law cannot be reviewed on a motion to set aside the information, because, after the charge has been examined by a magistrate and the evidence taken, and the examination warrants the commitment of the defendant for trial, the imperfections of the "complaint" are cured. *People v. Cole*, supra; *People v. Warner*, 147 Cal. 548, 82 Pac. 196. In other words, the deposition or "complaint," which is authority for the issuance of the warrant of arrest, is functus officio after the examination of the charge and the taking of testimony and the commitment of the accused, and, as the Supreme Court says, is of no consequence on a motion to set aside the information.

2. There is no merit in the contention of appellant that the offense for which he was committed was not properly designated or described in the commitment. The order committing the defendant, in part, is as follows: "It appearing to me that the offense of committing a lewd and lascivious act upon the body of a child under the age of 14 years has been committed," etc. Thus, and by reference to section 288 of the Penal Code, defining the crime, it will be seen that the commitment designates the offense generally, and this meets the requirements of section 872 of the Penal Code. *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112.

3. The point, urged by counsel for appellant in his brief, that the court below should have granted an alleged motion by defendant that he be discharged, on the ground that he had not been brought to trial within 60 days after the filing of the information, cannot be reviewed, for the reason that said motion

and the proceedings thereon are not authenticated in a bill of exceptions. *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907. The grounds of the motion, and all the proceedings had thereon, the ruling of the court on the motion, and the exception to the ruling, if any be taken by the defendant, must be authenticated, as required by rule 29 of this court (64 Pac. xii), in order to authorize this court to consider and review said ruling.

4. After the jury had been selected and sworn to try the case, and before the taking of testimony was begun, the assistant district attorney suggested that, owing to the revolting nature of the offense with which the defendant was charged, there would necessarily be introduced testimony disclosing the disgusting acts constituting the crime of which the defendant was accused, and that therefore the courtroom should be cleared of all spectators. The defendant's counsel objected to such an order, and the judge thereupon said that, if he had the power, he would take great pleasure in excluding all persons from the courtroom during the trial, but that the court had no such power, and to do so would be error. The judge then concluded as follows: "I deem it proper to say, however, that there will be nothing testified to in this case, in my judgment, that any right-minded person would desire to hear, and while I can't order anybody from the courtroom, I certainly make the statement for their benefit, and leave it to them to do as they please." To this statement the defendant took an exception. In his oral argument and in his brief counsel for the defendant urges that the injury resulting to the defendant from the court's remarks lay in the fact that the entire audience left the courtroom immediately after the remarks by the court, and that the effect of the court's statement was to deprive the defendant of his constitutional right to a public trial. The objection and exception to the court's statement upon that ground cannot be of any avail to the defendant. The court did not order the spectators to leave and remain from the courtroom during the trial, but explicitly declared that it had no power to do so. When the spectators withdrew from the room they certainly must have done so with a full understanding, from the remarks of the court, that they were not compelled under the law or the ruling of the court to retire. Whether they did or not, it is very plain that an order excluding spectators was not made by the court, and that, if the defendant was deprived of the high constitutional privilege of having the public listen to the witnesses detail facts and circumstances tending to prove against him the commission of acts, the offensive and noxious odors from which would drive a polecat into bankruptcy, it was due less to the remarks of the court than to the commendable sense of decency with which the citizens of Red Bluff comported themselves with reference to the trial.

5. The defendant insists that the court erred in permitting, over his objection, the witness Mary Gregory, aged 10 years, to testify, the specific contention being that she was, by reason of her age, an incompetent witness, under the provisions of section 1880 of the Code of Civil Procedure. That section declares that "children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses. It appears that the witness at the time the offense is alleged to have been perpetrated was under the age of 10 years, and it is therefore claimed that, notwithstanding the fact that when she was called as a witness at the trial she was over the age of 10 years, she was nevertheless a witness of the class referred to in said section 1880. There appears to be some force in that contention, yet, under the terms of the section, it was for the court to determine whether she was incompetent as a witness for the reasons therein mentioned. "The burden is upon the person who objects to the child being a witness to show that he is incapable, and the determination of the judge upon such objection, and examination of the child, is not a matter for review any more than is his ruling upon the capacity of an adult who may be offered as a witness. *People v. Craig*, 111 Cal. 469, 44 Pac. 186. See, also, *People v. Welsh*, 63 Cal. 167, and *People v. Swist*, 136 Cal. 522, 69 Pac. 223. The court examined the witness to determine the question of her competency, and, having found that she was competent, we cannot disturb the ruling.

6. We do not think that the court below abused its discretion in allowing certain leading questions to be put to the prosecutrix, who was, as seen, a mere child. The witness was no doubt without previous experience as a witness, except such experience as she acquired on the occasion of the preliminary examination, and was undoubtedly unfamiliar with court proceedings. In reply to a question by the district attorney, not leading in form, the prosecutrix first stated: "Well, papa told mama he was feeling bad, and he told her to go water the mules, and when he sent Alvin [her brother] down to the turkey's nest to get the eggs and caught ahold of my arm and dragged me around the corner of the house." What occurred thereafter was brought out by questions of rather a leading character. But, considering the age and sex of the witness, and the revolting circumstances to which she was required to testify, we can readily understand that it would have been with great difficulty that the facts and details of defendant's monstrous act could have otherwise been intelligently brought out. The examination of a witness in the trial of a case, or the manner of such examination, particularly as to the form of the question, is a matter committed

to the sound discretion of the trial judge, who must determine whether or not leading questions should be allowed in the examination of a particular witness from all the circumstances present and under his immediate observation. It is only where it clearly appears that the court has abused its discretion in the allowance of questions, leading or suggestive, in the form in which they are propounded, that this court would be authorized to interfere by reviewing the objections and exceptions to such questions. *Moran v. Abbey*, 63 Cal. 58; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Harlan*, 133 Cal. 19, 65 Pac. 9. We do not think that any abuse of discretion by the court below in the respect referred to is shown by the record.

7. The defendant, having been sworn and testified in his own behalf, was asked, on cross-examination by the district attorney, whether he had not "on several occasions endeavored to excite the passions of that little girl." The court sustained an objection to the question, saying that it was not proper to prove such misconduct. Counsel for defendant thereupon took an exception to the question, and assigned it as prejudicial misconduct on the part of the district attorney. We do not know but that the question was proper and within the principles announced in *People v. Castro*, 133 Cal. 11, 65 Pac. 13, *People v. Koller*, 142 Cal. 621, 76 Pac. 500, and *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463. It is, at least in our judgment, a debatable proposition whether the question was proper or not, and it certainly cannot be held that, where a question is propounded to a witness calling for testimony, the legal propriety of which may be shrouded in some doubt, and objection is sustained to such question, the mere asking of such question will constitute such misconduct upon the part of the prosecuting officer as to call for a reversal. Besides, the district attorney, after the court ruled the question out, did not persist in bringing out the testimony sought to be elicited by it, and the court's statement in ruling on the objection to the question, to the effect that the testimony it called for was improper to go before the jury, was enough to inform the triers that they were not privileged to draw an inference from the question unfavorable to the defendant. The case here, upon this point, is radically different from the case of *People v. Derbert*, 138 Cal. 467, 71 Pac. 564, where the district attorney persistently attempted to get before the jury the fact that the defendant had once been arrested on another charge than that for which he was on trial, after the court had repeatedly ruled against him, and told him the testimony he was seeking to bring out was manifestly improper.

8. It is contended that the judgment is void because, while it recites that the defendant was convicted of the "crime of committing a lewd and lascivious act upon and

with the body of a child under the age of 14 years," it does not declare the intent with which such act was done. It is not necessary to describe the offense in the judgment, as the contention of counsel necessarily assumes, with the technical precision and nicety required in its statement in an information, and if the crime is referred to in the judgment under its generic designation it is sufficient. "A recital in the judgment that the defendant was found guilty of the offense of gaming at tan as charged in the information is equivalent to the recital that the defendant was found guilty of gaming at tan by carrying on and conducting the same for money or its equivalent." Syllabus, *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *Ex parte Murray*, 43 Cal. 455. The principal object of the requirement that the judgment shall contain in its recitals a proper description of the offense of which the defendant has been convicted, and for which he is punished, is to show that the court has remained within its jurisdiction in the matter of the admeasurement of the punishment inflicted. The judgment here recites that the defendant was convicted of the "crime of committing a lewd and lascivious act upon and with the body of a child under the age of 14 years, committed upon the — day of August, 1906," and further recites the fact of his arraignment and plea of "not guilty," and his conviction of said crime, on the 20th day of December, 1907. There can be no difficulty in determining, from the judgment as thus described, and by an examination of section 288 of the Penal Code, the nature of the offense of which the defendant was convicted, and that the punishment imposed is within the penalty prescribed by said section.

The instructions embody a fair and correct statement of the law bearing upon the charge and the proven facts, and, while the testimony upon which a conviction was had is, in the main, from the lips of the prosecutrix alone, it is sufficient to support the verdict.

Finding no prejudicial error in the record, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 756

In re LEAVITT et al. (Civ. 494.)

(Court of Appeal, Third District, California. Sept. 9, 1908. Rehearing Denied by Supreme Court Nov. 2, 1908.)

1. TRUSTS (§ 11*)—EXPRESS TRUSTS—PURPOSES TO CONVEY TO REMAINDERMAN.

Under Civ. Code, tit. 4, § 847, providing that trusts in real property can be only those specified in this title, and section 857 thereof, permitting express trust to be created to sell real property or mortgage it for the benefit of legatees, etc., to receive rents and profits and pay them to the beneficiary, etc., and to receive

rents and profits and accumulate them for certain purposes, a trust to convey property after the death of a life tenant was void.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 11.*]

2. TRUSTS (§ 52*)—MANAGEMENT—DUTIES OF TRUSTEE.

Where property was conveyed in trust to keep the premises insured, and pay taxes, and pay the net income to the life tenant and convey to others on her death, the trust to convey being void, the only duties left for the trustee to perform were the collection and payment of rents and the payment of taxes.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 72; Dec. Dig. § 52.*]

3. TRUSTS (§ 319*)—COMPENSATION OF TRUSTEE—SUCCESSIVE TRUSTEES.

By Civ. Code, § 2274, except as provided by Code Civ. Proc. § 1700, relating to the compensation of testamentary trustees, where a declaration of trust does not fix the trustee's compensation, he is entitled to the same compensation as an executor. Code Civ. Proc. § 1618, provides that, when no compensation is provided by will, an executor must be allowed commissions upon the amount of the estate accounted for by him at the rate of 7 per cent. for the first \$1,000, 4 per cent. for the next \$9,000, etc. Appellant was appointed trustee under a trust to insure the property, pay the taxes and insurance, and pay the net income to the life tenant, appellant having succeeded two other trustees who had served 14 and 7 years, respectively, appellant having served 4 months, and his account as filed showed that his services during that time consisted in paying the taxes and insurance with the life tenant's money, and collecting and paying over 5 months' rent at \$100 per month, less \$10 a month allowed him by the court. Appellant's predecessors made no charge for their services, but appellant was allowed a commission of 7 per cent. on \$1,000 and 4 per cent. on \$3,000, the sums together being the amount for which the life estate was sold, from which was deducted his monthly allowance by the court. Held that, even if appellant could claim commissions on the basis of the corpus of the property, he was not entitled to the commissions to which his predecessors would have been entitled had they not waived compensation, as their waiver of compensation inured to the benefit of the beneficiaries, and not to the benefit of their successor.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 319.*]

4. TRUSTS (§ 315*)—COMPENSATION OF TRUSTEE—AMOUNT.

Respective whether appellant was entitled to compensation under the statutes on the basis of the purchase price of the life estate, or only to commissions on the money actually accounted for by him, the compensation allowed him was liberal under the circumstances, and he cannot complain thereof.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 315.*]

5. EXECUTORS AND ADMINISTRATORS (§ 499*)—COMPENSATION OF ADMINISTRATORS—SUCCESSIVE ADMINISTRATORS.

Each successive administrator is not entitled to the same right of compensation, but their claims for compensation must be considered with reference to the rights of the others; the estate being administered as an entirety.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 499.*]

6. TRUSTS (§ 329*)—REVIEW.

On an appeal by a trustee from an order fixing the amount of compensation allowed him, the commissions allowed being liberal under the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

circumstances, whether appellant's compensation should have been allowed on the amount actually received and disposed of by him, or on the amount for which the life-tenant sold her estate as was done, need not be determined, respondent not objecting to the compensation as allowed, so that the order will be affirmed.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 329.*]

7. TRUSTS (§ 61*)—EXISTENCE—TERMINATION BY DEATH OF PARTIES.

Where property was conveyed to a trustee to collect rents and pay taxes and pay over the net income to the life tenant, and, on her death, to convey to others, the requirement to convey being void as not being a trust allowed by statute, the trust terminated ipso facto on the death of the life tenant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 84; Dec. Dig. § 61.*]

Appeal from Superior Court, City and County of San Francisco; J. A. Hosmer, Judge.

In the matter of the trust created by deed of Charles H. Leavitt and others to Jerome B. Fargo. From an order fixing the compensation of the trustee, the trustee appealed. Order affirmed.

Geo. B. Merrill, for appellant. Edmund Tauszky, for respondent.

HART, J. On the 20th day of October, 1882, Charles H. Leavitt, Simeon Sawyer, and Mary A. Sawyer, his wife, conveyed to Jerome B. Fargo a portion of 50 vara lot No. 1 in the Western addition, block No. 512, on the northwest corner of Fulton and Divisadero streets, in the city and county of San Francisco, in trust for the following uses and purposes, to wit: First. To keep the buildings on said premises insured, and pay the insurance and taxes on said premises. Second. After payment of the insurance and taxes, to pay the net income of said premises to said Mary A. Sawyer monthly during the term of her natural life. Third. Upon the death of said Mary A. Sawyer to convey said premises to certain designated beneficiaries. Said deed was duly acknowledged and recorded in the office of the county recorder of said city and county on the 20th day of October, 1882. Before being so recorded, said Fargo in writing indorsed upon said deed his acceptance of said trust. Immediately upon the recordation of said deed, said Fargo entered upon and proceeded to discharge the duties of such trustee, and continued to act as such until his death, which occurred on the 6th day of January, 1896. On the 6th day of August, 1896, the court, upon the petition of the parties in interest, appointed John C. Winans as trustee in the place of said Jerome B. Fargo, deceased, and said Winans thereafter duly qualified and then entered upon the discharge of his duties as such trustee, and continued to act as such until his death some time in the year 1903. Frederick Kronenberg, having, by mesne convey-

ances, succeeded to the interests of all the beneficiaries named in said deed of trust, except the interest of the said Mary A. Sawyer, petitioned the superior court for the appointment of a trustee of said trust to fill the vacancy in said trusteeship created by the death of said Winans, and on the 11th day of November, 1905, in accordance with the prayer of said petition, the court appointed the appellant herein, George B. Merrill, to the position of trustee of said trust. On the 15th day of November, 1905, said Merrill filed an undertaking in accordance with the order of the court appointing him trustee, took his oath of office, and proceeded to perform the duties of his trust. On the 4th day of December, 1905, the court made the following order fixing the compensation of said trustee as such: "On reading and filing the stipulation of the parties herein, it is ordered that George B. Merrill, trustee herein, may retain to his own use, out of his receipts as such trustee, the sum of \$10 per month, on the first day of each and every month on account of his compensation for his services as trustee, any further compensation as such trustee to be determined by the court upon the settlement of his final account as such trustee." On the 16th day of March, 1906, a petition, previously filed, praying for the termination of the trust, was heard by the court. In this proceeding the account of the trustee, Merrill, with said trust, was filed and considered. The account exhibited the receipts and disbursements of moneys on account of the trust, and on the 19th of March, 1906, the court made its order allowing and settling said account. On the 23d day of March, the matter having been continued to that day to be heard, the court received testimony and heard arguments as to the matter of the compensation of the trustee for his services in the performance of the duties of the trust, and on the 26th day of March made an order fixing the same at the sum of \$190, "less the sum of fifty dollars already paid him"; the same representing a commission of 7 per cent. on \$1,000 and 4 per cent. on \$3,000 of the sum for which the life estate was sold. Appellant excepted to this order. In this proceeding evidence was heard showing the total value of the trust property to be \$25,400, and that Mary A. Sawyer had agreed to sell her life estate in said property for the sum of \$4,000 to said Kronenberg and the latter had agreed to buy the same for the consideration named. The evidence upon the points mentioned was not disputed—in truth, the facts thus found were admitted. This appeal is taken from the order fixing the compensation of the trustee for his services as such.

The declaration of trust being silent upon the subject of the trustee's compensation, the regulation or fixing thereof is controlled,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by express authority of section 2274 of the Civil Code, by section 1618 of the Code of Civil Procedure. The contention of appellant is that he is entitled to compensation based on commissions on the value of the entire trust property. The contention of Kronenberg is that the appellant is entitled, at the most, to compensation only upon the basis of the amount for which the life interest of Mary A. Sawyer was sold, to wit, on said sum of \$4,000 "for the portion of the period during which he had served as trustee." Section 2274 of the Civil Code provides in part: "Except as provided in section 1700 of the Code of Civil Procedure, when a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor." Section 1700 of the Code of Civil Procedure, *supra*, relates to the fixing by the court of compensation and the allowance of necessary expenses to be paid to the trustee of a testamentary trust which the trust clause of the testament authorizes to be continued after the distribution of the estate. Under the claim of the appellant, if tenable, that he is entitled to compensation on the corpus of the trust property, and not alone upon the value of the life estate therein of Mary A. Sawyer, the court should have allowed him as compensation, by virtue of the terms of section 1618 of the Code of Civil Procedure, an amount aggregating the sum of \$851.08, less the sum of \$50 already received by him. This figure would represent the legal commissions, not only on the corpus of the trust estate, but also in addition commissions on the amount for which he rendered an account.

It will be observed from the statement of the facts that Fargo served as trustee for 14 years, Winans for 7 years, and the appellant for 4 months. The evidence shows that Fargo and Winans made no charge for their services. The account filed by the appellant as trustee shows that during the brief period of his incumbency in that office, his services consisted exclusively of paying the taxes and insurance on the trust property with money furnished him by Mrs. Sawyer and in the collection of five months' rent at \$100 per month and paying the same over to Mrs. Sawyer, less \$10 per month which he was authorized by the court's order to retain as part of the compensation to which he was entitled as trustee. Indeed, the services thus enumerated were all that he was required to perform by the terms of the trust. Section 1618 of the Code of Civil Procedure, in accordance with the provisions of which, by authority of section 2274 of the Civil Code, the compensation of the appellant must be fixed, the declaration of trust being silent on the subject of compensation, among other things, provides: "When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of

estate accounted for by him, as follows:" Then follows a specification of the commissions to which under the circumstances mentioned he would be entitled. It is clear from his account that the property in reality accounted for by him consisted entirely of the moneys received by him for the benefit of the life tenant or beneficiary and the money received from Mrs. Sawyer with which to pay insurance and taxes. Undoubtedly the purpose for which a trustee was named in the trust deed was to thus provide for the care and protection of the life interest in the trust property of Mary A. Sawyer and for a proper execution not only of that provision of said trust, but upon the death of the life tenant to convey the property to those entitled to it, under the terms of the deed, in remainder. But the trust to convey being void (Civ. Code, §§ 847 and 857; Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70), there was consequently nothing remaining for the trustee to do but to attend to the matter of the collection of the rents, etc., and paying the taxes and insurance on the property. Whether, however, under the provisions of section 1618 of the Code of Civil Procedure, the court was right or not in allowing the appellant commissions on the price at which the life estate was sold, instead of upon the money constituting all the tangible property actually accounted for by him, a proposition we are not asked to decide here, we are perfectly satisfied that he is not entitled to commissions upon the corpus of the trust property. And, if the court had made the allowance of his compensation on the value of the entire property, the appellant could not justly claim the full amount of the commissions allowed upon that basis for the shares in such commissions to which his predecessors would, respectively, have been entitled but for their waiver of compensation would have to be deducted. It will not seriously be contended that where there is a succession of administrators of the same estate each shall be entitled to the same rate of compensation, "for, if that were so, the estate might be eaten up beyond the power of prevention." *Ord v. Little*, 3 Cal. 287, speaking of commissions of an executor under the section of the old probate act, corresponding to section 1618 of the Code of Civil Procedure. As is said in the case of Estate of Barton, 55 Cal. 87: "The administration of an estate is an entirety. There may be different persons in office at different times, or at the same time, but the claim of each to compensation must be considered with reference to the rights of each and all the others." So in the case at bar, if the compensation were to be based on commissions on the value of the entire trust property, the appellant's compensation would have to be adjusted with reference to the rights of his predecessors in the office of trustee.

From what we have said it is obvious that

our opinion is that there is no merit in the proposition, which appellant's position necessarily assumes, that the waiving of compensation by his predecessors leaves the field open to him to claim the full commissions which would be allowable on the corpus of the property. Why they waived their right to compensation the record does not inform us, but in doing so they manifestly intended it as a benefit to the beneficiaries of the trust estate—perhaps particularly for the benefit of the life tenant—and not to the appellant or any other person who might succeed to the trusteeship. We have stated that there is no demand here for a decision of the question whether the court should have fixed the rate of appellant's compensation on the amount for which the life estate was sold, its presumable value (*Estate of Fernandez*, 119 Cal. 579, 585, 51 Pac. 851), or upon the amount actually received and disbursed by him, for the respondent appears to be satisfied with the order appealed from. But it may not be improper to suggest that it has been held by very high authority that the proper basis of compensation in a case in which the character of the trust and the nature and extent of the duties imposed upon the trustees are very much similar to those in the case at bar is the commissions upon the sums of money or their equivalent received and paid out by the trustee. *Phoenix v. Livingston*, 101 N. Y. 451, 5 N. E. 70. In that case the fee in the trust property did not pass. In this case the trust to convey was a futile attempt to vest the trustee with the fee in the trust property. Hence the situation is the same as if no attempt had been made to pass the fee to the trustee. There was therefore nothing left of the trust but the power in the trustee to execute its terms as to the life estate. He obviously was without power to make a final disposition of the corpus subject to the trust after the termination of the life estate. In other words, upon the termination of the life estate, the trust *ipso facto* terminated. So it is to be seen the case here is almost, if not quite, identical as to the facts with the case cited. In any event, it is plainly apparent that, considering the labor performed, and a most liberal, even if not a legal, measure of compensating the trustee having been adopted by the court, the appellant has no just reason to complain of the order from which he has appealed, and while, in view of the fact that the respondent does not complain of the order, the same should be affirmed, we refrain from expressing either approval or disapproval of the basis upon which the court below fixed appellant's commissions.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

8 Cal. App. 768

UNION OIL CO. OF CALIFORNIA v. MERCANTILE REFINING CO. et al.
(Civ. 492.)

(Court of Appeal, Third District, California.
Sept. 9, 1908. Rehearing Denied by Supreme Court Nov. 2, 1908.)

1. ALTERATION OF INSTRUMENTS (§ 11*)—EFFECT ON RIGHTS.

Though, before delivery of a bond, one of the sureties, without the knowledge of the obligee or other sureties, changed it, so as to make it in form joint and several, instead of joint, as it was before, recovery can be had on it as a joint bond; the obligee being without fault in acting on the belief that the change was authorized.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 63; Dec. Dig. § 11.*]

2. JUDGMENT (§ 244*)—JOINT OBLIGATION.

A judgment that plaintiff recover of the defendants a certain sum is in appropriate form for one on a joint, and not a several obligation.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 244.*]

3. BONDS (§ 128*)—PLEADING—VARIANCE.

Where plaintiff alleges and proves facts entitling him to judgment on a joint bond, he may recover, though he goes further, and alleges, but fails to prove, an alteration of the bond, which would entitle him to recovery as on a joint and several bond.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 215; Dec. Dig. § 128.*]

4. BONDS (§ 120*)—DEFENSES.

Defendants are not precluded from setting up a defense available as against a joint bond, but not as against a joint and several bond, by the fact that plaintiff, in suing on a bond originally joint, alleges that a change in it, making it in form joint and several, was made under such circumstances as to authorize recovery on it as such a bond.

[Ed. Note.—For other cases, see *Bonds*, Dec. Dig. § 120.*]

5. PRINCIPAL AND SURETY (§ 83*)—ESTOPPEL.

Sureties on a bond are estopped to claim that a change in it, made by another surety before delivery, was without their authority; they, though knowing the obligee was delivering goods on the belief that the alteration was made with their authority, not having notified him to the contrary.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 130; Dec. Dig. § 83.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Union Oil Company of California against the Mercantile Refining Company and others. Judgment for plaintiff. Defendants T. P. Spiers and others appeal. Affirmed.

P. A. Bergerot and Frank McGowan, for appellants. Stoney, Rouleau & Stoney, for respondent.

BURNETT, J. The action is upon a bond given to secure the payment, by the Mercantile Refining Company, to the plaintiff of the consideration for oil furnished by the latter to the former. Plaintiff had judgment, from which, and the order denying

their motion for a new trial, certain of the sureties have appealed.

The main controversy in the cause grows out of the fact that an alteration was made in the bond after it had been signed, but before it was delivered to and accepted by plaintiff. The change was made by one of the sureties—not an appellant—who added the word “severally,” making the bond in form “joint and several,” instead of “joint” as before the addition. Assuming that the aforesaid interpolation changed the legal effect of the instrument, and therefore constitutes a material alteration, and that it was made without the knowledge or consent of the appellants, then the rule is as stated by them: “It either rendered the instrument absolutely null and void, if the changes were made with the knowledge, express or implied, of the plaintiff, or else left the bond, as it was originally executed, a joint obligation, if the words inserted in it were interlined by a stranger to the bond, or without any fault or without the knowledge of the plaintiff.” In *Walsh v. Hunt*, 120 Cal. 53, 52 Pac. 117, 39 L. R. A. 697, the Supreme Court declares: “The general rule undoubtedly is, as contended by appellant, that any material alteration in the contract avoids it, even in the hands of innocent holders, and prevents recovery upon it to any extent. But this rule has application to cases where such alteration has been made by the payee or party seeking to enforce it. By the later authorities the rule does not apply in cases where the alteration is by a stranger to the contract, and it is now the settled doctrine, in this country at least, that such an act by a stranger, without the privity of the grantee or obligee, does not avoid the contract in its entirety, even though it be without the knowledge or consent of the party to be bound, but amounts to a spoliation merely, which will not prevent a recovery upon the contract in accordance with its original terms, where those terms can be ascertained. And this is obviously upon the principle that the act of a mere interloper without the privity of the parties should not be permitted to defeat a contract to the extent that it would otherwise be valid and binding. And an agent without authority is, in this sense, held to be a stranger to the transaction.” In the case at bar the court found: “That on said date all of said defendants knew that said plaintiff was making deliveries of oil under said contract to said defendant corporation, and intended to make further deliveries of oil thereunder, and they knew that said plaintiff was making such deliveries, and intended to make further deliveries, relying upon the credit of said defendant bondsmen and the validity of said bond. That at said time said plaintiff did not know that said change in said bond was made without the knowledge or consent or authority of all, or any, of said defendants,

and did not know said fact until long after the commencement of this action, * * * but said plaintiff believed that said correction or addition of said word ‘severally’ therein was made with the full knowledge, consent, and authority of each of said defendants, and so believed the fact to be until after the commencement of this action.” There is ample evidence to support said finding. Indeed, assuming that said change was made without the consent of appellants, plaintiff had no knowledge of it, and every reason for believing to the contrary. And respondent was without any fault in acting upon its belief that the change was authorized by appellants. Therefore, upon authority, and the most rudimentary principles of equity, appellants are at least bound by the terms of the original contract. The court has, in effect, so held, and the judgment is in accordance with the terms of the bond as it existed prior to said change. The judgment is “that plaintiff * * * do have and recover of defendants, T. P. Spiers, Leo Dietle, Geo. W. C. Baker, Angler Baker, Arthur Dietle, and George F. Ehrenpfort the sum of,” etc. This is the appropriate form of judgment upon a joint, and not several, obligation. The judgment is in harmony with the conclusion of law, is justified by the findings of fact, and is within the issues raised by the pleadings.

It is true that plaintiff alleged in its complaint that the alteration in said bond was made with the knowledge and consent, and by the authority, of all of the defendants, but this allegation, and the corresponding findings of the court, may be disregarded entirely, and still the judgment for plaintiff, for reasons already indicated, must be upheld. The only answer to this consideration attempted by appellants is that: “The suit instituted by the plaintiff to enforce the bond was an action on a ‘joint and several’ bond, and not on a ‘joint’ obligation. The nature of the action was prejudicial to the appellants, in this: That it precluded them, or either of them, from urging, as a legal defense to the cause of action, the alleged claim of appellants that the plaintiff had released some of the sureties on the bond.” But appellants are entirely mistaken in their understanding of the situation. Under our liberal system of pleading and practice plaintiff is not denied any relief, if justified by his pleading and evidence, simply because he fails to prove that he is entitled to the full measure that he claims. In the case at bar plaintiff alleged facts which are supported by the evidence, justifying recovery under the original instrument. The pleading went further, and set forth a change in the terms of the bond, which, if shown as alleged, would entitle plaintiff to the additional relief of a several judgment against the defendants. To hold that a failure to prove these additional allegations is to be

sent out of court empty-handed is opposed to the spirit of modern legislation and the decisions of the courts. Code Civ. Proc. § 580; *Bell v. Solomons*, 142 Cal. 63, 75 Pac. 649; *Reiner v. Schroeder*, 146 Cal. 416, 80 Pac. 517. Nor were defendants precluded from setting up the defense suggested. Ordinary prudence would lead them to urge whatever available defense they might have to any cause of action set forth in the complaint. If plaintiff had formulated its pleading in two counts, based upon the original instrument and the altered instrument, respectively, no one would question the applicability of the rule herein announced. There is no difference in principle, since sufficient facts are alleged to justify a judgment in keeping with either theory, although not separately set forth.

Again, it is found by the court, and the evidence is sufficient to support it, "that on said 2d day of February, 1903, and while deliveries, as aforesaid, were being made by plaintiff to defendant corporation, said defendants and each of them knew that plaintiff was ignorant of the facts connected with the said alteration, but believed that said alteration had been made by the authority, and with the consent and knowledge, of all of said defendants; that said defendants did not, nor did any or either of them, notify or inform plaintiff that any alteration had been made in said bond without their knowledge or authority, or against their consent, or that said bond was for any reason invalid, or any of the facts or claims respecting the said alteration therein, other than the alteration was made with the authority of all persons signing said bond," etc. In other words, we have a familiar illustration of the principle of estoppel. It is sufficiently pleaded, if necessary to plead it in anticipation of the possible defense of unauthorized modification of the original bond. It is warranted by the evidence, and properly found by the court. The rule is just and supported by the authorities that, where a document has been altered, and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered. *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Ward v. Williams*, 26 Ill. 447, and cases cited in the note, 79 Am. Dec. 385. It is plain here that, since plaintiff was furnishing the oil on the strength of the bond, it was the duty of appellants to notify respondent immediately of any change in the terms of the bond within their knowledge and not authorized by them.

The other points made, and the citations noted, by appellants, have all been examined, but they are of mere academic interest, and do not demand further notice.

The judgment is right, and should be upheld, and therefore it and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

154 Cal. 326

BOCA MILL CO. v. CURRY, Secretary of
State. (S. F. 4,997.)

(Supreme Court of California. Oct. 8, 1908.)

1. CORPORATIONS (§ 37*)—EXTENSION OF COR-
PORATE EXISTENCE—LEGISLATIVE AUTHORI-
TY—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 7, prohibiting the Legisla-
ture from extending any franchise or charter or
remitting the forfeiture of any franchise or
charter of any corporation, when considered
in connection with the prior Constitutions and
with article 1, § 21, article 4, § 25, article 11,
§§ 3-6, and article 12, §§ 1, 5, prohibiting the
granting of special privileges, the passing of
special laws, etc., and in connection with the
proceedings of the constitutional convention,
prohibits the Legislature from enacting any law,
general or special, under which the charter or
franchise of a corporation may be extended or
the forfeiture of any franchise or charter re-
mitted.

[Ed. Note.—For other cases, see Corporations,
Dec. Dig. § 37.*]

2. CORPORATIONS (§ 1*) — CREATION OF COR-
PORATIONS.

A corporation is purely a creature of law,
and can exist only by permission of the state.

[Ed. Note.—For other cases, see Corporations,
Cent. Dig. § 1; Dec. Dig. § 1.*]

3. CORPORATIONS (§ 4*).

The legislative department is the only de-
partment empowered to form corporations or
authorize their formation or prescribe or ex-
tend their term of existence, and, except as it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is limited by the Constitution, the power of the Legislature is supreme.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 11; Dec. Dig. § 4.*]

4. CORPORATIONS (§ 37*).

A constitutional provision that the Legislature shall not extend any charter of any corporation declares against legislation extending or authorizing the extension of the charter of any corporation in any way, and where the Constitution prohibits the exercise of the powers to so extend by the only body possessing it, and does not provide any other way by which the extension may be had, there is a prohibition against any legislation effecting or authorizing the extension of corporate life.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 37.*]

5. CORPORATIONS (§ 37*).

Const. art. 12, § 1, providing that corporations may be formed under general laws, shall not be created by special acts, and that all laws concerning corporations may be altered or repealed, does not, when considered in connection with section 5, prohibiting the Legislature from passing any act granting any charter for banking purposes, etc., but corporations may be formed for such purposes under general laws, and article 11, § 12, declaring that the Legislature shall not impose taxes on counties, etc., but may by general law vest in the corporate authorities the power to assess and collect taxes, authorize or recognize the power of the Legislature to pass a general law for the extension of the existence of corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 37.*]

6. CORPORATIONS (§ 39*).

The purpose of Const. art. 12, § 1, providing that corporations may be formed under general laws, but shall not be created by special acts, and that all laws concerning corporations may be altered or repealed, is to make plain the will of the constitutional convention that a corporation shall have no legal right to insist that any general law relating to corporations shall continue in force unchanged because it was in force at the time of its organization, but such general power is subject to such prohibition as to specific matters as elsewhere found in the Constitution.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 39.*]

7. CORPORATIONS (§ 37*).

The object of Const. art. 12, § 7, providing that the Legislature shall not extend any franchise or charter nor remit the forfeiture of any franchise or charter of any corporation, is not to limit the power of the Legislature in the matter of corporations thereafter to be organized as to the time for which they may be originally created, for that is a different matter from that of extending the life of existing corporations, including those organized under the former Constitutions beyond the time fixed in their charter.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 37.*]

8. CONSTITUTIONAL LAW (§ 13*)—PROVISIONS—CONSTRUCTION.

Where the language used in a constitutional provision plainly and unequivocally shows a certain and definite purpose to be accomplished thereby, the courts must construe it so as to carry that purpose into effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 10; Dec. Dig. § 13.*]

9. CONSTITUTIONAL LAW (§ 20*)—LEGISLATIVE CONSTRUCTION—EFFECT.

St. 1906, p. 22, c. 19, and St. 1907, p. 745, c. 403, relieving corporations from the penal-

ties of forfeiture incurred by a failure to pay the license tax levied by St. 1905, p. 493, c. 386, do not show such a continuous course of legislative construction of Const. art. 12, § 7, prohibiting the Legislature from extending any franchise or charter or remitting a forfeiture of any franchise or charter, as is entitled to any particular weight in determining the construction of the section, especially as at the legislative sessions of 1905 and of 1907, a proposed constitutional amendment of the section so as to provide for the extension of corporate charters was adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 15; Dec. Dig. § 20.*]

10. CORPORATIONS (§ 37*)—EXTENSION OF CORPORATE EXISTENCE—STATUTES—VALIDITY.

St. 1907, p. 344, c. 274, amending Civ. Code, § 401, by providing that every corporation may at any time prior to the expiration of the term of its corporate existence extend such term to a period not exceeding 50 years from the date of such extension, is in conflict with Const. art. 12, § 7, declaring that the Legislature shall not extend any franchise or charter of any corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 37.*]

In Bank. Mandamus by the Boca Mill Company against Chas. F. Curry, as Secretary of State, to require defendant to file a certified copy of a certificate of extension of the corporate existence of plaintiff. Alternative writ of mandate discharged, and proceedings dismissed.

John Garber, Garret W. McEnerney, J. J. Dwyer, T. C. Coogan, Jas. T. O'Connor, and W. H. Orrick, amici curiæ (Tobin & Tobin and James M. Allen, of counsel), for petitioner. U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, J. This is an original proceeding instituted in this court by plaintiff, a California corporation, to obtain a writ of mandate requiring the defendant to file in his office a certified copy of a certificate of extension of its corporate existence.

The question presented by this proceeding is as to the constitutionality of an act of the Legislature approved March 18, 1907, purporting to amend section 401 of the Civil Code (St. 1907, p. 344, c. 274), by the terms of which amendment "every corporation heretofore or hereafter formed, and existing under the laws of this state, may at any time prior to the expiration of the term of its corporate existence extend such term to a period not exceeding fifty years from the date of such extension." Prior to the amendment, and ever since the year 1873, the section provided that any corporation formed for a period of less than 50 years, the maximum period under our statute for which a corporation may be originally organized, might extend its term of existence to a period not exceeding 50 years from its formation. The amended section provides, as did the original, that such extension may be made at any meeting of the stockholders or members called by the directors expressly for considering the

subject if voted by stockholders representing two-thirds of the capital stock, or by two-thirds of the members, or upon the written assent of two-thirds of the members or of stockholders representing two-thirds of the capital stock. A certificate of the proceedings of the meeting upon such vote, or upon such assent, must be signed by the chairman and secretary of the meeting and a majority of the directors, and be filed in the office of the county clerk where the original articles of incorporation were filed, and a certified copy thereof in the office of the Secretary of State, and thereupon the term of the corporation is extended for the specified period. The plaintiff was incorporated on the 5th day of June, 1877, for the maximum term of 50 years. In October, 1907, it was resolved, in the manner provided by the amended section, to extend the term of its corporate existence for the further period of 50 years from the date of extension. All the proceedings were in accord with the provisions of said section. The Secretary of State refused to file the certified copy of the certificate of extension upon the ground that section 401 as so amended is in violation of a provision of our Constitution, and thereupon this proceeding was instituted. It will be observed that the amendment to section 401, Civ. Code, made a radical change in the law. As the section stood before the amendment, only a corporation formed for a period of less than 50 years could extend its term of existence, and then only to a date not exceeding 50 years from the date of its original incorporation. Under the amendment, any corporation may extend its term of existence, although originally incorporated for the full term of 50 years, not exceeding 50 years from the date of such extension.

The claim of the defendant is that the amendatory act is invalid because it is prohibited by section 7 of article 12 of our Constitution, the article relating to corporations. That section is as follows: "The Legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist under the laws of this state." The question here is as to the meaning of this provision. The defendant contends that it prohibits the Legislature not only from enacting any law, general or special, extending the term of existence of any or all corporations, but also from enacting any general law under which corporations may themselves extend such period. The claim of plaintiff is that the provision is intended simply either to prohibit such an extension by legislation special in its character, or to prevent the Legislature from passing any general law which, by the operation of the law itself, independent of action by any one else, will accomplish the extension of corporate charters; in other words, that the constitutional restriction is upon the

method of accomplishing such an extension, and is not directed against the substantive thing, the extension, and that it does not prohibit the enactment of a general law of a permissive character, open to all corporations alike on equal terms. The constitutional provision under consideration is peculiar to our own state and the states of Washington and Idaho, which evidently copied it from our Constitution. At the time of its adoption the Constitutions of Pennsylvania, Missouri, and Colorado contained provisions in terms prohibiting the passing by the Legislature of special laws creating corporations or renewing or extending the charters thereof, and the Constitutions of Illinois and Nebraska declared that no corporation, except those organized for charitable, educational, penal, or reformatory purposes and under the control of the state, shall be created by special laws or its charter extended, changed, or amended, which was practically the same as the provision of Pennsylvania, Missouri, and Colorado. Since the adoption of our Constitution of 1879, the states of Montana and Idaho have adopted constitutional provisions in terms prohibiting the granting, extension, or amendment of corporate charters by special law, and the state of Delaware one prohibiting the creation, amendment, renewal, or revival of any corporation by special act. In view of all the circumstances proper to be considered in construing a constitutional provision, we are forced to the conclusion that section 7 of article 12 is not susceptible of either of the constructions sought to be given it by learned counsel for the plaintiff, and that it was plainly the intent of the framers to prohibit any action by the legislative department, by virtue of which any corporate charter or any franchise (at least any franchise held by a corporation) might be extended, or the forfeiture of any such charter or franchise remitted.

So far as the extension of corporate charters is concerned, when we come to a consideration of the evils to be guarded against by constitutional provision in that behalf, it must be conceded that under our system that of special legislation was the one principally to be feared, and therefore to be prohibited. We would naturally expect, for this reason, to find more force in an argument that this was the real object of the provision, than in the other claim of plaintiff that its object was to simply prevent the Legislature from directly extending the charter of corporations by general legislation, leaving that body free to authorize all corporations to extend their own period of existence. We are unable to perceive any particular object to be subserved by a provision having the effect asserted in this latter claim of plaintiff. The only suggestion of its learned counsel in this regard is that it may have been the purpose in prohibiting direct extensions by the Legis-

lature by general law to guard against the special legislation that might be successfully cloaked thereunder. There is little force in this suggestion. The evil thus referred to is one common to all general legislation, and experience has given rise to more than a suspicion that it is to be found in various statutes enacted by our Legislature, general laws in form, and general laws in the sense that the courts can find no valid ground upon which to hold them to be special laws. This evil is as possible in the matter of legislation permitting corporations to extend their own charters, as in the case of legislation directly extending them. It is on the latter claim, however, that plaintiff principally relies, being apparently forced to this position by the weakness of any possible argument that, under the circumstances, can be made in support of the special legislation claim. The constitutional convention of 1879 was evidently firmly set against special legislation of all kinds, and the prohibitions thereof are very numerous. When guarding against the evils supposed by the members to accompany the power of enacting that character of laws, there was no reluctance to use terms showing beyond doubt that a certain method of legislation, viz., special legislation, was the only thing prohibited. An examination of the Constitution shows many prohibitions of this character. Section 21, art. 1, declares: "Nor shall any citizen, or class of citizens, be granted privileges or immunities which upon the same terms, shall not be granted to all citizens." Section 25, art. 4, provided that the "Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say"; and contains 23 subdivisions stating the classes of subjects as to which such laws are not permissible. The nineteenth subdivision was: "Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." And the twenty-third subdivision was: "In all other cases where a general law can be made applicable." By sections 3, 4 and 5 of article 11, the Legislature was authorized to provide "by general and uniform laws" for the formation of new counties, and directed to establish a system of county governments, "which shall be uniform throughout the state," and directed to provide "by general and uniform laws" for the election, etc., of officers. Section 6 of article 11 declared: "Corporations for municipal purposes shall not be created by special laws; but the Legislature by general laws, shall provide," for their incorporation, etc. Section 1 of article 12 provided: "Corporations may be formed under general laws, but shall not be created by special act." Section 5, art. 12, provided: "The Legislature shall have no power to pass any act granting any charter for banking purposes, but corporations or associations may be formed for such purposes under general laws." These instan-

ces are cited to show that, when the convention was guarding against special legislation, it did not hesitate to show its purpose by clear and unmistakable language. The provision under consideration is destitute of any word or words from which any such purpose may be inferred, and, if it was intended by the framers of the Constitution as a prohibition on special legislation, it is, so far as we have found, the one solitary instance among the many prohibitions, of legislation of that character, in which they failed to make their purpose clear. "The Legislature shall not extend any franchise or charter" is the language used. There is no saving clause to the effect that such charters may be extended under general laws, analogous to that used in section 5 of the same article, nor is it declared, as in the many other instances of such prohibitions, that the Legislature shall not do the thing "by local or special law." In addition to this, the debates and proceedings of the constitutional convention show very clearly that all those who made any remarks while the provision was being discussed, both those favoring and those opposed thereto, were of the opinion that the effect thereof would be to place it beyond the power of the Legislature to enact any law, general or special, under which the charter or franchise of a corporation might be extended, or the forfeiture of any such franchise or charter remitted, and that such was the intention of those thus advocating it. It may be conceded, as urged by counsel for plaintiff, that our judgment as to the meaning of the provision cannot be influenced by the construction placed upon it by individual members of the convention in the debates. We speak of this expression of views solely with reference to the subsequent action of the convention in rejecting an amendment offered by Mr. Cross. He proposed that it be amended to read as follows: "The Legislature shall not by a special act extend any franchise or charter, or remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist, under the laws of this state." The only change proposed by the amendment was the insertion of the words "by a special act." He said in support of the amendment: "Many corporations exist in this state to-day that are doing business which is beneficial to the state. Now, corporations are organized in the state of California for a period of 50 years. If this provision is adopted as proposed by the committee, whenever that 50 years expires that corporation must dissolve and distribute its property, and wind up its business. Take, for instance, the case of some banking association that is conducting an honorable business. Say its charter expires in 20 years. When its charter expires, there must be a distribution of all its corporate property among the stockholders. Now, pass this provision, and it is absolutely neces-

sary that the corporation shall be wiped out of existence, without any remedy. If we insert this amendment, the Legislature can provide by general law that corporations now existing may continue their existence." This amendment was entirely satisfactory to Mr. Wilson, the leader of the opposition to the original provision; he stating that it would be sufficient for the purpose he desired to accomplish. At the close of a discussion in which no one asserted a view contrary to that of Mr. Cross as to the effect of the original provision, the proposed amendment was rejected and the provision was adopted as reported by the committee. 1 Cal. Const. Conv. 1878-79, pp. 431-434. This action of the convention was most significant under the circumstances. The original provision contained nothing to indicate that its purpose was simply to prohibit special legislation, although in every other case where such was the object the purpose was clearly indicated. By its terms it plainly prohibited any kind of legislation extending any franchise or charter. No one disputed the proposition that, as drawn, the provision prohibited general as well as special legislation. The proposed amendment was practically the same as the language most commonly used in the other cases in which special laws were prohibited, and was substantially the same as the language contained in the provisions on the same subject contained in other state Constitutions. In the face of all this, it is unreasonable to conclude, as is suggested by counsel, that the rejection of the amendment may have been for the reason that the members of the convention thought the amendment unnecessary. If they were seeking solely to prevent special legislation, and were willing to allow general legislation accomplishing such extensions, in view of their action in other cases and the manner in which the matter was brought before them, it would have appeared exceedingly necessary to them to have adopted Mr. Cross' amendment, or some substantially similar amendment. That they did not do so indicates very clearly that they were not, by the provision under consideration, simply guarding against special legislation. They evidently intended exactly what appears to us to be the only reasonable construction of the provision—that the Legislature should not be allowed by any kind of legislation, general or special, to grant the extensions or remissions described therein.

Coming to a consideration of the second claim made by defendant, viz., that while the provision under consideration prohibits the Legislature from directly extending franchises and charters, or remitting the forfeiture of any franchise or charter of any corporation, it does not prohibit the legislature from enacting a law under which corporations may extend their own charters. In this consideration we must bear in mind

that a corporation is purely a creature of the law, and can exist only by permission of the state; that in all of the states of this country the state legislative department is the only department of government empowered to form corporations or authorize their formation, or prescribe or extend their term of existence; and that, except in so far as it is limited by constitutional provision, the power of the Legislature in this regard is absolute. As is said by learned counsel for plaintiff, "that power belongs to the legislative body as an attribute of sovereignty, unless it is restricted by the Constitution." In *Clark & Marshall on Private Corporations*, § 58, it is said: "Since corporations can be created by or under legislative authority only it is only by or under such authority that the charter of a corporation can be extended beyond the period for which it was created." See, also, *Taggart v. Perkins*, 73 Mich. 303, 41 N. W. 426. In view of this, it being clearly established that the purpose was not to prohibit special legislation, there is but one meaning that can be given to the provision under consideration. As the charter of a corporation may be extended only when authorized by the state, and as the permission of the state in this regard can be expressed only through its legislative department except as it is expressed in the Constitution itself, it would appear to necessarily follow that, when the framers of the Constitution declared that the Legislature shall not extend any charter of any corporation, they were declaring against the substantive thing, as it is put by counsel; that is, against legislation extending or authorizing the extension of the charter of any corporation in any way. When they prohibited the exercise of the powers to so extend by the only body possessing it, and did not provide any other way by which an extension might be had, they apparently intended to forbid any legislation effecting or authorizing the extension of corporate life just as clearly as if they had in terms said: "The Legislature shall have no power to enact any law extending or authorizing the extension of any charter." It is urged that section 1 of article 12 confers this authority on the Legislature, or recognizes that it has such power, and that it cannot be said that the power is conferred by one section and denied by the other. We do not so understand that section. Besides prohibiting the formation of corporations by special law and declaring that they may be formed under general laws, it does no more than to expressly reserve the power to the Legislature, in general terms, to alter or repeal any law then in force or thereafter enacted concerning corporations. The evident purpose of this provision was to make plain the will of the convention that corporations should have no legal right to insist that any general law relating to corporations shall continue in force unchanged

because it was in force at the time of its organization. This general power is, of course, subject to such prohibitions as to specific matters as are elsewhere found in the Constitution, and there are many such prohibitions. The nature of the subject-matter of the section under consideration is such as to fully account for the form of the prohibition used, and to distinguish the case from the numerous other instances of prohibitions on substantive things contained in the Constitution, differing in form from this, which are relied on by counsel, and to make it apparent that it was not intended to leave the Legislature free to enact general laws under which corporations might extend their own charters. Any such construction would under the circumstances do violence to the language used. In this connection it is important to note that in other instances where such general laws relative to corporations were intended to be authorized the framers of the Constitution were careful to so state in conjunction with the prohibition otherwise. In section 1, art. 12, prohibiting the creation of corporations by special act, it was in terms declared that "corporations may be formed under general laws." In section 5 of article 12 the prohibition "the Legislature shall have no power to pass any act granting any charter for banking purposes" was followed by "but corporations or associations may be formed for such purposes under general laws." No good reason can be given for the insertion of this latter clause in section 5, art. 12, that would not be equally applicable to the provision under consideration and its absence there is very significant. We find in other sections similar instances of the care taken by the members of the constitutional convention to make it clear that certain prohibitions as to direct action of the Legislature were not intended as prohibiting that body from enacting general laws under which other authorities might do the thing prohibited to the Legislature itself. For example, section 12 of article 11 declares that "the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, * * * for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." As to the provision under consideration, they refused to insert any limitation on what was apparently an absolute prohibition of legislation effecting or authorizing extensions of corporate charters, even though, as has been seen, the matter was specially brought to their attention by the discussion on a proposed amendment.

The claim is made in support of plaintiff's construction that the language of the Constitution of 1849 in regard to divorces was, substantially similar to that of the provision under consideration, section 26 of article 4

providing "no divorce shall be granted by the Legislature"; that this clearly did not prohibit the substantive thing, the granting of divorces, but simply prohibited the Legislature from directly granting them; and that the language used in the provision here under consideration should be considered as used in the light of the language used relative to divorces in 1849 for the purpose of expressing a similar purpose. This argument is in our judgment without force. It appears to us that the divorce provision in the Constitution of 1849 was intended by the framers of that Constitution as no more than a prohibition of special legislation granting divorces, as was held concerning a substantially similar provision in *State v. Duket*, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928, and the provision can reasonably be construed in that way. Evidently it was not regarded by the framers of the Constitution of 1879 as clearly enough expressing such purpose, for they failed to reenact it, and included the matter in the general section prohibiting the Legislature from passing local or special laws in various cases, the fifth subdivision being "granting divorces" (Const. art. 4, § 25), thus very clearly indicating their intent as in all other cases where special legislation is the thing being guarded against. The provision of 1849 in the light of the change made in the Constitution of 1879 constitutes to our minds an argument against, rather than in favor of, plaintiff's claim.

The other matters treated by the section under consideration, and covered by the prohibition therein contained, viz., the extension of franchises, and the remission of the forfeiture of franchises and charters, are, like the matter of the extension of corporate charters, peculiarly within the domain of the legislative department of the state. Except as otherwise prescribed by the Constitution, a franchise may be granted or extended only by or under the authority of the state Legislature, and the same is true as to the remission of forfeitures of charters or franchises. As to such franchises as are granted directly by the Legislature, it would be absurd to construe the provision as simply prohibiting the Legislature from making direct extensions, and leaving it at liberty to provide that such an extension might be accomplished by some action of the holder thereof, or granted by some other official body. There is nothing in the fact of their inclusion in the prohibition to detract from the conclusion that the section was intended as prohibiting legislation of any kind by or under which the things therein mentioned could be accomplished. To the contrary, their inclusion is in conflict with the theory that the restriction of the section was not intended to prevent permissive general laws under which the corporation or holder of a franchise can do the thing prohibited to the Leg-

islature. As applied to such matters, the provision so construed would be most unreasonable.

It is much relied upon as showing that there could have been no intent to prohibit general legislation authorizing corporations to extend their own corporate existence, that there was not inserted in the Constitution of 1879 any limitation of the period of time for which the Legislature might authorize a corporation to be organized, the result being that the Legislature may change the present maximum period of 50 years for which a corporation may be organized to 100 years, or any other period. It is evident from this, of course, that the object of the provision was not to limit the power of the Legislature in the matter of corporations thereafter to be organized, as to the time for which they might be originally created. But this is a very different matter from that of extending the life of existing corporations, including those organized under the former Constitution, beyond the time fixed in their charters. There may have been, and the records of the constitutional convention indicate that there were, what appeared to the framers of the Constitution all-sufficient reasons for prohibiting the authorization of such extensions, while permitting the Legislature unlimited power in the matter of the time for which new corporations might be organized, and the fact that they permitted the latter is no indication that they did not intend to prohibit the former.

We do not see how plaintiff is aided by the fact that the five state Constitutions which, at the time of the framing of our Constitution of 1879, contained any express reference to the subject of charter extension, explicitly confined the restriction on legislative action respecting charter extensions to special legislation granting such extensions. These provisions, of course, show that the thing there being guarded against was simply the method of legislation. That, however, as we have already seen, cannot be held to be the situation as to our section adopted in the light of those other provisions, with the portions thereof confining them to restrictions on special legislation carefully eliminated, and refused insertion when offered by way of amendment. Our constitutional convention had some other purpose in view. To our minds, the language used in section 7 of article 12 clearly indicated that purpose to be to prevent the Legislature from accomplishing by any means the extensions and remissions therein mentioned. When resort is had to the record of the debates of the convention, this view of the purpose of the convention so indicated by the language used is but confirmed. Whatever may be the views of the courts as to the necessity for or propriety of such a provision is, of course, immaterial. If the language used plainly and unequivocally shows a certain and definite purpose to be

accomplished thereby, it is the duty of the courts to so construe it as to carry that purpose into effect. A legislative construction of this provision is claimed to be found in an act of the Legislature approved June 13, 1906 (St. 1906, p. 22, c. 19), purporting to relieve corporations from the penalties of forfeiture incurred by a failure to pay the license tax levied by the act of 1905 (St. 1905, p. 493, c. 386), and also an act of a similar nature approved March 20, 1907 (St. 1907, p. 745, c. 403). These two very recent acts of the Legislature do not show such a continuous course of legislative construction of a constitutional provision as is entitled to any particular weight in determining the proper construction of the provision. It is to be noted that at the same session at which the latter of these acts was adopted the Legislature adopted a proposed constitutional amendment to section 7, art. 12, to be submitted at the next election, providing for extension of corporate charters, thus indicating that, while it assumed by the amendment to section 401 of the Civil Code to authorize charter extensions, it was not at all satisfied that it had such power under the present constitutional provision. It is also to be noted that at the session of 1905 a proposed constitutional amendment of the same general nature was adopted by the Legislature, to be submitted and which was submitted at the general election of 1906. It is still further to be noted that the act of March 18, 1907 (St. 1907, p. 344, c. 274), amending section 401 of the Civil Code, the act here under consideration, is the first attempt of the Legislature since the adoption of the Constitution to enact any law in any way authorizing the extension of the charter of a corporation. Certainly, so far as legislative construction of this constitutional provision is concerned, there is at least as much against the construction contended for by plaintiff as there is in its favor.

It is said that during the 28 years that have elapsed since the adoption of the Constitution of 1879 no question has ever been raised as to the validity of section 401 of the Civil Code as it existed at the time of the adoption of the Constitution, or as to the validity of section 287 of the Civil Code authorizing corporations organized before the adoption of the Codes to come in under the Codes and thereby extend their corporate terms for a further period of 50 years; that, if section 7 of article 12 of the Constitution of 1879 is to be construed in the manner contended for by defendant, both sections 287 and 401 of the Civil Code ceased to be operative at the time of the adoption of the Constitution, section 1 of article 22, thereof providing that "the provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof"; that it is only fair to infer from the absence of any attack on these sections that many cor-

porations have assumed that they were in force and have acted thereunder; and that to now declare them invalid might cause disastrous consequences on a large and wide scale. It is admitted that such considerations cannot control in the construction of a constitutional provision. However it is proper to say that we do not know that any corporation has assumed to act under either of these sections since the adoption of the present Constitution, and we cannot agree that it is fair to infer that many have so acted. Corporations are generally organized for the maximum period in the first instance, and section 401 purported to authorize the extension only when the corporation was organized for a less period, and then only for such time as would enable it to exist for the maximum period from the date of its organization. It is fair to assume that the ante-code corporations that desired to come in under the Code had generally availed themselves of the provisions of section 287 of the Civil Code prior to the adoption of the Constitution. But, if any corporation has so assumed to act under either of these sections, it does not necessarily follow from our decision that such action was unwarranted. What we have decided as to the constitutional provision is simply that it prohibited any action by the Legislature, by virtue of which any corporate charter might be extended. It may be that sections 287 and 401 of the Civil Code, as they stood at the date of the adoption of the constitution, are not inconsistent with this provision as construed by us, and are still in force. See Board of Commissioners v. Board of Trustees, 71 Cal. 310, 12 Pac. 224.

Every argument that can be advanced in support of the claim of plaintiff as to the proper construction of section 7 of article 12 of our Constitution has undoubtedly been advanced by the learned counsel representing it. Fully realizing the importance of the question, we have given each and every point our careful consideration, although we may have failed to state some of them in this opinion. We see no escape from the conclusion that the act of March 18, 1907, purporting to amend section 401 of the Civil Code, is in violation of section 7 of article 12 of our Constitution, and therefore, invalid.

If it is desired to conform to the rule existing generally in other states, of allowing by general laws existing corporations to extend their corporate existence under such restrictions as may be considered reasonable, a change in our constitutional provision is essential. A proposed constitutional amendment of this character is now pending to be voted on at the next election, and the people of the state will thus presently be afforded the opportunity to make the change if they so desire.

The alternative writ of mandate hereto-

fore issued herein is discharged and the proceeding dismissed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HIENSHAW, J.

154 Cal. 440

**TULARE IRRIGATION DISTRICT et al.
v. COLLINS, Sheriff. (Sac. 1,622.)**

(Supreme Court of California. Oct. 20, 1908.
Rehearing Denied Nov. 16, 1908.)

**1. EXECUTION (§ 22*)—IRRIGATION DISTRICTS
—STATUTES—PROPERTY EXEMPT.**

Under Act March 7, 1887, p. 35, c. 34, § 13, as amended by St. 1897, p. 263, c. 189, declaring that the legal title to all property acquired under the act providing for the organization of irrigation districts shall vest in the district, and shall be held by it in trust for, and shall be dedicated and set apart to the uses set forth in the act, the legal title to all the lands of an irrigation district organized under the act is held in trust by the district, and the beneficial title is in the owners of the land within the district, and land which by reason of a change in the plans has become valueless for irrigation purposes is impressed with a trust, and is, like the other land of the district, exempt from execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 133; Dec. Dig. § 22.*]

2. EXECUTION (§ 22*)—STATUTES—CONSTRUCTION.

The rule that an exemption from execution of the property of a quasi public corporation only relieves from process such property as is necessary to the exercise of the quasi public functions which the corporation has assumed is not applicable to lands of an irrigation district held under an express trust created by Act March 7, 1887, as amended by St. 1897, p. 263, c. 189, where neither a sale of the land by the district nor any execution sale can be made without violating the terms of the trust.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 22.*]

3. EXECUTION (§ 22*)—RIGHT TO CLAIM EXEMPTION—ESTOPPEL.

The failure of the directors of an irrigation district existing as a public corporation under Act March 7, 1887, p. 29, c. 34, providing for the organization of irrigation districts, to pay a judgment against the district for damages occasioned through the negligence of the district in flooding land, does not estop the district from insisting that its property, held under a public trust, shall be protected from illegal seizure and sale, to the end that the public trust may not be violated.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 22.*]

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Tulare Irrigation District and others against W. W. Collins, sheriff of Tulare county. From a judgment for defendant, plaintiffs appeal. Reversed.

C. L. Russell, for appellants. Hannah & Miller, for respondent.

HIENSHAW, J. The plaintiff, Tulare Irrigation District, is a public corporation organized under the act of the Legislature approved March 7, 1887, generally known as

the "Wright Act" (St. 1887, p. 29, c. 34). The other parties plaintiff are members of the board of directors of the irrigation district and owners of land within its territorial limits. In 1894 one Mosier recovered a judgment against the district for damages suffered by him through the negligence of the district in flooding his land. The judgment was never satisfied, but was kept in force by subsequent actions thereon. In 1896 he caused execution to issue on his judgment, directing the sheriff to levy upon the personal property of the district, and, failing to find sufficient thereof, then to levy upon the real property of the district. This execution was placed in the hands of the defendant Collins for service, and he levied upon certain lands owned by the district and gave notice of sale. This action was thereupon brought to restrain him from making such sale. The court found the facts as above recited, and additionally found that the lands sought to be sold, though owned by the district, were not within the plan adopted by the district as its system and scheme of irrigation; that they were not a part of the canal system, of the storage reservoir system or of any other work or works for the irrigation of the land, for the completion and operation of which system bonds had been sold; that, after the receipt of moneys from the sale of bonds, the district did modify its plan and devoted part of the moneys so received to the acquisition of the land in controversy, contemplating its use as a reservoir, but that the district failed to acquire others lands necessary for the perfection of this reservoir site, and finally abandoned this branch of its scheme and acquired other lands, waters, and water rights. It finds the lands to be wholly unnecessary to and without the irrigation plans of the district, and to be in their character agricultural and grazing lands; finds that the bonds of the district have been fully paid, that the district has no indebtedness other than this judgment, which it has never paid or offered to pay. Upon these findings it refused to restrain the defendant from proceeding with the sale.

That upon such findings it was the duty of the district to pay this judgment may not be questioned. As little may it be questioned that the judgment creditor may, by appropriate method, compel the payment of his judgment. But here we are confronted with the single proposition whether or not an execution, levy, and sale of certain of the lands of the district is a lawful method for the collection of the debt. All of the land owned by this corporation was acquired by virtue of the provisions of the Wright act, section 13 of which declares that "the legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act,

and said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided." An examination of the Wright act and of the Bridgeford act, amendatory thereof (St. 1897, p. 263, c. 189), discloses that the situation here presented was not contemplated by the Legislature, or, if contemplated, was not provided for. We mean by this situation that disclosed by the findings where an irrigation district owns lands, which lands, because of a change in its plans, have become unnecessary to the irrigation scheme. It is to be noted that the legal title to all of the lands of the district is held in trust by the district, and "is dedicated and set apart to the uses and purposes" specified in the act. The beneficial title is in the owners of the land within the irrigation district. *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. 937. The trust being expressly limited in its terms, dedicating and devoting all lands owned by the district to the purposes of irrigation, there is no power in the trustees as the law now stands, even to sell such lands. *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74. Such an attempted alienation would be in clear violation of the trust. In brief, it seems not to have occurred to the legislative mind that after adopting such a plan of irrigation as the act requires and selling bonds in accordance with that plan, and then using the money arising from the bond sale for the purchase of lands, after all this has been done, the district might or would so change its plans as to render some of the land valueless for irrigation purposes. If this contingency had occurred to the Legislature, it is reasonable to suppose that it would have made some provision to meet it, would have provided for sale, would have authorized execution and levy, or by some appropriate expression have relieved such land from the terms of the strict trust which it has imposed. But, in the absence of such expression, these lands stand in precisely the same position as do the other lands of the district. Equally with such other lands they are impressed with the trust and equally they are exempt from execution, levy, and sale. This question as to pueblo lands was most learnedly considered in the leading case of *Hart v. Burnett*, 15 Cal. 530, and the principles there announced have never been departed from. These principles are equally applicable to the lands held under this public trust. *Seale v. Doane*, 17 Cal. 484; *Fulton v. Hanlow*, 20 Cal. 450; *Carlton v. Townsend*, 28 Cal. 219; *San Francisco v. Cannavan*, 42 Cal. 541; *Ames v. U. S.*, 101 Cal. 390, 35 Pac. 1005; *San Francisco v. Leroy*, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096.

We are in this not unmindful of the principle relied upon by respondent that the rule exempting from execution the property of a quasi public corporation, such as a railroad, goes no further than to relieve from process such property as is necessary to the exercise

of the quasi public functions which the corporation has assumed, so that a canal basin has been held not to be a legitimate incident to a railroad which has no authorized canal connection, and is not protected from levy and sale; and, where such a corporation abandons a portion of its franchise, the property employed in the exercise of this franchise may become subject to execution. 6 Thompson on Corporations, § 1755. In this state, indeed, the principle has been applied to assessments for benefits upon lands owned by public corporations not necessary to the exercise of their functions. *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; *Witter v. Missions School District*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; *City Street Improvement Co. v. Regents University of California* (Cal.) 96 Pac. 801. But the principle is not applicable to lands held by a public corporation, as here, under an express trust where neither a sale of the land by the district nor any execution sale could be made without doing direct violation to the terms of the trust. In this respect the situation is identical with that of the pueblo lands considered in the cases above cited.

Nor can force be given to the objection made by respondent that appellants may not be heard in this action, since by their admitted failure to pay the judgment in favor of Mosier they do not come into a court of equity having done or offered to do equity. This just maxim can have no application to a case like this. However remiss the directors may have been in failing to pay the judgment, it cannot be held to estop a public corporation from insisting that its property held under a public trust shall be protected from illegal seizure and sale, to the end that this public trust may not be violated.

The judgment and order appealed from are therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

9 Cal. App. 41

BELL v. HAUN et al. (Civ. 483.)

(Court of Appeal, Second District, California.
Sept. 15, 1908.)

1. FORCIBLE ENTRY AND DETAINER (§ 24*)—COMPLAINT—SUFFICIENCY.

A complaint alleging that plaintiff was in actual and peaceable possession, and that defendants wrongfully turned him out, but not alleging that defendants withheld possession from plaintiff at the commencement of the action, does not state a cause of action for forcible entry and detainer, so that Code Civ. Proc. § 1167, requiring defendant in such an action to answer in less than 10 days, does not apply.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 108, 114; Dec. Dig. § 24.*]

2. FORCIBLE ENTRY AND DETAINER (§ 24*)—COMPLAINT—SUFFICIENCY.

An allegation in a complaint, otherwise insufficient to state a cause of action for forcible entry and detainer because not alleging that defendants withheld possession at the commencement of the action, that plaintiff will continue to be damaged in a certain sum for each day possession is withheld by defendants, cannot be construed as an allegation that possession is withheld.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 108, 114; Dec. Dig. § 24.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. M. Bell against J. P. Haun, W. Jones and others. From a default judgment and an order denying a motion to set the same aside, Haun and Jones appeal. Reversed.

Louis Luckel, for appellants. Jones & Weller, for respondent.

SHAW, J. Appeal from judgment on default, and from order denying motion to vacate and set aside such default and judgment.

The action purports to be for the forcible entry and detainer of premises at the time occupied by plaintiff. It is alleged that defendants "did wrongfully and unlawfully, and without the consent of plaintiff, turn the plaintiff out of the possession thereof by force and violence, and did throw the personal property of plaintiff then on said premises into the public road," and that by reason thereof plaintiff is damaged in the sum of \$500, and will continue to be damaged in the sum of \$5 for each and every day the possession thereof is withheld from plaintiff by defendants, followed by a prayer for restitution of the premises and \$500 damages for the alleged forcible entry and the further sum of \$5 per day for each day the possession is withheld from plaintiff by defendants. It is not alleged in the complaint that defendants detained the possession of said premises from plaintiff. By summons served on defendants September 18, 1907, they were required to appear and answer within three days of service thereof. Defendants failed to answer as commanded by said summons, whereupon default was entered, upon which judgment was on September 24, 1907, rendered for damages as prayed for, and whereby it was further ordered that plaintiff recover possession of the premises and that he have issued a writ of restitution requiring the sheriff to place him in the peaceable possession thereof. Upon the ground of inadvertence and excusable neglect defendants moved the court to set aside the default and vacate the judgment, which motion was by the court denied.

The procedure adopted is that prescribed by chapter 4, tit. 3, of the Code of Civil Procedure, known as the "Forcible Entry

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and Detainer Act." Its purpose is clearly indicated by its title, which is: "Summary proceedings for obtaining possession of real property in certain cases." Section 1167 of this act provides that in proceedings instituted thereunder the summons issued shall require the defendant to answer within the time designated therein, which shall not be less, however, than two days before the return day. The summons issued complied with the provisions of this section, and required defendants to answer within three days after service thereof. Appellants' contention is that the complaint does not state a cause of action for forcible entry and detainer, and therefore the provisions of section 1167, wherein the defendant can be required to answer in less than 10 days, do not apply, in short, that the action is not one for the restitution of property, does not come within and is not controlled by any provision of the forcible entry and detainer act but is an action to recover damages for a trespass, as to which they were entitled to 10 days within which to answer, that the entering of default and rendition of judgment thereon before the expiration of such 10 days constituted error for which the judgment should be reversed.

The chief object of the action instituted under the provisions of the forcible entry and detainer act is to enable the party wrongfully ousted from the possession of premises to regain possession thereof by lawful means; thus avoiding incidental disturbances and breaches of the peace likely to occur in an effort to regain possession by force. Since the purpose of the action is to regain possession of the premises, it necessarily follows that it must appear from the complaint that the defendants at the time of the commencement of the action withhold and detain possession thereof from plaintiff. "In all actions brought under the forcible entry and detainer statutes it is necessary to allege a detention of the premises at the time of the institution of the action; for, in the absence of such detention, the complaint would amount to no more than a trespass." 19 Cyc. of Law, p. 1156. "The action must be brought against a person who is in the actual possession when suit is brought." 13 Am. & Eng. Ency. of Law, p. 766; *Champ Spring Co. v. Roth Tool Co.*, 96 Mo. App. 518, 70 S. W. 506. An allegation of forcible entry alone, unaccompanied by an allegation showing that defendant detains possession of the premises so forcibly entered, will not warrant an action under the provisions of said chapter 4, tit. 3, Code Civ. Proc., for forcible entry and detainer. *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339; *Preston v. Kehoe*, 10 Cal. 445; *Armstrong v. Hendrick*, 67 Mo. 542; *Merrill v. Forbes*, 23 Cal. 379. In the absence of such allegation, a fact necessary

to constitute the cause of action must be taken as having no existence. *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, 72 Pac. 395.

While it appears from the complaint that plaintiff was in the actual and peaceable possession of the premises, and that defendants did wrongfully and unlawfully turn the plaintiff out of the possession thereof, it nowhere appears that defendants detained or withheld possession of the premises from plaintiff at the commencement of the action. Indeed, from all that appears in the complaint, plaintiff may have immediately, upon the commission of the acts attributed to defendants, resumed possession of the premises, and held the same at the time of instituting the action. Section 1174 of the Code of Civil Procedure provides that, if the finding of the court be in favor of the plaintiff, judgment shall be entered for the restitution of the premises; and, in compliance with this provision, the court did adjudge that plaintiff do have and recover of and from the defendants possession of the premises, and that there issue to the sheriff a writ of restitution requiring him to place plaintiff in possession of the same, all of which would be idle acts did not defendants withhold possession from plaintiff. To warrant such judgment it must appear from the complaint that defendants withheld the premises from plaintiff, and hence the requirement of said section 1174 that the judgment shall provide for restitution thereof. The real gist of the action is the detention of the premises from the one entitled thereto, and this whether the detainer be forcible as defined by section 1160 of the Code of Civil Procedure, or unlawful, within the meaning of section 1161, or the retention of possession without force and violence by one who has by force and violence entered upon the possession of another.

The statement in the complaint that plaintiff will continue to be damaged in the sum of \$5 for each and every day the possession is withheld from him by defendants cannot be construed as an allegation that possession is withheld. To do so would be in violation of the rule that a pleading should always be construed most strongly against the party pleading, and no inferences indulged in its support. *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69; *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835.

From these views it is apparent that the complaint fails to state a cause of action within the meaning of the chapter in accordance with which the procedure was taken, and the judgment and order must, therefore, be reversed. It is so ordered. It is unnecessary to consider other points made by appellants.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 39

MACKEL et al. v. NOLAN et al. (Civ. 507.)
(Court of Appeal, Second District, California.
September 14, 1908. Rehearing Denied
by Supreme Court Nov. 12, 1908.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Findings of fact by the trial court which there is evidence to support are conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

2. TRUSTS (§ 103*)—CONSTRUCTIVE TRUST—INDIVIDUAL INTEREST OF AGENT.

Where no continuing fiduciary relation existed between the parties from which a duty from defendants to plaintiffs could be implied, and, if defendants were acting as plaintiffs' agents in making an exchange of property, the negotiations which had been undertaken on behalf of plaintiffs were completed before the property was purchased by one of the defendants, such property will not be declared to be held in trust and be required to be conveyed to plaintiffs on the ground that defendants acquired it as agents of plaintiffs.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 103.*]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by James Mackel and another against M. J. Nolan and others. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Affirmed.

R. L. Horton, for appellants. Percy R. Wilson (W. W. Middlecoff, of counsel), for respondents.

TAGGART, J. This is an action to have certain real property declared to be held in trust, and for a decree requiring the conveyance thereof by defendants to plaintiffs, on the grounds that the former acquired such property as agents of the latter and withheld it in violation of their trust. Judgment was for defendants, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial. Without passing upon respondents' objection to the record on the motion for a new trial, we will consider both appeals upon the merits.

The theory of plaintiffs' cause of action is that defendants occupied a fiduciary relation to them, and that the confidence arising from such relation was violated and the trust betrayed by defendants by the purchase of a certain lot of land in the city of Los Angeles, as to which plaintiffs had undertaken to enter into negotiations to purchase from the owner, through the defendants. The confidential relations growing out of the transaction itself are sought to be strengthened by allegations of continuous dealings with and exclusive reliance of plaintiffs on defendants for information and advice in respect to all transactions in real estate in which plaintiffs had engaged for a series of years, etc., etc.

The court finds that the defendants had not acted as the exclusive agents, and had not at any time acted as general or other advisers

of plaintiffs in their business affairs, that plaintiffs had confidence in the defendants, but such confidence was not reposed in defendants as agents of plaintiffs, but was because defendants had at all times dealt fairly and justly with the plaintiffs. In respect to the particular transaction in question, the court finds that defendants were acting as agents for the owner of the property here involved when plaintiffs made application to purchase it; that defendants communicated to the owner in good faith the proposition of exchange made by plaintiffs, which was refused, and brought a counter proposition from the owner to plaintiffs, which the latter refused to accept, and that plaintiffs "declined to proceed further with relation to the purchase of said lot 16, block B" (the property in question); that thereafter defendant Nolan purchased the lot and had it conveyed to the defendant D. A. Cole. This finding is fully supported by the testimony of the defendant M. J. Nolan, and the trial judge appears to have accepted his testimony as true. We cannot go behind this. It is unnecessary to cite authorities to sustain a judgment in favor of defendants upon these findings. They show that no continuing fiduciary relations existed between the parties from which a duty from defendants to plaintiffs could be implied; and also that, if defendants were acting as their agents in making an exchange of property, the negotiations which had been undertaken upon behalf of plaintiffs were completed before the defendant Nolan purchased the property. We find nothing upon which to base a reversal of the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 45

DONATI v. RIGHETTI. (Civ. 514.)

(Court of Appeal, Second District, California.
Sept. 15, 1908.)

1. FALSE IMPRISONMENT (§ 3*)—"MALICIOUS PROSECUTION" DISTINGUISHED.

False imprisonment is distinguished from malicious prosecution in that it is, as defined by Pen. Code, § 236, an unlawful violation of another's personal liberty, an unlawful arrest or detention of one without warrant or by an illegal warrant, or a warrant illegally executed, while if the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is a malicious prosecution.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2657-2661; vol. 8, p. 7660; vol. 5, pp. 4309-4310.]

2. FALSE IMPRISONMENT (§ 22*)—EVIDENCE—PRESUMPTIONS.

In an action for false imprisonment under a complaint in justice court, it must be presumed, in the absence of contrary allegations, that

the complaint stated facts giving the justice jurisdiction.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 22.*]

3. FALSE IMPRISONMENT (§ 10*)—PREVIOUS ARREST—EFFECT.

That plaintiff was previously arrested and convicted before a justice did not make his subsequent arrest and imprisonment on the same charge before another justice unlawful; that being a matter of defense.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 10.*]

4. FALSE IMPRISONMENT (§ 7*)—DISMISSAL OF PROSECUTION—EFFECT.

That a prosecution was dismissed because accused had been previously convicted for the same offense did not operate retrospectively to annul or render unlawful the arrest upon the legal process.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 7.*]

5. FALSE IMPRISONMENT (§ 31*)—UNESSENTIAL MATTERS.

That, in prosecuting plaintiff, defendant intentionally withheld knowledge of plaintiff's prior arrest before another justice on the same charge, does not tend to show false imprisonment merely tending to establish malicious motives and bad faith.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 31.*]

6. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings of the jury on conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

7. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EVIDENCE—EXCLUSION.

Any error in excluding evidence was harmless, where the fact involved was undisputed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4197; Dec. Dig. § 1057.*]

8. MALICIOUS PROSECUTION (§ 34*)—ELEMENTS—TERMINATION OF PROSECUTION.

A showing that the prosecution had been finally determined in accused's favor is essential to his establishment of a case of malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 70; Dec. Dig. § 34.*]

9. CRIMINAL LAW (§ 1023*)—MISDEMEANOR—DISMISSAL—EFFECT.

Under Pen. Code, § 1387, a misdemeanor charge is finally determined by a dismissal by the justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1023.*]

10. TRIAL (§ 256*)—INSTRUCTIONS—MALICE—NECESSITY OF REQUEST.

If plaintiff in an action for malicious prosecution desired an instruction defining "malice" in the language of Pen. Code, § 7, subd. 4, he should have requested it; the Code definition not excluding other proper definitions, and the court having correctly declared the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 639; Dec. Dig. § 256.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by V. L. Donati against Mike Righetti. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Wm. Shipsey, for appellant. McD. R. Venable and S. V. Wright, for respondent.

TAGGART, J. Action for false imprisonment and malicious prosecution. Judgment for defendant on demurrer as to first cause of action and on verdict on the second cause. Plaintiff appeals from judgment, and from order denying motion for a new trial.

Both causes of action are stated in substantially the same language, except that in the second count there is the additional allegation that in procuring the arrest and imprisonment of plaintiff defendant acted maliciously and without probable cause. The complaint shows that plaintiff and defendant quarreled with each other in the city of San Luis Obispo; that a constable of the township made complaint in the justice court of that township against plaintiff for disturbing the peace, and upon this complaint plaintiff was arrested and fined, and paid his fine. Four days later defendant procured the arrest of plaintiff upon a complaint filed by him in the justice court of Arroyo Grande township (14 or 16 miles distant from San Luis Obispo), stating the same facts and offense as that to which plaintiff had pleaded guilty in San Luis Obispo, and alleging the offense to have been committed on the same date. It is also alleged that all the facts relating to the arrest in San Luis Obispo were known to defendant at the time he made the complaint before the justice at Arroyo Grande. The two causes of action, false imprisonment and malicious imprisonment, are quite distinct and different, and to be distinguished in several respects. False imprisonment is the unlawful violation of the personal liberty of another. Pen. Code, § 236. It is the unlawful arrest or detention of a person without warrant, or by an illegal warrant, or a warrant illegally executed. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. 8 Ency. of Plead. & Prac. p. 841; *Neves v. Costa*, 5 Cal. App. 117, 89 Pac. 860.

There is nothing in the complaint before us to show that the warrant issued by the Arroyo Grande justice was either void, voidable, or irregular. In the absence of contrary allegations, we must assume that the complaint stated facts proper to give the justice jurisdiction. The arrest and imprisonment, then, was made in the legal execution of a warrant which issued as the result of regular judicial action by a justice having jurisdiction. The fact that plaintiff had been arrested before did not make the arrest or imprisonment unlawful. In the course of the proceedings upon the complaint, this fact, like any other plea, was a matter of defense to be set up by the party charged. The prosecution being dismissed upon this ground did

not operate retrospectively to annul or render unlawful the arrest upon the legal process. The fact that the defendant intentionally withheld his knowledge of the prior arrest from the justice would only tend to establish malicious motives and bad faith. These are not allegations material to an action for false imprisonment, and, although evidence thereof may aggravate the damages, they have nothing to do with the cause of action. *Neves v. Costa*, supra; *Marks v. Townsend*, 97 N. Y. 590. The demurrer to the first cause of action was properly sustained.

The question of the knowledge of defendant of the prior arrest was one of fact for the jury to determine. There was a conflict of evidence upon this matter, and the jury found in favor of the defendant. We must be content with their finding.

The order dismissing the case brought in the Arroyo Grande justice's court was introduced to show a final determination in favor of plaintiff. It contained the grounds of the district attorney's motion to dismiss, as follows: "That facts go to show that this defendant has been arrested on this same offense in the justice's court of San Luis Obispo, pleaded guilty, was by that court fined, and paid the same." On motion of defendant this was excluded on the ground that "the reasons given were no part of the act of the justice of the peace." Appellant contends that the reasons for the dismissal are made a necessary part of the order by section 1385 of the Penal Code, and to exclude this part of the order from the jury was error. Assuming, without determining, that this was error, it clearly was harmless. There was no controversy as to the fact that defendant "had been arrested on this same offense, pleaded guilty, and paid his fine." The showing that the case had been finally determined in favor of plaintiff was essential to the establishment of a case of malicious prosecution. *Carpenter v. Nutter*, 127 Cal. 61, 59 Pac. 301. Whatever the reason, the charge being a misdemeanor, the dismissal by the justice finally determined the case (Pen. Code, § 1387), and the reasons became immaterial.

No error was committed in sustaining defendant's objections to the questions asked him on cross-examination as to whether he had complained to the deputy sheriff about the disturbance. The questions as put were not properly framed for the impeachment of the witness. Neither was the proper foundation laid for this purpose, and this was the only purpose which they would have served if proper at all. If the plaintiff desired an instruction given to the jury in the language of section 7, subdivision 4, of the Penal Code, he should have requested it of the court. The Code definition does not exclude the giving of other proper definitions of the word

"malice," and we think the instruction given by the court correctly declared the law.

No error appearing from the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 1

PAOLINI v. FRESNO CANAL & IRRIGATION CO. (Civ. 114.)

(Court of Appeal, Third District, California. Sept. 10, 1908.)

1. TRIAL (§ 165*)—TAKING CASE FROM JURY—NONSUIT—GROUNDS.

In deciding a motion for nonsuit, plaintiff's evidence is taken as admitted, and every reasonable inference from any fact is regarded as proved, and, if all the facts and permissible inferences would sustain a verdict for plaintiff, a nonsuit should be denied; it being proper only where a verdict for plaintiff would be set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 374; Dec. Dig. § 165.*]

2. WATERS AND WATER COURSES (§ 262*)—IRRIGATION DITCHES—INJURIES INCIDENT TO SUPPLY—LEAKAGE.

If defendant negligently permitted water from its irrigation ditch to escape onto the plaintiff's land, because of defects in the ditch, or allowed the flow of the water to be obstructed so as to cause it to seep through the ditch and injure the land, defendant would be liable; the injury not being *damnum absque injuria*.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 262.*]

3. WATERS AND WATER COURSES (§ 263*)—IRRIGATION DITCHES—INJURIES INCIDENT TO USE—ACTIONS—QUESTION FOR JURY.

In an action for injury to land by leakage from defendant's irrigation ditch, whether the land was injured by the seepage of water from defendant's ditch *held* for the jury, and a directed verdict for defendant was improper.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

4. TRIAL (§ 169*)—TAKING CASE FROM JURY—DIRECTING VERDICT—GROUNDS.

It is improper to sustain an order directing a verdict for defendant, where reasonable men might differ in their conclusions from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 383; Dec. Dig. § 169.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by P. R. Paolini against the Fresno Canal & Irrigation Company. From a judgment upon a directed verdict for defendant, plaintiff appeals. Reversed.

Henry Brickly, for appellant. Frank H. Short and F. E. Cook, for respondent.

CHIPMAN, P. J. Action for damages. The jury under instruction of the court, and upon motion of defendant, at the conclusion of plaintiff's evidence rendered a verdict for defendant. Plaintiff appeals from the judgment upon the verdict.

Plaintiff alleged ownership of certain 160 acres of land, along the eastern boundary

of which defendant was the owner of an irrigating ditch, used for the purpose of storing and conveying water; that defendant had failed and neglected to keep said ditch in repair by reason of which said failure and neglect "the same has become unfit for the purpose of carrying or containing water, and for a long time has been so unfit, and water allowed to flow therein has for a long time constantly seeped or percolated through the banks and bottom thereof, and flooded lands adjacent thereto," and "well knowing the defective condition of said ditch, defendant has carelessly and negligently, and against the will of plaintiff, caused water to flow in and through said ditch, or in or through said ditch, which said water has constantly seeped or percolated through the banks or bottom thereof during said time, and has constantly flooded a large tract of vineyard, to wit: 7 or 8 acres belonging to plaintiff, lying adjacent to said ditch, and being part of the real property described in paragraph 11 of the complaint"; that by reason of said flooding said land has become valueless, and has been converted into a swamp, whereby plaintiff has suffered the damage complained of. In its answer defendant denies specifically the allegations of the complaint, and sets up a special and separate defense, but as this latter phase of the case was not reached, this defense need not be stated. The rules in judging the correctness of orders granting motions for nonsuit are well settled. The evidence submitted by the plaintiff is deemed to be uncontradicted, and every fact and every reasonable inference that may be drawn from any fact must be regarded as proven. If the facts proven directly, or the just inferences from facts proven, would support a verdict for plaintiff, the nonsuit should not be granted, and it is error to do so. It is only where the facts are such that a verdict for plaintiff would compel the court to set it aside that a nonsuit is properly granted. *Morey v. Wells*, 147 Cal. 495, 82 Pac. 57; *Vanderford v. Foster*, 65 Cal. 49, 2 Pac. 736. We must consider the evidence with the above rules in view and be governed by them.

It appears by plaintiff's testimony that he is the owner of 160 acres of land, most of which is planted to vines. One of defendant's ditches comes to his land from the north to his northeast corner, and is used for irrigating purposes, and runs along the eastern boundary of plaintiff's land, from the northeast corner to the southeast corner (which we will designate as the north ditch), where it joins another of defendant's ditches coming from the east, this latter ditch at that point continuing southward, and is spoken of by witnesses as the "south ditch." At the northeast corner of plaintiff's land is a gate in defendant's ditch, through which water is let into another ditch, spoken of as a "side ditch," which runs along plaintiff's

northern line. The portion of plaintiff's land alleged to have been rendered worthless through defendant's negligence is about 5 acres, and is situated about midway between the northeast and southeast corners, and lies immediately along the defendant's said north ditch between these two points. This piece of land is somewhat lower than the surrounding lands of plaintiff, and is spoken of by the witnesses as a "low place" or "sag" in plaintiff's land. Plaintiff testified that he "bought this land about five or six years ago" and had rented it two years before that. (The trial was February 16, 1905.) These ditches were all there when he bought the land. He testified that, when water is run through the south ditch, it backs up in this north ditch to a point above this low place of plaintiff's land, and stands. He testified: "During the summer months there is water in that ditch (the north ditch) all the time; during spring and summer. There is water there now. It is coming from here [indicating from south to north] this way, and this water is coming down and backing up here. There was water in that ditch all last year during the spring and summer. And the year before that, and every year before that. Here [indicating a portion of his land] is a kind of low place like that. Here the land is all high [speaking from a diagram, apparently]. Where it is low the vines have died. The condition of the land in that low place you might say is worthless on account of the seepage water. In reference to its being dry or wet, it is wet. * * * Well it happened that the vines all died in the last two years. In the low place is a part of the vineyard that had been producing vines before. The vines have all died out in the low place. They have all died on the low place. The land surrounding the low place, and those vines around the edges on the high place, I noticed last summer that they didn't bear as good as they did before. * * * About three years ago there was a pretty good crop of raisins on this low place where there are no vines. I should judge fully an acre around like that. That would make five acres." He testified that the land immediately around "this low place produced about a ton per acre of raisins or dried cured grapes. * * * This particular piece during the year 1903 didn't produce hardly any, maybe 15 or 20 pounds on some of the sickly vines, one bunch here and there. Last year it produced none at all." He also testified that the water that stood in the north ditch came from the south ditch by backing up; that there was no water run through the north ditch the year before, except for two days; that if water was run through that ditch, it would go on into the south ditch, "but there would be some water remain there. There would be a low place in the ditch where the water would have to evaporate. If there was no water in the

big ditch south, the water would go from the north through this ditch, and on the south pretty well, but not all of it. It would leave some water on the low place there, but not so high as if there was water in the south ditch."

Witness McKay, county surveyor, made a survey to ascertain the relative levels of the low place on the north ditch, and the water in the ditch at the point of the alleged seepage, and the level of the land affected thereby. He testified: "I took the levels on the land lying west of the ditch, the place known as the 'low sag' spoken of there, and I found that that land was a little more than a foot lower than the top of the water in the ditch at the present time, or about 2½ feet below high-water mark in the ditch. There were no vines on the land. There was a tract there, with no vines on, quite low, and at one point I observed some tules growing, and some water grass; that would indicate that it was somewhat swampy." He testified that, continuing his levels in a southerly direction about 1,800 feet to another low sag in the vineyard, he found it about a foot lower than the first one, and that "grape vines were growing down there," and that the grade fall of the country southward was about 4 feet to the mile. The second sag was about a quarter of a mile west of this north ditch. The witness observed that the vines "seemed to be growing all right, except this one place." He further testified: "The ditch is about 18 feet wide opposite this low sag in the land. The ditch had some trash on the bottom. I believe there was some kind of water grass, something of that kind, growing in it. I didn't observe it very closely there; that is, the ditch itself. I know there was some trash in the bottom of the ditch that looked like an old fish-trap and also some weeds, as though it had not been cleaned for some time; I don't know for how long. It had not been cleaned out recently, at least. The water in it appeared to be standing; there was no current to it." On cross-examination he testified: "I do not know that there was anything to prevent the water running out, not along that portion of the ditch. I didn't follow it down. The effect on the water that might come into the ditch by the presence of this grass and old fish-trap and tules in the ditch would be a tendency to retard the water. If the water is retarded somewhat in the ditch, it would naturally have the effect of increasing the seepage from the ditch. It would retard the flow of the water along the sides and the bottom. * * * At that place there was more than ample space in the ditch for water through the ditch. The water at that time was dead water, standing water." Witness Griggs testified: "That when the south canal is filled up pretty well with water, it backs up in the ditch north, and so far this year there has

been no water coming down from the north, down from the other ditch, but the water is standing in that ditch there nearly to the north line here, up, I suppose somewhere along in here [showing]." He testified that he knew the land in 1902, and helped to handle the raisins that year; that "there were raisins growing on there then [referring to the low place in plaintiff's land]. There were a few dead vines, but the majority of it had vines on it. * * * There is nothing there at all now. He has taken the vines out of there." With some evidence as to the value of raisins for the two or three years preceding the trial, the plaintiff rested.

The learned trial judge gave expression to his view of the case, in directing the jury to find a verdict for the defendant, which is printed in the record. There being no question but that defendant was rightfully in possession of the canals, with the right to use them for the purpose of running water through them, said the court: "If damages result incidental to that use, it would be a great hardship to say that the use should not be permitted. In other words, if the defendant is here of right, then to charge it with damages it must be because of some particular acts of negligence or tortious acts for which it is said to be held guilty, and the damage must be, in addition to that, the proximate effect of this particular act of negligence. Now I fail to see or understand how in this particular matter the defendant is to be charged with any actionable negligence. Assuming that it might have kept the ditches cleaner than it did, still there is no evidence that the ditches were not entirely suitable for the purpose for which they were used—nothing of that kind, and we cannot say, at this stage of the business of irrigation that it is necessary or absolutely requisite that a party appropriating and diverting water and delivering water must deliver it through channels that are so constructed that they will not permit of any possible percolation; in other words, that it must be delivered in pipes of cement channels, or anything of that kind, in the present stage of irrigation in this part of the state, to say the least, and irrigation be practically an impossibility if it had to be done in that way. The business could not be carried on, and the people of the county would have to abandon their homes and their possessions practically, if that had to be done because that would be practically impossible as it would seem. Whether that would be so or not, whether that is a speculation here or not, it is a fact that the business is conducted, and has been conducted, in a certain manner. Now there is no evidence here, as I say, that this ditch—either one of these ditches—was not suitable for its purpose at the time, and has not been during the time, that the plaintiff has been in possession of this property. There is no evidence that the defendant has used the

property in any other way, or used the ditches in any other way, than the customary way. There is no direct evidence of any actionable negligence, as I understand it." We have given the views of the trial judge quite fully, because they seem to state the position taken by the respondent in support of the judgment. The general conditions existing in the irrigating districts of Fresno county are not shown, nor is there any evidence in the record to show that defendant was operating its system of ditches in the usual and customary way prevailing in the country. We do not think the case presents the question which the learned trial judge seems to have considered involved, and we are not called upon to pass upon it. There was some evidence brought out on the cross-examination of witnesses tending to show that the effect of irrigation throughout the district would cause the water plane to rise generally, in some cases almost to the surface, the purpose no doubt being to suggest a possible cause for the drowning of plaintiff's vines, caused by this universal seepage and percolation through the ditches. The court seemed to be impressed with the serious consequences which would flow from a rule that would accord damages for such apparently unavoidable cause. We think, however, that the case as it now stands does not present an issue requiring so broad treatment. The evidence, it seems to us, is sufficient to present the question whether, under certain circumstances, actionable damages may not accrue through the escape by percolation or seepage of water from defendant's ditch to the tract of land mentioned. If at that particular point in the ditch the water was suffered, through defendant's negligence to escape to plaintiff's land by means of faulty construction of the ditch, or by allowing the water to accumulate and stand there, and permitting the flow to be obstructed by growing grass and tules and other obstructions, thus causing the water to seep or percolate to plaintiff's land to its injury, defendant would be liable in damages. We do not think there is any rule of law, or any case, holding that injury to land by seepage or percolation is, under all circumstances, *damnum absque injuria*. There may be as direct damage by this means as by overflowing the banks of a ditch, and the law will as readily redress injury resulting from the one cause

as from the other when the facts satisfactorily locate the cause. The case of *Shields v. Orr Extension Ditch Company*, 23 Nev. 349, 47 Pac. 194, is illustrative of the principle, and was a case where the injury was caused wholly by percolating water coming from a ditch. So, also, is the case of *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30. It was there said: "Where one brings a foreign substance on his land, he must take care of it, and not permit it to injure his neighbor. The law on the subject is tersely expressed in the maxim, '*Sic utere tuo ut alienum non lædas*.'"

There was evidence tending to show that, at the point of defendant's ditch in question, the land of plaintiff had produced a good crop of grapes prior to 1902; that since then, by means of seepage of water from the ditch, about five acres of plaintiff's vines had been destroyed and the land rendered worthless; that at that point in the ditch the bottom was below the grade of the ditch, causing water to stand there; that water backed up in the ditch from the south ditch, and stood there as dead water; that grass and tules and other obstructions had been allowed to accumulate at this particular point, the effect of which was to retard the flow of water when running through the ditch and thus cause greater percolation and seepage than would otherwise have happened; that at another place in the vineyard, some distance from the ditch, though a foot lower, the vines were thrifty; that no water, except for two days, had been run through the north ditch past plaintiff's land, but that the water, backed up from the south ditch past the low place in plaintiff's land, had stood there during the irrigating season. There was no direct evidence establishing with absolute certainty cause and effect, but we think there were enough facts and circumstances to take from the court the right to direct a verdict. It was said in *Chidester v. Consolidated Ditch Company*, 59 Cal. 197: "In a case where reasonable men might, upon deliberation, differ in their conclusions, it would be improper for this court to interfere with the verdict"; and it would be equally improper, in such case, to sustain an order directing a verdict.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.



